

THE STATE OF FLORIDA
THE SITING BOARD

DEPARTMENT OF
ENVIRONMENTAL PROTECTION

OCT 16 2006

SITING COORDINATION

In Re: Seminole Electric Cooperative)
Seminole Generating Station Unit 3)
Power Plant Siting Application)
No. PA 78-10A2.)
_____)

DOAH CASE NO. 06-0929EPP

SEMINOLE ELECTRIC COOPERATIVE, INC.'S
RESPONSES TO SIERRA CLUB, INC.'S
AMENDED EXCEPTIONS TO RECOMMENDED ORDER
ON LAND USE AND ZONING

Seminole Electric Cooperative, Inc. (Seminole Electric), by and through its undersigned counsel submits the following Responses to the Amended Exceptions to Recommended Order on Land Use and Zoning filed by Sierra Club, Inc. (Sierra Club) on September 28, 2006.

Background

As recited in the Administrative Law Judge's (ALJ) Recommended Order on Land Use and Zoning (Recommended Order), Seminole Electric proposes to build a new, third unit at Seminole's existing power plant site located in the unincorporated area of Putnam County, Florida. That existing site contains Units 1 and 2, representing a 1300 megawatt (MW) coal-fired facility which began operation in 1984. Seminole proposes to add a new third unit of 750 megawatts at that site which will be much like the existing facilities. See Findings of Fact 3, 4, and 10.

The site for the existing and proposed unit is approximately 2000 acres in size. The site is comprised of a larger parcel, which contains the existing two units, and a smaller 4.5 acre parcel along the St. Johns River which contains an intake pump house. The smaller parcel is connected to the larger parcel by an existing privately-granted easement that contains underground water pipelines to supply water to the generating units and a duct bank containing electrical conduit. Facilities for the new Unit 3 will be located adjacent to and integrated with,

the existing facilities within the larger parcel and a new pipeline and a new duct bank will be added in the existing pipeline easement. Pumps within the existing pump house will be upgraded but no changes will be made to the pump house building itself. See Findings of Fact 4, 6, 10 and 12.

The site for the existing and proposed units was certified under the Florida Electrical Power Plant Siting Act (PPSA) in 1979. In its final Order Relating to Land Use and Zoning, dated March 21, 1979, the Siting Board determined that the site for the two now-existing units was “consistent and in compliance with the land use plans and zoning regulations [of Putnam County] in effect at that time.” The Siting Board also ordered that the “responsible zoning and planning authorities [are] to refrain from hereafter changing such land use plans or zoning ordinances so as to affect the proposed site.” See In Re: Seminole Electric Cooperative, Inc., Application for Power Plant Site Certification, Putnam County, DOAH Case No. 78-1388, 1979 Fla. ENV LEXIS 10 Siting Board, March 21, 1979, which is Seminole Exhibit 1. Sierra Club was a party to that 1979 site certification proceeding in which the site was determined to be consistent and in compliance with Putnam County’s land use plans and zoning ordinances. See Findings of Fact 7, 8 and 9.

In 1978, Putnam County had adopted PUD zoning for the Seminole Electric plant site. Putnam County did not have an adopted comprehensive plan or future land use map (FLUM) when the site was first certified in 1979. See Finding of Fact 7.

Putnam County subsequently adopted a comprehensive plan and future land use map, which designated the larger parcel of the site where the existing units are located as “Industrial” and designated the parcel containing the pump house as part “Rural Residential” and part

"Agricultural II". The lands occupied by the pipeline easement were designated "Agricultural II". See Findings of Fact 18, 19 and 20.

On January 10, 2006, the Putnam County Board of County Commissioners adopted an ordinance that amended the PUD zoning for both parcels of the site to accommodate the construction of the proposed Unit 3. In making its decision to amend the PUD zoning, the County Commission determined the Unit 3 project and its proposed site are consistent with the County's Comprehensive Plan and met the requirements of the County's land development code. Sierra Club participated in the County's public hearing on January 10, 2006 and did not object to or appeal the County's decision to amend the PUD zoning for the proposed Unit 3. See Findings of Fact 22, 23, 24 and 25.

All of the Sierra Club's exceptions relate only to the portions of the Recommended Order that address the existing pump house and pipeline/duct bank easement. These are particularly benign features of the Unit 3 Project. The only changes will be upgraded pumps inside the pump house, and the additional installations, beneath the land surface of the existing easement, of pipes and conduit similar to that already located in that easement. Unrebutted testimony demonstrated that there would be no adverse impacts on adjacent land uses from these activities. (Zwolak, Tr. II, pp. 12-13) The record demonstrates that Putnam County explicitly considered these features of the Unit 3 Project to be consistent and in compliance with applicable land use plans and zoning laws when the County adopted its amended PUD ordinance for the Project site.

Standards Of Administrative Review

In reviewing a recommended order such as the one now before the Siting Board, the findings of fact entered by the administrative law judge may not be rejected or modified by a reviewing agency "unless the agency first determines from a review of the entire record, and

states with particularity in the order, that the findings of fact are not based on competent substantial evidence". Subsection 120.57(1)(b)(1), F.S.; Dunham v. Highlands County School Board, 652 So.2d 894 (Fla. 2d DCA 1995). An agency reviewing a recommended order from an administrative law judge may not reweigh the evidence, resolve conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the administrative law judge as the trier of fact. Belleau v. Dept. of Environmental Protection, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); Maynard v. Unemployment Appeals Commission, 609 So.2d 143, 145 (Fla. 4th DCA 1992). Furthermore, an agency reviewing a recommended order has no authority to make independent or supplemental findings of fact in its final order. North Port, Fla. v. Consolidated Minerals, Inc., 645 So.2d 485 (Fla. 2d DCA 1994).

The scope of agency review of a DOAH recommended order involves ascertaining whether the administrative law judge's findings of fact are supported by competent substantial evidence of record. North Port, 645 So.2d at 487. Competent substantial evidence is such evidence that it is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. Perdue v. T.J. Palm Associates, Ltd., 755 So. 2d 660 (Fla. 4th DCA 1999); De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Interpretations of its own ordinances and regulations by an agency such as Putnam County are entitled to great deference and should not be overturned, unless "clearly erroneous." Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); State Contracting & Engineering Corp. v. Dept. of Transportation, 709 So.2d 607, 610 (Fla. 1st DCA 1998). An agency's interpretation of statutes, ordinances and rules within its regulatory jurisdiction does not have to be the only reasonable interpretation. It is enough if such agency interpretations are "permissible" ones. Falk

v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209, 212 (Fla. 1st DCA 1996).

On administrative review, an agency is not bound by the labels affixed by an administrative law judge designating various portions of a recommended order as "findings of fact" or "conclusions of law." Battaglia Properties v. Land and Water Adjudicatory Commission, 629 So.2d 161, 168 (Fla. 5th DCA 1993). Thus, the labeling of a finding of fact as a conclusion of law in a recommended order will be treated either as harmless error or as a mixed finding of fact and conclusion of law.

Seminole Electric's Responses to Sierra Club's Exceptions

Addressing the substance of Sierra Club's four exceptions to the ALJ's Recommended Order on Land Use and Zoning, Seminole offers the following.¹

Preliminary Considerations

As a preliminary matter, two issues should be addressed. The Siting Board's March 21, 1979 Order Relating to Land Use and Zoning is a significant legal precedent that bound and otherwise restricted the subsequent land use and zoning decisions of Putnam County as those decisions related to the certified site for the Seminole Electric power plant in Putnam County. The ALJ in this case found in the August 31, 2006, Recommended Order, that Putnam County "has assigned future land use categories to all of the properties occupied by SECI's facilities,

¹ Sierra Club did not number its individual exceptions but instead referenced individual numbered Findings of Fact or Conclusions of Law in its exceptions. In this response, Seminole will address the Sierra Club's exceptions in numerical order. The first response will be addressed to the exception to Finding of Fact 19; the second response addresses the Sierra Club's exception to Finding of Fact 32; Seminole's third response addresses Sierra Club's exception to Conclusion of Law 40 and 42, and; Seminole's fourth response addresses Sierra Club's exception to Conclusion of Law 43.

including the electrical generating Units 1 and 2, the pump house and the pipeline easement, that are consistent with the Siting Board's Order relating to land use and zoning and do not affect the use of those properties for such uses." The ALJ further found that "Putnam County has not taken any subsequent land use or zoning action which affect the continued use of the site for electrical generating facilities." See Conclusions of Law 37 and 38, (which constitute mixed Findings of Fact and Conclusions of Law.) The Sierra Club has not taken exception to those significant factual findings and legal conclusions concerning the effect of the March 21, 1979 Siting Board Order Relating to Land Use and Zoning. In its exceptions, Sierra Club does not acknowledge that prior 1979 Order of the Siting Board relating to the site for the existing and proposed units. The Sierra Club would apparently have the Siting Board ignore its own express directive to local officials to not affect the use of the site in the future in adopting land use plans or zoning. Based on this omission by Sierra Club, to take exception to these key factual findings regarding the effect of the Siting Board's 1979 Order and the County's land use and zoning decisions in accord with that Order, the Sierra Club's more limited exceptions would not change the outcome recommended by the ALJ.

Additionally, as the ALJ found in Finding of Fact 9, Sierra Club was a party to the original site certification proceeding and is bound by the Siting Board's determination of the consistency of the existing site with the County's land use plans and zoning ordinances. Further, in Finding of Fact 25, the ALJ found that Sierra Club also participated in the Putnam County Commission's public hearing on January 10, 2006 at which the existing PUD zoning for the site was amended to accommodate the placement of Unit 3 and its related facilities. At that hearing, the Putnam County Commission also determined that the Unit 3 project was consistent with the County's comprehensive plan and land development code. The ALJ found that the Sierra Club

did not object to the adoption of the amended PUD zoning ordinance and that no one appealed the County's amended PUD zoning ordinance. Therefore, the ALJ found in Finding of Fact 25, that "Sierra Club is now bound by the determinations of land use and zoning consistency in these prior proceedings, as well as in the original site certification proceeding." Sierra Club has not filed exceptions to Findings of Fact No. 9 and 25 that found Sierra Club is bound by these prior proceedings; Sierra Club has not attempted to explain why it should not be bound by the determinations from the prior proceedings in which it participated. State, Dept. of Revenue v. Bridger, 935 So.2d 536 (Fla. 3rd DCA 2006); Wendel v. Wendel, 852 So.2d 277 (Fla. 2nd DCA2003) ("Under the law of the case doctrine, questions of law that have actually been decided on appeal must govern the case in the same court and in the trial court through all subsequent stages of the proceedings); Advisory Opinion to Attorney General re Referenda Required For Adoption and Amendment of Local Government Comprehensive Land Use --- So.2d ----, 2006 WL 1699568 (Fla. 2006) ("Res judicata bars the litigation of issues that were raised or could have been raised in a prior proceeding between the same parties.") Sierra Club thus has no basis to take exception to issues that have been resolved in prior proceedings in which it participated. Again, the Sierra Club has filed exceptions to a small handful of limited issues, but has not taken issues with critical factual findings and conclusions that are outcome determinative in this matter related to its prior conduct.

Sierra Club provided no evidence in support of its allegations during the land use and zoning hearing. Seminole provided expert testimony, in addition to a number of exhibits, to support its position. Sierra Club made no effort to rebut the testimony of Seminole's experts and cannot do so now by questioning the propriety of the ALJ's findings of fact. So long as the

ALJ's Findings of Fact are supported by competent substantial evidence, and Sierra Club having provided no evidence to the contrary, the Siting Board must reject Sierra Club's exceptions.

Response to Exception No. 1

In its first exception, related to Finding of Fact 19, Sierra Club takes exception to the portion of the ALJ's finding that the "existing pump house and underground water pipes and electrical duct bank are allowed uses in both the Agricultural II and in the Rural Residential future land use districts as a Type 2 community facility." Sierra Club cites to provisions of the County's comprehensive plan in support of this contention, as well as arguing for supplemental evidentiary findings on the incompatibility of such facilities to support this exception. Sierra Club provided no evidence to the contrary at the hearing.

First, these future land use categories for the parcel containing the pump house and for the pipeline and duct bank easement must be considered in light of the March 21, 1979 Siting Board Order Relating to Land Use and Zoning for the Seminole Electric site, which included this pump house parcel and the pipeline easement. To now find, as the Sierra Club's exception would require, that the existing pump house and water pipelines are not allowed uses in those future land use districts, would be inconsistent with the Siting Board's directive that the Seminole site not be affected by a change in land use plans or zoning ordinances subsequent to that 1979 Order. Sierra Club's interpretation would mean the existing pump house and pipelines are not consistent and in compliance with Putnam County's land use plans and zoning regulations. To find that the pump house and pipeline and duct bank are now not consistent with the County's land use plans would also mean that Putnam County has acted contrary to the Siting Board's 1979 order by affecting the use of these lands in an adverse way.

The ALJ correctly concluded that "Putnam County has assigned future land use categories to all of the properties occupied by SECI's facilities, including the electrical generating Units 1 and 2, the pump house and the pipeline easement, that are consistent with the Siting Board's Order Relating to Land Use and Zoning and do not affect the use of those properties for such uses." Sierra Club has taken no exception to these findings as to the County's actions which were taken in accordance with the Siting Board's 1979 directive. In the face of these findings to which it did not take exception, Sierra Club's exception to Finding of Fact 19 is untenable.

Further, Sierra Club's exception to Finding of Fact 19 involves re-argument of the evidence presented to the ALJ, and is an improper attempt to have the Siting Board make supplemental findings of fact. The County's comprehensive plan defines a Type 2 Community Facility as "light infrastructure facilities, including but not limited to, water wells, water tanks, sewage pump stations, electrical substations, and water and wastewater treatment plants with a capacity of less than 500,000 gallons per day." Type 2 Community Facilities are allowed in all eleven of Putnam County's Future Land Use categories. See Finding of Fact 30. The expert planning witness testified without any rebuttal testimony, that the pump house and water pipeline met this County definition for a Type 2 Community Facility. (Zwolak, Tr. II, p. 28) Thus, there is competent substantial evidence to support this Finding of Fact.

Contrary to the Sierra Club's argument on incompatibility, the ALJ found in Finding of Fact 17 (to which Sierra Club took no exception) that the addition of the proposed Unit 3, which includes the existing pump house and new water pipeline, "would be compatible with the existing land uses at and near the Site" and that the "new Unit 3 will be able to co-exist with existing land uses in that the new Unit 3 is not expected to have a significant adverse impact to

nearby residential development.” [Emphasis added] This finding was based on the expert planning testimony of Seminole Electric’s witness Richard Zwolak. (Zwolak, Tr. II, p. 12-13) Thus, the requirements of the cited comprehensive plan policy A.1.9.3.A.4.e are fulfilled, that Type 2 Community Facilities such as the pump house and pipeline be compatible with the overall character of the existing and future development of the area. Sierra Club provided no evidence to the contrary and cannot do so now through the filing of exceptions.

Sierra Club would also have the Siting Board engage in supplemental fact finding related to land use compatibility and interpretations of the County’s comprehensive plan in granting this exception. Sierra Club seeks to have the Siting Board make a finding of fact that those facilities are not compatible with surrounding land uses, when the ALJ’s Finding of Fact 17 finds that they are and will be compatible. The ALJ has made those factual findings contrary to Sierra Club’s assertions. The Siting Board may not engage in supplemental fact finding on this issue. North Port, Fla. v. Consolidated Minerals, 645 So.2d 485 (Fla. 2d DCA 1994

Sierra Club also cites to Putnam County Comprehensive Plan Policy A.1.9.3.A.10.c for the proposition that “a Type 2 community facility must ‘be directly related to Agricultural uses.’” However, a reading of that cited policy, found in Seminole Exhibit 10A at page AA-29, reveals that Sierra Club has misquoted the policy in a manner to incorrectly represent that Type 2 Community Facilities are not allowed in areas designated Agricultural II if those facilities are not “directly related to agricultural uses.” First, the comprehensive plan policy cited by Sierra Club relates to Industrial Uses and not to Type 2 Community Facilities. Second, Policy A.1.9.3.A.10.c, which Sierra Club cites to, instead provides that “Industrial Uses that are directly related to Agricultural uses shall be located on sites within the area that they are designed to serve and are accessible by one or more transportation facilities. . . .” That same cited policy

goes on to provide that "Other Industrial uses larger than 10 acres . . . may be permitted [in Agricultural II areas] through a PUD. . . ." Thus, there is simply no prohibition on either Type 2 Community Facilities or Industrial Uses including electrical power plants in Agricultural II areas when properly sited and zoned in accordance with the County's comprehensive plan and other regulations.

The correct comprehensive policy for Type 2 Community Facilities located in Agricultural II areas is found in Putnam County Comprehensive Plan Policy A.1.9.3.A.10.d, which immediately follows the policy to which Sierra Club cites. Policy A.1.9.3.A.10.d provides that

d. Community Facilities and Services Types 1, 2, and 3 are permitted subject to compliance with standards provided in the land development code. Community Facilities and Services shall be located on sites that are accessible to their intended service area and do not require significant non-residential vehicular traffic to pass through established neighborhoods. The location, scale and intensity of Community Facilities and Services Types 1, 2 and 3 shall be compatible with the overall character of the existing and future development of the area. Community Facilities and Services acreage in each distinct Agriculture II area shall not exceed 5 percent of its total land area without a comprehensive plan amendment to designate the area as Public Facilities future land use.

See Seminole Ex. 10A at page AA-29. There is simply no restriction or limitation in the relevant Putnam County comprehensive plan policy that requires that Type 2 community facilities in Agricultural II areas "must be directly related to Agricultural uses" as Sierra Club would now have the Siting Board find.

Sierra Club offers no citation to the Recommended Order or the record evidence to support its claim that "Industrial activities by their nature and classification are incompatible with residential uses. . . ." In fact, the Recommended Order in Finding of Fact 17 finds that the proposed Seminole Unit 3 is compatible with nearby residential development. That finding was

based on record evidence and the expert planning testimony of Mr. Zwolak. (Zwolak, Tr. II, pp. 12-13) There is no basis in the record evidence or the law to accept the Sierra Club's assertion that the proposed power plant at this location is incompatible with nearby residential development. Nor is there any basis for concluding that the pump house or pipeline/duct bank easement would be incompatible with nearby development. The record demonstrates that there will be no visible changes to the pump house or the easement. The Sierra Club has not linked any of its contentions to an ascertainable rationale related to land use policy.

Sierra Club in its exception fails to cite to any record evidence to support its proposition that the pumps in the existing pump house are not Type 2 Community Facilities and instead constitute heavy industrial activities. One need only consider that when it adopted its comprehensive plan, Putnam County did not designate the pump house and water pipeline easement as Industrial as would have been the case if Putnam County believed the pump house, and the pipelines are Industrial facilities. Putnam County did designate the portion of the site containing the two existing electrical generating units as Industrial when it adopted its comprehensive plan.

The Sierra Club's proffered factual finding that "pumps are not Type 2 Community Facilities as defined by the comprehensive plan's glossary because they are not 'light infrastructure facilities'" is expressly contrary to the ALJ's Finding of Fact 30 and contrary to the un rebutted evidence and expert testimony in the case as noted by the ALJ in Finding of Fact 30. Thus, even if it were legally permissible to do so, there is no evidentiary basis to make the Sierra Club's proffered supplemental factual finding that the pump is "part and parcel of the heavy industrial activities associated with electrical production" in a way that would make them ineligible to be a Type 2 Community Facility. North Port, 645 So.2d at 485.

Sierra Club's reference to the "definition of electrical power plant" in section 403.503(12), Florida Statutes (F.S.) is not explicated or understandable in the context of this exception. To the extent necessary, this issue is addressed in the response to Sierra Club's second exception. For the foregoing reasons, Sierra Club's first exception should be denied.

Response to Exception No. 2

In its second exception, Sierra Club challenges Finding of Fact 32, in which the ALJ found that Sierra Club offered no contradictory evidence of the County's interpretation of its plan, offered no evidence as to how the community could be adversely affected by the continued use of the pump house, and offered no evidence that these facilities constituted industrial uses under the Putnam County land use plans and zoning regulations.

Sierra Club erroneously argues that this finding "misplaces the burden of proof and creates evidentiary requirements that do not exist." However, Sierra Club's argument on this issue is contrary to the holding in Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). Under the burden shifting nature of an administrative hearing, J.W.C. stands for the proposition that Seminole Electric, as the applicant, had the initial burden to demonstrate that in this circumstance that the site for its proposed Unit 3 project was consistent and in compliance with the adopted land use plans and zoning ordinances of Putnam County, in accordance with section 403.508(2), F.S. (2005). Seminole made that showing through evidence including the expert testimony of Mr. Richard Zwolak, a land use planner, to support that conclusion. Under J.W.C., the burden then shifted to the Sierra Club, as the opponent on land use issues, to offer "contrary evidence of equivalent quality" to contradict Putnam County's interpretation of its comprehensive plan, and to counter Seminole Electric's competent substantial evidence that the community would not be adversely affected by the continued use of

the pump house and that the pump house and pipeline are not an industrial use under the County's comprehensive plan. The ALJ did not misplace the burden of proof and did not create new evidentiary requirements for Sierra Club.

In this exception, Sierra Club also asserts that "Seminole's contention that the pump house is not an industrial facility contradicts the statutory definition of electrical power plant, which makes no such distinction and instead, specifically includes 'associated facilities which directly support the operation of the plant,'" citing to section 403.503(12), F.S. Sierra Club offers no additional analysis beyond this simple assertion to explain its notion that the PPSA's definition of "electrical power plant" compels the conclusion that a pump house must be regulated as an industrial facility under local government land use plans and zoning regulations. Nothing in the Power Plant Siting Act or the cited PPSA definition of "electrical power plant" stands for the proposition that all parts of a power plant must be considered to be "industrial" and therefore designated industrial or zoned industrial in a county's future land use plans or zoning laws, respectively. Nothing in the Power Plant Siting Act says that Seminole had to demonstrate that all of the associated facilities of the Unit 3 project, including the pump house and pipeline, were placed in an industrial future land use designation or an industrial zoning category.

Further, under Sierra Club's logic that all components of a power plant must be designated or zoned "industrial" if they are related to the operation of the plant, is impractical. That analysis would suggest that every potable water line, sewer line, roadway, and transmission line that supports a power plant as an associated facility would have to be designated or zoned "industrial" on that basis. This would be an outcome that lacks a rationale and would usurp the authority of local governments on land use and zoning issues. Further, there is no precedent in 30 years of cases under the PPSA in Florida to support such a conclusion.

Response to Exception No. 3

In its third exception, Sierra Club challenges the ALJ's Conclusions of Law 40 and 42 that Putnam County's definition of "development" in its adopted land development code exempts from that definition "work by any utility or other persons engaged in the distribution or transmission of gas or water for the purpose of inspecting, repairing, renewing or construction on established rights-of-way, any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks or the like." This exception involves the issue of whether the installation of a new pipeline within the existing pipeline easement established by Seminole Electric in 1979 is exempt from the definition of "development" which is subject to the County's comprehensive plan. The record evidence at this hearing clearly demonstrates that the installation of a pipeline and a duct bank in that long-established pipeline easement is exempt from the County's definition of "development."²

This exception by Sierra Club also reflects a fundamental misunderstanding of the Power Plant Siting Act and the manner in which local comprehensive plans are considered. Under the Power Plant Siting Act, a local comprehensive plan is addressed at two stages of the proceeding. First, the future land use element and future land use map are considered at the land use hearing to determine if the proposed site for an electrical power plant is consistent and in compliance with the land use plans and zoning ordinances of the jurisdictional local government. See Section 403.508(2), F.S. (2005). At the land use hearing stage of the proceeding, only a limited portion of the County's comprehensive plan is at issue, specifically the future land use element

² Sierra Club cites a similar exemption for agricultural activities from the State's definition of "development" found in Section 380.04(3)(e), F.S. Sierra then cites to agricultural-related policies in the County's comprehensive plan. However, the Florida Department of Community Affairs has concluded that "agricultural activities are exempt from the definition of "development" which applies to comprehensive plan [sic]. Sections 163.3164(6) and 380.04(4), Florida Statutes." McSherry v. Alachua County and Department of Community Affairs, 27 FALR 2686, (Fla. Dept. of Community Affairs 2004) (See page 27 FALR 2774, at paragraph 237.)

and future land use map as they relate to a determination of whether the proposed site is an allowed use under the County's comprehensive plan and zoning regulations. See Conclusion of Law 35, in which the ALJ concluded that the "applicable land use plan" is the Future Land Use Element of the Putnam County Comprehensive Plan and the accompanying FLUM" or Future Land Use Map.

The balance of the County's comprehensive plan beyond the land use element and the balance of the land development code beyond zoning regulations are addressed at the later site certification hearing stage of the proceeding. Under Section 403.507(2)(a)4., F.S. (2005), the jurisdictional local government, in this case Putnam County, may address issues related to the "adopted local comprehensive plans and land development regulations" in its agency report submitted under that provision of the PPSA. Thus, any other policies that may be contained in the Putnam County comprehensive plan beyond consistency and compliance with the future land use map and zoning regulations of the County can be addressed at this second phase of the site certification hearing. Any policies of the County's comprehensive plan that were not at issue in the land use hearing can be considered at this later stage of the proceeding.

In this third exception, Sierra Club also excepts to Conclusion of Law 42 in which the ALJ concludes, if the new water pipeline within the existing easement is not exempt from the County's definition of "development", then the pipeline and duct bank would be Type 2 Community Facilities under the County's comprehensive plan. Sierra Club then recites to its earlier exception to the Finding of Fact 19, as to whether the pipeline constitutes a Type 2 Community Facility. In a similar fashion, Seminole Electric adopts its response to that first exception by Sierra Club to Finding of Fact 19. For the foregoing reasons, Sierra Club's third exception should be denied.

Response to Exception No. 4

In its fourth exception, Sierra Club takes exceptions to the ultimate Conclusion of Law in paragraph 43 that “competent, substantial evidence received at the hearing demonstrates that the site and the Unit 3 project, including the pump house and additional underground water pipe and electrical duct banks, are consistent and in compliance with Putnam County’s land use plans.”

Sierra Club makes no effort to show that this conclusion is not supported by competent substantial evidence. Instead, in this exception, Sierra Club seeks to induce the Siting Board to engage in supplemental fact finding concerning whether the pumping of water to and from the River are “industrial activities conducted on land designated for residential or agricultural uses.” To the contrary, the expert testimony established that the pump house and pipeline are not industrial activities under the County’s comprehensive plan. (Zwolak, Tr. II, pp. 27-28, 41-42) Significantly, Putnam County specifically acknowledged and approved these activities within these land use categories and zoning districts when the County amended the PUD zoning for the Project site in January, 2006. In this proceeding, the County’s unchallenged interpretation of its Comprehensive Plan is entitled to deference unless shown to be “clearly erroneous.” Falk v. Beard, 614 So.2d 1086, 1089 (Fla. 1993); Suddath Van Lines, Inc. v. Dept. of Environmental Protection, 668 So.2d 209 (Fla. 1st DCA 1996).

The record is devoid of any evidence to support the Sierra Club’s proposition that the activity of pumping water is “industrial” under the County’s comprehensive plan, while the record evidence supports the ALJ’s conclusions. Sierra Club offered no evidence to support this position and is unable to cite to any record evidence to support this proposition or to show that the County’s interpretation of its own adopted comprehensive plan is “clearly erroneous.” Falk v. Beard, 614 So.2d at 1086.

Similarly in this exception, Sierra Club seeks to have the Siting Board render a factual finding that the pump house is "not compatible with surrounding residential uses." But the Sierra Club produced no evidence whatsoever to support such a finding. Seminole, on the other hand, produced substantial competent evidence supporting the ALJ's finding of fact that the pump house was compatible with surrounding residential uses. See Finding of Fact 17 and Seminole Electric's response to Sierra Club's first exception above. Based on the foregoing, Sierra Club's fourth exception should be denied.

For the foregoing reasons, each of the four exceptions filed by Sierra Club should be rejected and the Siting Board should enter a final order adopting the ALJ's Recommended Order.

Respectfully submitted this 12th day of October, 2006.

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