IN THE CIRCUIT COURT OF THE TWENTIETH JUDICIAL CIRCUIT IN AND FOR HENDRY COUNTY, FLORIDA CIVIL DIVISION

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SEMINOLE TRIBE OF FLORIDA,

Plaintiff,

vs.

Case No. 2011-CA-540

HENDRY COUNTY, FLORIDA, a political Subdivision of the State of Florida,

Defendant,

and

FLORIDA POWER & LIGHT CO. and MCDANIEL RESERVE REALTY HOLDINGS, LLC, a Florida Limited Liability Company,

Intervenor-Defendants.

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BARBARA S. BUTLER
CLERK OF CIRCUIT COURT
BY _____ D.C.

ORDER GRANTING DECLARATORY AND INJUNCTIVE RELIEF AND ENJOINING DEFENDANT HENDRY COUNTY FROM ENFORCING ORDINANCE 2011-07

THIS CAUSE came before the Court for bench trial conducted from July 14, 2014 to July 17, 2014. By agreement, the parties filed written closing arguments on August 7, 2014. Having reviewed the amended complaint, the amended answer and the record, having heard the testimony and received the exhibits presented at trial, and having considered the closing arguments submitted by the parties, the Court GRANTS Plaintiff's request for a declaratory judgment. The Court finds that Hendry County Ordinance 2011-07, which allows the construction of a solar and gas-powered electrical generation plant on the property referred to in this order as "the McDaniel's property," inconsistent with the Hendry County Comprehensive and, therefore, null and unenforceable.

FINDINGS OF FACT

1. On June 24, 2011, Plaintiff, the Seminole Tribe of Florida, filed a Complaint in Hendry County circuit court seeking declaratory judgment and injunctive relief from an ordinance adopted by Defendant, Hendry County. The Complaint was filed pursuant to Fla. Stat. §163.3215(3) and

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§86.021 as a timely challenge of a "Development Order" which Plaintiff claimed is inconsistent with numerous goals, objectives and provisions of the then-applicable comprehensive plan of Hendry County, implemented in May 2011. The parties agreed by pretrial stipulation that Ordinance 2011-07 is a "Development Order" as that term is defined in §163.3164(15) and §163.3215(3) and that Plaintiff is an "aggrieved or adversely affected party" as that term is defined in §163.3215(2).

2. The Hendry County ordinance in question, 2011-07, approved the rezoning of 3,127 acres of land abutting the northern border of the Big Cypress Seminole Indian Reservation ("the McDaniel property") from Agricultural 2 ("A-2") to Planned Unit Development ("PUD"). The passing of this ordinance allowed for the construction and operation of a large-scale, regional, natural gas and solar-powered electrical power plant. Florida Power & Light Co. ("FPL") and McDaniel Reserve Realty Holdings, LLC ("McDaniel"), were allowed to intervene in the proceedings as Defendants.[1]

3. The Court dismissed Plaintiff's complaint on April 2, 2012, but the dismissal was reversed on appeal. *Seminole Tribe of Florida v. Hendry County*, 114 So.3d 1073 (Fla. 2d DCA 2013). The case proceeded through discovery thereafter until Plaintiff filed its motion for summary judgment on March 26, 2014. On April 8, 2014, Defendants filed a response to the motion for summary judgment. The motion for summary judgment was denied on April 15, 2014, and the case was eventually set for non-jury trial beginning July 14, 2014.

4. Essentially, Plaintiff seeks to have Ordinance 2011-07 declared null and unenforceable because the proposed power plant on the McDaniels property is not an allowable land use under the county's comprehensive plan. In a pretrial order, the scope of the trial was narrowed to the ordinance's consistency with a limited list of goals, objectives and policies of the comprehensive

[1] McDaniel is the original owner of the property at the time the rezoning application was submitted to the county and

plan. However, the ultimately dispositive crux of this dispute is an ambiguity as to the term, "Utility" within one provision of the plan, Policy 1.1.1, the "Agriculture (A-2) Future Land Use Category."

The Comprehensive Plan

5. The McDaniel property was zoned as agricultural land under Policy 1.1.1 before the rezoning ordinance that prompted this lawsuit. The self-professed purpose of Policy 1.1.1 is "to define those areas within Hendry County which will continue in a rural and/or agricultural state through the planning horizon of 2040." Accordingly, Policy 1.1.1 describes the range of permissible land uses within property zoned as agricultural.[2] Under the comprehensive plan, there is a specific, two-tier hierarchy of land uses permitted within agricultural land: Level 1 uses and Level 2 uses.

6. Level 1 uses are permitted as a matter of right. These uses include Everglades restoration projects, the production of food and other products through the growing/harvesting of plants or animal husbandry, production and processing of agricultural products, rural residential and agricultural housing, and retail oriented towards the agriculture industry. Then, there are Level 2 uses.

7. Unlike Level 1 uses, Level 2 uses are not allowed as a matter of right. Instead, the property in question must first be rezoned to a "Planned Unit Development" ("PUD"), which requires the landowner to go through the typical, lengthy rezoning process so that "the appropriateness of the use on the particular parcel may be determined." The total list of Level 2 uses set forth in Policy 1.1.1 is as follows: "***utilities***, *bio-fuel plants, mining and earth extraction and processing operations, solid waste facilities, resource recovery facilities, and other similar*

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approved. As the future owner and operator of the power plant, FPL ultimately had the land conveyed to it by deed.

[2] There is a second category of "agricultural" land pursuant to Policy 1.1.1b. This category is known as "Agriculture/Conservation Future Land Use Category." All mentions of land categorized as "agricultural" in this

uses." (emphasis added)

8. Hendry County, by and through its County Attorney, concluded that the word "utilities" set forth within Policy 1.1.1's list of Level 2 uses allows a large-scale electrical power plant to be built on A-2 category land as a Level 2 use. The rezoning of the property was thus approved via Hendry County Ordinance 2011-07, which rezoned the McDaniels property from A-2 to PUD, therefore allowing the construction of the proposed natural gas and solar-powered power plant. The ordinance was conditioned on the satisfaction of a number of requirements relating to the construction of visual buffers, management of noise and traffic, and minimization of wildlife and environmental impact.

9. Plaintiff, on the other hand, contests the County's interpretation of the comprehensive plan and argues that the word "utilities" in Policy 1.1.1 does not allow the construction of a full-scale electrical power plant on agricultural land, even if it is rezoned to PUD. Rather, Plaintiff contends that the power plant can only be built on property categorized under Policy 1.1.10, the "Industrial Future Land Use Category."

10. Policy 1.1.10's purpose is "to identify those areas within Hendry County which currently are or should be classified for industrial development through the planning horizon of 2040." Lands classified as industrial "are primarily within the urban area of Hendry County with adequate infrastructure, including roads, water, sewer, and drainage systems," with an exception for industrial uses that are not intended to directly support the urban areas of the county. Uses permitted in the industrial land use category include: *"manufacturing, assembling, processing, storage (both inside and outside), distribution centers, batch plants, concrete plants, flex space for the service industry, mining and earth extraction and processing operations,* ***electrical generation plants****, recycling facilities, resource recovery facilities, similar uses, and ancillary uses*

opinion are referring to land zoned under Policy 1.1.1, not Policy 1.1.1b, unless stated otherwise.

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specifically designed to service the industrial employment workforce." (emphasis added)

11. In other words, because Policy 1.1.10 *specifically* allows "electrical generation plants" on property under the industrial zoning category, Plaintiff argues that the word "utilities" in Policy 1.1.1 cannot include a power plant such as the one approved by Ordinance 2011-07. Thus, if Plaintiff's argument is to be accepted, the rezoning ordinance should be declared unenforceable because it does not comply with the comprehensive plan of Hendry County.

12. This has been a difficult case without a clear answer. The parties both put forward considerably persuasive legal arguments. The Court ultimately set the case for trial because it considered the term "utilities" as used in the comprehensive plan to be ambiguous. The Court's hope was that extrinsic evidence could allow it to determine whether the word "utilities" in Policy 1.1.1 allows the construction of the proposed power plant on the McDaniel property. Having heard the testimony presented at trial, having reviewed the documents entered into evidence, and having considered the closing arguments of counsel, the Court finds that Ordinance 2011-07 is not consistent with Policy 1.1.1 of Hendry County's comprehensive plan and **grants** the requested declaratory and injunctive relief, for the reasons set forth below.

13. Plaintiff also raised various arguments about the ordinance's inconsistency with other goals, objectives and policies of the Comprehensive Plan relating to wildlife, wetland preservation, and cultural/archaeological resources located on the property. Because the Court finds that the ordinance is inconsistent with Policy 1.1.1, it does not reach Plaintiff's claims regarding consistency with other provisions of the comprehensive plan.

Controlling Law and Burden of Proof

14. Chapter 163, Part II of Florida Statutes, also known as the Community Planning Act, requires local governments to adopt what is known as a "comprehensive plan." A comprehensive plan is meant to regulate and govern future land uses in the county in the long term and assist with

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other land planning issues. The Act further mandates that "[a]fter a comprehensive plan, or element or portion thereof, has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element *shall be consistent* with such plan or element as adopted." §163.3194(1)(a) (emphasis added). A development order's consistency with all provisions of the county's controlling comprehensive plan is mandatory and not discretionary. *Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 198 (Fla. 4th DCA 2001). "The [Community Planning Act] is framed as a rule, a command to cities and counties that they must comply with their own Comprehensive Plans after they have been approved by the State. The statute does not say that local governments shall have some discretion as to whether a proposed development should be consistent with the Comprehensive Plan." *Id.*[3] Moreover, a proposed use must be placed in the most specific category into which it fits. *Keene v. Zoning Bd. of Adjustment*, 22 So. 3d 665, 669 (Fla. 5th DCA 2009); *Saadeh v. Stantion Rowing Foundation*, 912 So. 2d 28 (Fla. 1st DCA 2005).

15. A trial court need not defer to the county's interpretation of its comprehensive plan. *Id.* at 197-98. When reviewing a challenge to a development order (such as a rezoning ordinance) on the grounds that it is inconsistent with the controlling comprehensive plan, "the traditional and non-deferential standard of strict judicial scrutiny applies." *Machado v. Musgrove*, 519 So.2d 629, 632 (Fla. 3d DCA 1987). A comprehensive plan is sometimes likened to a "constitution" that binds the county and controls all future development within its boundaries. *Id.* at 631.

16. When a development order is challenged as violating the applicable comprehensive plan, the burden of proof is on the applicant and/or local government to show "by competent and

[3] The *Pinecrest* case also provides a useful summarization of the history of the Community Planning Act, including the state's early struggles with the counties' tendency to change their plans "willy-nilly virtually every time a city council or county commission met." 795 So. 2d at 199 (citations omitted).

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substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements." *Id.* at 632. "Competent substantial evidence" is evidence a reasonable mind would accept as adequate to support a conclusion. *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957). The correct analysis for determining compliance with the comprehensive plan is focused on what the development order *authorizes*, not what the developer, government or other interested parties *intend* to do under that order. *United States Sugar Corp.* v. *1000 Friends of Florida*, 134 So.3d 1052 (Fla. 4th DCA 2013). Once a basic prima facie case of compliance with the comprehensive plan is established, the burden shifts to the plaintiff to demonstrate its inconsistency. *See Bd. Of County Com'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993). If the plaintiff cannot rebut the defendant's prima facie case, the development order should be upheld. *Id.*

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Interpreting a Comprehensive Plan

17. A comprehensive plan is interpreted the same way as a statute passed by the state legislature. *See 1000 Friends of Florida v. Palm Beach County*, 69 So. 3d 1123, 1126-27 (Fla. 4th DCA 2011). When attempting to discern the meaning of a term, a court must first consider the actual language of the statute. *Joshua v. City of Gainesville*, 769 So. 2d 432, 435 (Fla. 2000). If the language is clear and unambiguous, a court may not look behind the plain meaning of the words, consider legislative intent, or apply the rules of statutory construction; instead, the plain and ordinary meaning must control. *See Borden v. E-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006); *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004).

18. However, when the term is ambiguous, a court may resort to the principles of statutory construction. "It is well settled that legislative intent is the polestar that guides a court's statutory construction analysis." *Knowles v. Beverly Enters.-Fla, Inc.*, 898 So. 2d 1, 5 (Fla. 2004). The first source of legislative intent is the actual language used in and throughout the statute; this is where

a court may apply the rules and maxims of statutory construction. *See Borden*, 921 So. 2d at 595. "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole." *Knowles*, 898 So. 2d at 6 (citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So.2d 452, 455 (Fla.1992)).

19. A court may also resort to extrinsic aids in order to discern legislative intent upon finding a term to be ambiguous. *Lee v. City of Jacksonville*, 793 So.2d 62 (Fla. 1st DCA 2001). For example, expert testimony may be necessary to assist a court in understanding specialized terms and phrases employed in statutory language. *See Calio v. Equitable Life Assurance Soc'y*, 169 So. 2d 502, 505 (Fla. 3d DCA 1964). The particular meaning of a term within the relevant industry or profession may also be considered. *Hancock Advertising, Inc. v. Dept. of Transportation*, 549 So. 2d 1086, 1089 (Fla. 3d DCA 1989).

20. Finally, a court may discern legislative intent by delving into legislative history. *See Rollins v. Pizzarelli*, 761 So. 2d 294, 299 (Fla. 2000); *McDonald v. Roland*, 65 So.2d 12, 14 (Fla. 1953); *State v. Amos*, 79 So. 433, 434 (Fla. 1918). Legislative history encompasses a range of various procedures and documentation relating to the passage of a statute. For example, although legislative staff analyses "are not determinative of final legislative intent, they are, nevertheless, one touchstone of the collective legislative will." *Archstone Palmetto Park, LLC v. Kennedy*, 132 So.3d 347 (Fla. 4th DCA 2014) (internal quotation and citation omitted). In contrast, statements made by *individual* legislators concerning the intent of the legislative body as a whole, or statements made by legislators while the statute is under consideration (such as floor debates), are irrelevant and inadmissible. *See Crown Diversified Indus., Inc. v. Watt*, 415 So. 2d 803, 806 (Fla. 4th DCA 1982); *Smith v. Crawford*, 645 So. 2d 513, 525 (Fla. 1st DCA 1994).

21. Additionally, and most helpful in the instant case, evidence that a term in earlier drafts of a statute was intentionally altered or deleted from the final version "is one of the surest signs of

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its rejection by the legislature." *Don King Productions v. Chavez*, 717 So.2d 1094 (Fla. 4th DCA 1998). "Put another way, when the legislature so clearly and intentionally removed" particular language from a statute, the court "will not contravene the legislature's obvious intentions by restoring the excluded language." *Id.*

The Word "Utilities"

22. The Court begins its analysis with consideration of the word "utilities" itself. Unfortunately, there is no definitions section in Hendry County's comprehensive plan. The plan itself does not provide any guidance on the meaning of "utilities" in Policy 1.1.1, nor how it may be different from – or inclusive of – the term "electrical generation plants" in Policy 1.1.10. Neither is the word "utilities" defined the Community Planning Act. The parties have raised various arguments for the definition of "utilities" based on other sources, primarily Hendry County's Land Development Code, other statutes, and dictionary definitions. For the reasons below, the Court finds that none of these arguments establishes a clear, plain meaning for the term "utilities" as it is used in Policy 1.1.1.

"Utilities" in the Land Development Code

23. Alongside Hendry County's comprehensive plan is its Land Development Code ("LDC"). The LDC is the "implementation arm" of the comprehensive plan. While the comprehensive plan establishes goals, objectives and policies, the LDC formalizes and applies those goals, objectives and policies via enforceable regulation. Section 1-53-2.2 of the LDC establishes a list of definitions for various land use classifications in the Code. Within this list are two definitions with potential informative value to the meaning of "utilities" in Policy 1.1.1: "essential public or utility facilities" and "public service/utility facility."

24. Under the code, these nearly identical phrases have separate meanings. An "essential public or utility facility" is "a component of the distribution or collection system for a utility or

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communication system, such as water and sewer lines, electric lines, telephone or cable television lines, but not including substations, switching stations, or treatment facilities which are defined as public service/public utility uses." In contrast, a "public service/utility facility" is "those facilities from which essential or important public services are provided[.]" The LDC then outlines six types of uses, plus "substantially similar activities," that fall under the definition of "public service/utility facility": emergency service activities, such as dispatch centers for fire, police and rescue; transmission towers; "utility facilities" such as water plants, wastewater treatment plants, and electricity substations servicing 230 kv or greater; maintenance facilities and storage yards for schools, government agencies or cable companies; gas storage for distribution facilities; and airports, airfields or truck/bus terminals.

25. Later, in section 1-53-3 of the LDC, is a table illustrating what types of land uses or activities are allowed in each zone established by the comprehensive plan. The table indicates that "essential public or utility facility" uses are permitted by right in every single zoning district under the comprehensive plan and that "public service/utility facility" uses are permitted by special exception in every single zoning district under the comprehensive plan.

26. Neither of the definitions in the LDC explicitly includes an electrical power plant. An "essential public or utility facility" refers to "components" of the distribution or collection system for a utility, but considering its list of extremely non-intensive uses such as basic power lines, a large-scale regional power generation plant would not appear to fit under this definition. A "public service/utility facility" mentions only "electricity substations servicing 230 KB or greater" with regard to electrical utilities. Accordingly, the definitions in the LDC do not provide particularly useful guidance to the Court, and especially not for the central dispute in this case – what "utilities" means within the context of Policy 1.1.1. The table in section 1-53-3, which is based on the definitions and addresses the "special exception" process instead of PUD rezoning, is likewise

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unhelpful.

Defendants' Definition of "Utilities"

27. In their joint written closing argument, Defendants make three arguments regarding the definition of the word "utility" itself, irrespective of the extrinsic evidence presented at trial. The first of these is a reference to two definitions in Florida Statutes Chapter 366, which establishes regulation of utilities through the Public Service Commission. §366.02(1) defines "public utilities" to mean "every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas... to or for the public within this state". §366.02(2) defines "electric utility" as "any municipal electric utility, investor-owned electric utility, or rural cooperative which owns, maintains, or operates an electric generation, transmission, or distribution system within the state." Defendants argue that these definitions are persuasive because FPL is a utility regulated by the State of Florida and that the proposed power plant will require PSC approval.

28. Second, Defendants point to several dictionary definitions of "utility." *See Seagrave v. State*, 802 So. 2d 281, 286 (Fla. 2001) (meaning of ambiguous terms may be ascertained by reference to a dictionary). The Court took judicial notice of certain online dictionary definitions of the word "utilities" both pretrial and during trial. These definitions[4] are as follows:

> 1) "A public service such as gas, water or electricity that is used by everyone." *Macmillandictionary.com.* Macmillan Publishers Limited. N.d. 20 June 2014. http://www.macmillandictionary.com/dictionary/american/utility.
>
> 2) "A service (such as a supply of electricity or water) that is provided to the public" or "a company that provides electricity, water, etc." Merriam-Webster.com. Merriam-Webster. 20 June 2014. http://www.merriam-webster.com/dictionary/utility.
>
> 3) "A supply of gas, electricity, water, or telephone service to homes and businesses, or a business that supplies such services."

[4] Additional definitions of utility as, for example, "the quality or condition of being useful; usefulness" are obviously not pertinent to the dispute here and have been omitted.

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Dictionary.cambridge.org. Cambridge Dictionaries Online. 20 June 2014. http://dictionary.cambridge.org/us/dictionary/American-english/utility_2.

4) "A public utility" or "a commodity or service, such as electricity, water, or public transportation, that is provided by a public utility."
AHdictionary.com. The American Heritage Dictionary of the English Language, Fourth Edition. (2003) 20 June 2014. http://www.ahdictionary.com/word/search.html?q=utilities.

5) "A public service, as a telephone or electric-light system, a streetcar or railroad line, or the like," or "a public service, such as the bus system; public utility."
Dictionary.com Unabridged. Random House, Inc. 20 June 2014. http://dictionary.reference.com/browse/utilities.

29. Third, through inspection of the definition of a "development order" under §163.3164(15) and §380.04(3)(b), Defendant argues that "construction of power lines on established rights-of-way is not considered development"; and furthermore, "new distribution electric substations are permitted uses in all land use categories" under §163.3208(4). Thus, Defendants deduce, "that leaves the electric generation plant as the only component of an electric utility system subject to development approval by the County." However, they admit in a footnote that "it is possible that a small number of very large transmission electric substations not falling within the definition of 'distribution electric substation' set forth in [§]163.3208(2), Florida Statues, may also require development approval."

30. Additionally, Defendants argue that sections 1-53-3.1 and 1-53-2.2 of the LDC also support its argument that power plants are the "only component" of an electric utility system that must be approved by the county because it states that electric lines, water and sewer lines, and telephone/cable lines are permitted in all land use categories. Because these items are already permitted uses in agriculture zones, rezoning to PUD would not be necessary in order to construct them. Thus, Defendants argue, the term "utilities" in Policy 1.1.1 is meaningless "unless it is construed to mean something more than mere transmission or distribution infrastructure."

31. The Court does not find any of these arguments persuasive. If anything, Defendant's

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attempts to define "utilities" in the above manners only underscore the ambiguity of the term as it is used in the comprehensive plan; this ambiguity is what led the Court to deny Plaintiff's motion for summary judgment and conduct a trial to accept extrinsic aids.

32. First of all, the definitions within Chapter 366, the Public Service Commission statute, do not even match the definition that Defendants attempt to attach to the comprehensive plan. Under Chapter 366, a "utility" is a "**person, corporation, partnership, association,** or other **legal entity**" providing a public service such as water or light. An electrical utility is "any municipal electric **utility**, investor-owned electric **utility**, or rural **cooperative**" providing or operating an "electric generation, transmission, or distribution system." Thus, according to Chapter 366, a "utility" is not a building, power plant, substation, network of power lines, or other structure whose placement would be controlled by zoning ordinances. Rather, it is the organized *entity* that owns and operates those structures to provide water, electricity and other services to the public. The structures themselves, which physically deliver the utility services, are referred to as a ***system*** in §366.02(2). If the Court were to apply this definition of "utility" to the comprehensive plan, it would render the term meaningless, as a "person, corporation, partnership, association, or other legal entity" is not a land use.

33. The online dictionary definitions likewise do not assist the Court. The definitions cited by Defendants all define a "utility" as either a "service" or a "company," contrary to the point Defendant attempts to make. None of these definitions make reference to the *physical components* of utilities. The single word "utilities," without any other qualifying descriptive terms (i.e., "major utility facility," "minor utility component," "regional utility system," or endless other permutations), does nothing to describe what *land uses* are permitted by this term under Policy 1.1.1. Surely, there is any number of structures, buildings, factories, large power plants, smaller power plants, power lines, office buildings, service centers, substations, etc. that would be part of

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a utility service or utility company's total system of operations. Because these definitions of "utility" only emphasize the term's ambiguity within the comprehensive plan as a *land use*, they are far from helpful to the Court's analysis.

34. The Court must also reject Defendant's third definitional argument. While Fla. Stat. §163.3164(15) and §380.04(3)(b), coupled with sections 1-53-3.1 and 1-53-2.2 of the LDC, do appear to indicate that basic power lines and substations would not require the PUD rezoning mandated by Policy 1.1.1, the Court is not convinced that this necessarily causes the word "utilities" to be synonymous with electrical power plants. First of all, it was not clearly established at trial that "power lines," "substations" and "power plants," as stated in those broad terms, are the only components of an electric utility's delivery system. Indeed, the Court feels that it is highly unlikely that it could refer to *only* a power plant, as that would render pointless the use of a different term, "electrical generation facility," in Policy 1.1.10. Second, Defendants admit that large substations may also require zoning approval under Policy 1.1.1. The Court must conclude that §163.3164(15), §380.04(3)(b) and the LDC do not necessarily show that "utilities" in Policy 1.1.1 *must* include an electrical power plant.

35. Moreover, the LDC's definitions may not be controlling or persuasive for two reasons. First, the current version of Hendry County's LDC is outdated, as it has yet to be updated since the implementation of the 2011 comprehensive plan at issue in this case. The term "electrical generation plant" was added to the comprehensive plan *after* the most recent update of the LDC. The Court does not find this insignificant, as the current LDC appears to be completely silent on the appropriate location for an electrical generation plant anywhere in the county, even in the context of Policy 1.1.10, where it is explicitly permitted. Thus, the LDC's definitions of "essential public or utility facilities" and "public service/utility facility" are of dubious relevance to the dispute at the center of this case. Second, as was established through the expert testimony of Ethel

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Hammer, should the LDC and the comprehensive plan conflict with each other, the comprehensive plan prevails. Because the LDC is "subservient" to the comprehensive plan in this manner, its unhelpful definitions and provisions are not informative for the dispute in this case.

Plaintiff's Proffered Definition of "Utilities"

36. Plaintiff does not provide its own dictionary definitions of "utilities" and does not contest the dictionary definitions submitted by Defendant. However, it has argued that "utilities" as used in Policy 1.1.1 does not include electrical generation because when the word is used in other parts of the plan, it overwhelmingly refers to only sewer and water facilities. This claim was bolstered by the testimony of Dr. Robert Pennock, an expert for Plaintiff.

37. The Court disagrees that the word "utilities" in Policy 1.1.1 refers to water and sewer only. While it may be true that the word refers to water and sewer only in other parts of the comprehensive plan, most of those other uses of the word "utility" are within sections of the plan that are clearly focused on wastewater issues only, such as the lengthy Ten-Year Water Supply Plan. There is no similar context within Policy 1.1.1 that would restrict the word "utilities" to only certain types of public services.

38. Having reviewed the definitional arguments of both Plaintiff and Defendants, the Court finds that the meaning of the word "utility" in Policy 1.1.1 is unclear even after consulting dictionaries, the LDC, and other statutes.

Application of Rules of Statutory Construction

39. Being unable to discern the intended meaning of "utilities" as it is used in the comprehensive plan, the Court turns next to the rules of statutory construction to assist it in determining its meaning. The parties make numerous arguments relating to the word's placement within the broader phrasing of Policy 1.1.1, the use of the phrase "electrical generation plants" in 1.1.10, and the comprehensive plan as a whole, as well as potential applicability of various legal

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maxims of statutory interpretation. It is worth noting that there is no apparent dispute that the proposed power plant on the McDaniels property would qualify as an "electrical generation plant" under Policy 1.1.10; the disagreement is whether the word "utilities" includes or excludes an "electrical generation plant" on A-2 land even after it has been rezoned to PUD.

40. Two rules of statutory construction potentially apply to this situation. First is the doctrine *expressio unius est exclusio alterius* ("the express mention of one thing excludes all others"). In other words, "[w]hen the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, [the court] will not imply it where it has been excluded." *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995). This is because "the deliberate inclusion ... in some sections of an act and the equally deliberate exclusion thereof from another does not permit the presumption that the legislature intended to do that which it obviously refrained from doing." *Florida State Racing Com'n v. Bourquardez*, 42 So.2d 87, 90 (Fla. 1949); *see also Gabriele v. School Bd. Of Manatee Cnty.*, 114 So. 3d 477, 482 (Fla. 2d DCA 2013) ("The legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended."); *Ocasio v. Bureau of Crimes Compensation*, 408 So.2d 751 (Fla. 3d DCA 1982) (same).

41. A second doctrine, *noscitur a sociis* ("a word is known by the company it keeps"), may also be applicable. Under this rule, an ambiguous term's meaning can be determined by examining the other words used in conjunction with it, especially if the term is within something like a list. *See Stratton v. Sarasota County*, 983 So.2d 51, 56 (Fla. 2d DCA 2008). Moreover, general and specific words that may have an analogous meaning "take color from each other," so that the general word is restricted to the scope implied by the more specific term. *See id.* (citing *Carraway v. Armour & Co.*, 156 So.2d 494, 495 (Fla.1963)).

42. Essentially, Plaintiff and Defendants advocate for one or the other of these two maxims.

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Defendants argue that the doctrine of *noscitur a sociis* should apply. Upon inspection of Policy 1.1.1, the word "utilities" is followed by a string of other land uses that could potentially be as large and intensive as the proposed power plant on the McDaniel property. Also, two of the listed uses, "bio-fuel plants" and "resource recovery facilities," were established at trial through expert testimony as serving dual functions of waste management and electricity generation, although they do not generate the large amount of electricity that a power plant does. Based on these connections within the list of Level 2 uses, Defendants argue, "utilities" must include an electrical power plant.

43. In contrast, Plaintiff argues for the applicability of *expressio unius est exclusio alterius*. It reasons that because the more specific "electrical generation plants" use is allowed in the industrial future land use category, this necessarily implies the exclusion of that term from "utilities" in Policy 1.1.1. This argument is further bolstered by the usage of *identical terms* in other situations where the same land use appears in both 1.1.1 and 1.1.10. For example, mining and earth extraction and processing is an allowed land use under both Policy 1.1.10 and Level 2 of Policy 1.1.1; accordingly, that precise wording – "mining and earth extraction and processing operations" – is used within both policies to denote that this use is allowed in both categories. "Resource recovery facilities" appears in both policies as well. Plaintiff argues that this shows that "utilities" cannot include the "electrical generation plants" use specifically listed in Policy 1.1.10 because the drafters of the plan could have used the same phrasing if it intended electrical generation plants to be permissible in both categories, as it did with "mining and earth extraction and processing operations" and "resource recovery facilities." Thus, its intentional choice not to include "electrical generation plants" in Policy 1.1.1 shows that "electrical generation plants" are not allowed under Policy 1.1.1.

44. In response to this, Defendants argue that "utilities" was used in Policy 1.1.1 *instead of* "electrical generation plant" because it is meant to be a broader, more inclusive word that merely

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includes electrical generation plants among other "utility" uses. Moreover, Defendant claims that that *expressio unius est exclusio alterius* does not apply to Policies 1.1.1 and 1.1.10 because they are not "the same statute" as required by the case law applying the doctrine.

45. After considering the above arguments, the Court finds that the cited rules of statutory construction, unfortunately, still do not resolve this dispute. First, Defendants' attempt to exclude Policy 1.1.1 from application of *expressio unius est exclusio alterius* is unpersuasive. It cannot be fairly and reasonably argued that Policy 1.1.1 and Policy 1.1.10 are not the "same statute." They are both provisions under a single "act" – the Hendry County comprehensive plan – and it is not uncommon for courts to compare different *sections* of the *same act* when engaging in statutory interpretation. At the same time, when considering the two doctrines side-by-side, there is no indication of which one should trump the other. Both maxims seem to apply to this situation. The Court is unaware of any case law designating any preference for one rule of construction over the other, and the parties did not cite to any such case law in their written closing arguments.

Expert Testimony on the Meaning of "Utilities" and "Other Similar Uses"

46. With dictionary definitions and rules of statutory construction providing no dispositive guidance, the Court turns to extrinsic aids to determine the meaning of the word "utilities" as used in Policy 1.1.1. At trial, the joint Defendants presented testimony from the following witnesses: 1) Roxanne Kennedy; 2) Kennard Kosky, P.E.; 3) Robert Carr; 4) Kyle Grandusky, P.E.; 5) Donald Steven Lamb, P.G.; 6) Ethel Hammer; 7) Churchill Roberts; 8) Margaret Emblidge; 9) Shane Parker, P.E.; 10) Sarah Catala; and 11) Vincent Cautero.[5]

47. For the sake of efficiency and in consideration of the availability of the numerous

[5] A number of these witnesses were called to testify about Plaintiff's other challenges to Ordinance 2011-07 involving wetlands, wildlife impact and cultural/anthropological resources. Several of the above-listed witnesses were called only to introduce their names, resumes and involvement with the case into the record, should their testimony be needed later in the trial. These witnesses were Kyle Granduksy, Donald Steven Lamb, Churchill Roberts, and Shane Parker. Ultimately, they did not end up testifying. Additionally, as mentioned earlier in this order, the Court ultimately resolves this dispute based on the meaning of "utilities" in Policy 1.1.1. In the interest of being as brief as possible, the Court

witnesses, the parties agreed that Plaintiff could take some witnesses out of order and conduct direct examination along with cross-examination. After Defendants rested their case, Plaintiff called the following additional witnesses: 1) Paul Blackhouse, Ph.D.; 2) Andrew Woodruff; and 3) Robert Pennock, Ph.D.

Meaning of "Utilities"

48. Ethel Hammer, Margaret Emblidge, and Robert Pennock were qualified as experts in the field of land planning.[6] These experts testified as to the meaning of "utilities" in Policy 1.1.1 of the Hendry County comprehensive plan and whether inclusion of that term allows the construction of a power plant on agricultural land.

49. The first land planning expert to testify for Defendant was Ms. Ethel Hammer. A land planner since 1975, Ms. Hammer has worked on hundreds of development projects throughout the State of Florida and is the recipient of several awards. She also served as Land Planner for Hillsborough County, one of the first counties in Florida to adopt a comprehensive plan. Ms. Hammer testified that after reviewing the documentation in this case, it was her opinion that Ordinance 2011-07 is consistent with Hendry County's comprehensive plan, including Policy 1.1.1. Ms. Hammer testified that she believed "utilities" was meant as a broad umbrella term that included, rather than excluded, electrical power plants. She based her opinion on a review of the comprehensive plan and LDC and a definition of "utilities services" from a learned treatise. She reasoned that a power plant must require a PUD rezoning because the LDC otherwise allows "essential public service utilities" in all zones and "public service/utility facilities" by special exception in all zones, leaving power plants as a component of electricity delivery to be subject to

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shall not review the witness testimony that had no bearing on the meaning of "utilities."

[6] Mr. Kennard Kosky, P.E., an engineer employed with the ground engineering environmental firm Golder Associates Inc., also testified briefly as to the meaning of the term from an engineering perspective, among other topics. Mr. Kosky testified that the single word "utilities" does not have a specialized meaning in the field of engineering, but he asserted that a power plant is a "utility." The Court did not find his testimony, as an engineering expert, to be particularly helpful or persuasive as to the meaning of the word within a land planning document such as the Hendry County

the PUD process.

50. However, Ms. Hammer acknowledged on cross-examination that there are apparent inconsistencies or missing information between the LDC's land use table and the comprehensive plan. She acknowledged that the LDC is outdated. Ms. Hammer also confirmed that "resource recovery facilities" and "mining and earth extraction and processing operations" are described identically in Policies 1.1.1 and 1.1.10, while "utilities" and "electrical generation plants" are not.

51. Margaret Emblidge was called as the land planning expert witness for Defendant Hendry County. She has worked as a professional land use planner for twenty-five years. After reviewing the documentation and facts in this case, her opinion was that the proposed power plant is an allowed use under Policy 1.1.1, as a "utility" or as a "similar use" when compared with the other permitted Level 2 uses. She did not think that an electrical generation plant is excluded from "utilities" by use of the term "electrical generation plant" in Policy 1.1.10. The basis for her opinion was the "plain meaning" of "utilities" and that "as a land planner reviewing comprehensive plans, you don't go to the different land use categories for trying to understand what another land use category would permit or allow as a use."

52. Ms. Emblidge's reliance on the plain meaning of the word does little to assist the Court. Expert testimony is useful to help understand the meaning of specialized jargon used in particular industries, but by her own admission, her understanding of "utilities" was based on the plain meaning of the word. As stated above, the Court does not agree that the plain meaning of "utilities" necessarily establishes an electrical generation plant as an allowable land use under Policy 1.1.1. The Court is also unconvinced that land planners do not reference other portions of comprehensive plans or related statutes when trying to understand a particular land use category. This assertion was contradicted by the testimony of the other expert witnesses, Ms. Hammer and Dr. Pennock,

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Comprehensive Plan.

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who both considered the entire plan before rendering their opinions.

53. The third land planning expert, Dr. Robert Pennock, testified for Plaintiff. He was previously employed by the Department of Community Affairs, the state agency that was charged with overseeing all land planning issues before it was merged with another department in 2011. He has been working in land planning since at least 1981 and has worked with and interpreted "literally hundreds" of comprehensive plans. After reviewing the documents and facts in this case, Dr. Pennock's opinion was that the McDaniels property rezoning, Ordinance 2011-07, is not consistent with the comprehensive plan because it allows a land use that is not permitted by Policy 1.1.1. He believed that the proposed power plant was not an allowable use under Policy 1.1.1 because that land use is identified in another category, Policy 1.1.10. Dr. Pennock testified that it is not unusual for a use to be allowed in multiple land use categories, as can be seen in Hendry County's own Comprehensive Plan. For example, Dr. Pennock pointed out the use of "mining and earth extraction and processing operations" in multiple sections of the Plan. Dr. Pennock testified that referring to the same use with different words is uncommon because it leads to confusion. He testified he does not see the same use referred to with different words in other comprehensive plans.

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Meaning of "And Other Similar Uses"

54. Along with the differences in expert opinion detailed above, an issue also arose over the meaning and/or relevance of the words "and other similar uses" at the end of the list of Level 2 uses in Policy 1.1.1. Defendants argue that this term, in conjunction with the other permissible uses under Level 2 plus the word "utilities," indicates that a power plant is allowable under Policy 1.1.1 once land is rezoned to a PUD, even if "utilities" does not include power plants.

55. It is clear from Ms. Hammer's and Ms. Emblidge's testimony that they relied on the phrase "and other similar uses" to conclude that the proposed power plant is allowed under Policy

1.1.1. They drew numerous comparisons to the other listed Level 2 uses and the Court heard testimony about some other uses such as sugar processing and mining that were permitted in A-2 land after being rezoned to PUD.

56. However, Plaintiff's expert witness, Dr. Pennock, testified that the phrase "and other similar uses" was included in the plan to capture future unknown or unforeseen land uses that were not contemplated at the time of drafting the comprehensive plan, but which are nevertheless similar to those already listed. Dr. Pennock reasoned that electrical generation plants could not be an unknown or unforeseen land use to which "other similar uses" would apply, because "electrical generation plants" was included in Policy 1.1.10. Thus, Plaintiff argues, electrical generation plants could not reasonably fall under "other similar uses" as a future unknown or unforeseen use.

57. After a thorough review of the Court's notes and the trial transcript, the Court observes that Dr. Pennock's characterization of the words "and other similar uses" is uncontradicted. Ms. Ethel Hammer specifically testified she was not giving an opinion on the meaning of "other similar uses." Ms. Emblidge, despite being an expert for the defense, gave a definition for the phrase that comported with Dr. Pennock's. (She did not reach Dr. Pennock's conclusion, however, perhaps due to her assertion that land planners do not look to other provisions of a comprehensive plan when determining the meaning of words.) There is no testimony in the record contradicting Dr. Pennock's expert testimony that the phrase "and other similar uses" is used in land planning to include and allow land uses that were *unknown* and *unforeseen* at the time of drafting the particular provision.

58. The Court finds that the proposed power plant cannot fit under the umbrella of "other similar uses." An electrical generation plant was not an unknown or unforeseen use at the time the comprehensive plan was drafted, as evidenced by the presence of "electrical generation plant" in Policy 1.1.10. If it is to be allowed under Policy 1.1.1, it must be contained within the word

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"utilities."

59. However, the expert testimony does not resolve the dispute over the meaning of "utilities" in Policy 1.1.1. Ms. Hammer and Dr. Pennock were both highly qualified and provided reasonably credible testimony on the meaning of "utilities" in Policy 1.1.1. It is true that Dr. Pennock was the only expert who testified that Ordinance 2011-07 was not compatible with the comprehensive plan; however, the three Defendants were permitted to each call their own witnesses, including experts. The Court will not find Dr. Pennock's testimony unpersuasive simply because he was "outnumbered" in this manner.

Legislative History and the "EAR"-Based Amendment

60. The second extrinsic aid available to the Court to help determine legislative intent is legislative history. The primary piece of "legislative" history presented at trial was Hendry County Ordinance 2010-29, which the parties referred to as "the EAR-based amendment." An "evaluation and appraisal report," or "EAR," is a report submitted by a county to the State of Florida every seven years, pursuant to the Community Planning Act, as part of state oversight for county comprehensive plans. The EAR is a detailed analysis of whether the comprehensive plan is working effectively or not. Depending on the findings in the report, amendments to the county's comprehensive plan may be required. Thus, an EAR-based amendment is a county ordinance passed for the purpose of modifying or updating the county's comprehensive plan in order to alleviate any problems uncovered by the EAR.

61. Testimony at trial revealed that an EAR-based amendment is adopted much like a state statute. The Land Planning Agency ("LPA"), a board created via county ordinance for the purpose of drafting and recommending a new comprehensive plan, submits a draft of the new comprehensive plan to the county commissioners, much like a House or Senate subcommittee. The new comprehensive plan goes through numerous drafts and revisions until the language is settled

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and agreed upon. It is then enacted as an ordinance reflecting a "strike-through and underline" edit of the previous comprehensive plan, in the same way that state statutes are changed or updated. In other words, language that was removed from the comprehensive plan is struck-through with a straight line, language added to the comprehensive plan is underlined, and language that was not changed is left alone.

62. Sarah Catala, an associate planner employed by the Hendry County Board of County Commissioners, was called by both sides at trial. Ms. Catala has a number of different job responsibilities relating to the planning and zoning processes in Hendry County. She conducts public hearings on land use applications and for the local planning agency, conducts intake and review for land use applications, writes staff reports and summaries, and drafts resolutions to ordinances. Ms. Catala was directly involved in the rezoning of the McDaniels property, was directly involved in past EAR-amendments to the comprehensive plan, personally reviewed the rezoning application, and made the initial, preliminary determination to accept the application based on the term "utilities" in Policy 1.1.1.

63. Ms. Catala's opinion was that the proposed power plant is a "utility" use allowable in the A-2 category through the approval of a PUD rezoning. However, Ms. Catala was listed as a fact witness, not an expert witness, and she described her position with the county as largely administrative. She was also evasive and somewhat argumentative during Plaintiff's direct and cross-examination. Given these factors, plus the lack of deference afforded to a county's interpretation of its own comprehensive plan, the Court does not find Ms. Catala's interpretation of the term "utilities" to have any probative weight.

64. However, Ms. Catala did provide critical testimony regarding the legislative history of the Hendry County Comprehensive Plan. She testified that in general, the planning and zoning department prepares a "packet" that is circulated to the LPA prior to their "workshop" meetings on

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formulating the EAR-based amendment. Any revisions to the draft amendment are also given to the LPA prior to the workshops. In 2010, the comprehensive plan was altered by Hendry County Ordinance 2010-29, which was an "EAR-based amendment" as described above.

65. Ms. Catala testified that the prior version of the comprehensive plan used the term "regional utility facility" to describe allowable PUD uses on A-2 use category land. After the 2010 EAR-based amendment, it was reduced to simply "utilities," while the new term "electrical generation plant" was added into the industrial category. She could not remember whether "electrical generation plant" was present in any other section aside from Policy 1.1.1 during the drafting process of the EAR-based amendment, as her administrative duties did not require her to read the drafts.

66. Rather, it was witness Vince Cautero who was involved in drafting the actual language of the EAR-based amendment. Mr. Cautero no longer works for Hendry County, but he was employed as Hendy County's community development director from August 2006 to October 2010. Mr. Cautero described himself as a "major author" of the EAR-based amendment. He was directly involved in drafting the amendment and personally wrote a significant portion of the amendment itself.

67. Mr. Cautero testified that the term "utilities" in Policy 1.1.1 refers to facilities and infrastructure for basic public utility services. He describes the term as "common in the vernacular," but this characterization conflicts with the judicially-noticed definitions for "utility," in which no structures or land uses of any kind are mentioned. The Court is further hesitant to accept Mr. Cautero's testimony on the intended meaning behind the word "utilities" for another reason: as an individual personally involved in the drafting of the EAR-based amendment, his testimony on the meaning of a particular term would appear to fall under a class of evidence the Court excluded from being presented at trial. The Court ruled that Plaintiff was not allowed to

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present evidence of discussions between individual members of the LPA or county commissioners, such as e-mails or transcripts of meetings, because the statements of an individual legislators are impermissible evidence of legislative intent. *See Smith v. Crawford*, 645 So. 2d 513, 524-25 n.8 (Fla. 1st DCA 1994). The parties agreed at trial that it would be improper to call a member of the board of county commissioners to the stand to testify as to what the intended meaning of "utilities" was. The role of Mr. Cautero, as the community development director at the time, in drafting the EAR-based amendment appears to be roughly analogous to that of a legislative staff member assisting with the drafting of a new statute. Thus, in accordance with the Court's ruling during trial, it will disregard Mr. Cautero's personal opinion on the meaning of "utilities."

68. More significant is Mr. Cautero's factual testimony regarding the evolution of the comprehensive plan as the drafting process proceeded and the ultimate changes adopted by Oridnance 2010-29. Recall that packets and drafts of the amendment were submitted to the LPA and revisions were made based on feedback from the LPA; the final proposed amendment was later submitted to the board of county commissioners to be approved and adopted as an ordinance. The rejections and decisions made by the LPA as a whole are clearer indications of legislative intent than the testimony of one individual involved in the drafting process.

69. According to Exhibit 97, the strike-through and underline ordinance adopting the EAR-based amendment, the previous version of the agriculture future land use category read as follows: "This category also includes public facilities and quasi public facilities, including environmental services, public noncommercial recreation, and utilities. Industrial uses may be developed in this category as Planned Unit Developments subject to Policy 2.2.1 of this Element." The "Policy 2.2.1" referenced in the old plan reads: "Planned Unit Developments in areas designated Agriculture on the Future Land Use Map may only be used to permit industrial uses which are compatible with agribusiness, or regional utility facilities, or mining and extractive uses,

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or uses set forth in Policy 2.1.1 of this Element." In other words, "utilities" were allowed as a matter of right on A-2 land, but "regional utility facilities" required the PUD rezoning process. Mr. Cautero testified that, under the pre-EAR version of the comprehensive plan, there were "utilities" that would not have risen to the level of "regional utility facilities" requiring a PUD rezoning, such as a facility serving a small commercial or residential development. These facilities were not "regional" but served more than one structure or property.

70. Mr. Cautero also testified on language considered by the LPA during the drafting process. Significantly, the phrase "electrical generation plant" was included as a Level 2 use in the agricultural future land use category in at least one previous draft of the amendment. This draft was submitted to the LPA, but as can be seen in the post-EAR comprehensive plan that was adopted by Ordinance 2010-29, its inclusion in Policy 1.1.1 was ultimately rejected.

71. Thus, the situation appears to the Court as follows:

- Before the 2010 amendments, "utility" uses other than "regional utility facilities" were permitted on A-2 category land as a matter of right, or perhaps subject to a special exception in some circumstances. "Regional utility facilities" were restricted to the PUD rezoning process.
- Under the prior comprehensive plan, there were, in fact, land uses that fit under "utilities" but did not fit under "regional utility facilities." Moreover, under the prior comprehensive plan, a large power plant serving a "region" would have qualified as a "regional utility facility."
- Then, via the 2010 amendments, this structure was changed. The Planned Unit Development description in old Policy 2.2.1 was deleted, and the agricultural future land use category was split up into Level 1 uses and Level 2 PUD-required uses.
- The term "regional utility facilities" was removed from the comprehensive plan.

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"Utilities" was moved into Level 2 uses and the blanket allowance of "industrial uses" in PUDs was removed. Instead, *specific* industrial uses were listed.

- "Electrical generation plant" made its first appearance into the comprehensive plan as a new term in Policy 1.1.10, the industrial land use category. It was not included in the numerated "industrial uses" of the new Policy 1.1.1.

The Court's Conclusions

72. After consideration of both expert testimony and legislative history, it is clear to the Court that the proposed power plant is not a permissible use on the McDaniels property because "utilities" in Policy 1.1.1 does not include power plants. Thus, the ordinance granting the rezoning and allowing the power plant is null and unenforceable because it does not comport with the Hendry County Comprehensive Plan. There are three reasons behind this conclusion: the testimony of the expert witnesses, the changes made to the comprehensive plan after the EAR-based amendment, and the rejection of "electrical generation plants" from Policy 1.1.1.

73. First, the expert testimony presented at trial supports the Court's conclusion. It is true that the experts were not in agreement with each other. However, the Court finds Dr. Pennock's testimony more persuasive. Dr. Pennock's professional experience and work history is more closely focused on the interpretation and understanding of comprehensive plans. He previously worked for the state agency charged with overseeing county implementation of comprehensive plans. Ms. Hammer, while still highly qualified to testify at trial, was more heavily experienced with submitting rezoning applications and working on individual projects. While Ms. Hammer worked on "hundreds" of projects in a number of counties, Dr. Pennock worked with "hundreds" of comprehensive plans and his expertise was more directly focused on the writing and interpretation of comprehensive plans. Dr. Pennock was also the only expert to shed light on the meaning of the words "and other similar uses," throwing into doubt the conclusions reached by Ms.

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Hammer and Ms. Emblidge to the degree they may have relied on those words in forming their opinions.

74. Dr. Pennock testified that comprehensive plans must be written clearly and concisely as to avoid confusion on what land uses are allowed or not allowed. The fact that "and other similar uses" is employed to include *unforeseen* land uses conversely implies that foreseen uses are concisely provided for elsewhere in the plan. There is no dispute that the proposed power plant would be permissible on land categorized as industrial under Policy 1.1.10. Policy 1.1.10 clearly and concisely allows "electrical generation plants" as a matter of right. Policy 1.1.1 does not clearly and concisely allow electrical generation plants, if at all. "When a use or activity falls into a category of permissive uses, but more closely falls into a category that is prohibited by the Plan, the latter trumps the former and the activity must be prohibited. This rule is specifically recognized and applied by the courts." *Keene*, 22 So.3d at 669 (citing *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla.2000); *Stroemel v. Columbia County*, 930 So.2d 742 (Fla. 1st DCA 2006); *Saadeh v. Stanton Rowing Found., Inc.*, 912 So.2d 28 (Fla. 1st DCA 2005); *Barry v. Garcia*, 573 So.2d 932 (Fla. 3d DCA), *review denied*, 583 So.2d 1034 (Fla.1991)).

75. Second, the prior version of the comprehensive plan and the changes made to it also support the Court's interpretation of "utilities" in Policy 1.1.1.[7] In the previous version of the plan, two separate categories of utility uses existed: "regional utility facilities" and "utilities." "Regional utility facilities" required a PUD rezoning, while "utilities" were allowed as a matter of right. The EAR-based amendment changed this structure significantly. Policy 1.1.1 was broken up into Level 1 and Level 2 uses. The term "regional utility facilities" and general term "industrial uses" were not carried over into the list of Level 2 uses; instead, "utilities" was moved into Level 2 uses, a specific

[7] It is not improper to consider a prior version of the statute, and thus the manner in which it was changed, when interpreting the more current statute. *See Kasischke v. State*, 991 So. 2d 803, 808-09 (Fla. 2008).

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list of permissible higher-intensity "industrial" uses was added, and the term "electrical generation plant" was included as a new type of land use into Policy 1.1.10.

76. It is apparent from inspection of the prior version of the plan and Mr. Cautero's testimony that, contrary to Defendants' assertion, a power plant is not the only remaining electrical utility use under the word "utilities" in Policy 1.1.1. The Court notes that the old plan made a distinction between utility land uses and "regional" utility land uses. If a large-scale, regional utility land use, such as the proposed power plant, was intended to remain as an allowable use under Policy 1.1.1, then the term "regional utility facilities" could have simply been preserved as a PUD-required Level 2 use under Policy 1.1.1. Instead, the lower-intensity term "utilities" was moved into Level 2, and a new land use, "electrical generation plant," was added to Policy 1.1.10. The Court finds that this reflects an intention for the lesser electrical utility uses to go through PUD rezoning, and for a large-scale regional electrical generation plant, such as the proposed power plant, to be placed in industrial category land only.

77. Finally, and the most persuasive of all, is Mr. Cautero's testimony that the new term "electrical generation plant" was once included under Policy 1.1.1 during the drafting of the EAR-based amendment but was ultimately rejected by the drafters and the LPA. Instead, it appears in Policy 1.1.10 only. Evidence that terms or provisions in earlier drafts of a statute were intentionally altered or deleted from the final version "is one of the surest signs of its rejection." *Don King*, 717 So.2d at 1094. There could not be more definitive proof that electrical generation plants are not permitted under Policy 1.1.1 than the conscious decision to exclude that use from Policy 1.1.1. Thus, the ordinance allowing the proposed power plant – undeniably an "electrical generation plant"– on the McDaniels property is not in compliance with the comprehensive plan. To hold otherwise would be to "contravene the legislature's obvious intentions by restoring the excluded language." *Id.*

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78. For clarity of the record, Court makes the following explicit findings of fact and law:

1. The word "utilities" in Policy 1.1.1 of the May 2011 Hendry County Comprehensive Plan does not include a large-scale, regional electrical generation power plant. Such a use is restricted to property falling under Policy 1.1.10, the Industrial Future Land Use Category, and the term "electrical generation plant." Exceptions exist for any electricity-generating land use that is specifically enumerated in other sections of the Comprehensive Plan, such as a bio-fuel plant.

2. With regard to electrical utility facilities and infrastructure, the land uses allowed by the word "utilities" in Policy 1.1.1 are any electricity-related facilities that do not fit under "electrical generation plant" in Policy 1.1.10 and are otherwise not allowed by right or by special exception under the Land Development Code. This includes, for example, very large transmission electric substations or facilities. The Court makes no determination as to the meaning of the word "utilities" as it may apply to other public services such as water, cable, or sewer.

It is, therefore,

ORDERED AND ADJUDGED that Plaintiff's request for a declaratory judgment is GRANTED. The Court hereby finds that Hendry County Ordinance 2011-07, which allows the construction of a solar- and gas-powered electrical generation plant on the property referred to in this order as "the McDaniels property," is null and unenforceable because it is inconsistent with the Hendry County Comprehensive Plan.

It is further **ORDERED AND ADJUDGED** that Plaintiff's request for permanent injunctive relief is GRANTED. Defendant Hendry County is enjoined from implementing, relying on or enforcing Ordinance 2011-07 in any form which does not comply with the Hendry County Comprehensive Plan. Bond is set in the amount of $50,000.00. In the event any party wants to present further evidence as to the amount of the bond, the Court will consider the issue upon the filing of an appropriate motion.

The Court reserves jurisdiction as to any outstanding matters including Motions for Sanctions and costs.

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DONE AND ORDERED in Chambers at Punta Gorda, Charlotte County, Florida, this 22 day of September, 2014.

Donald Mason
Circuit Judge

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing order has been furnished to Edward P. De La Parte, 101 E. Kennedy Blvd., Suite 2000, Tampa, FL 33602; George F. Gramling III, 118 South Newport Avenue, Tampa, FL 33606; Mark F. Lapp, Post Office Box 2340, Labelle, FL 33975; Charles Burns Upton II, 525 N. Calhoun Street, Tallahassee, FL 32301; Lewis Longman & Walker, 515 North Flagler Drive Suite 1500, West Palm Beach, FL 33401 and **Court Administration**, 1700 Monroe Street, Fort Myers, Florida 33901, this 24 day of Sept., 2014.

By: Judicial Assistant

Inst:201426008432 Date:9/25/2014 Time:4:01 PM
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