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

SEMINOLE TRIBE OF FLORIDA,

CASE NO.: 2011-539CA

Petitioner,

vs.

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

Respondent.
_____/

PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

In this Petition, the Petitioner, the Seminole Tribe of Florida, is referred to as "Petitioner" or "Seminole Tribe." The Respondent, Hendry County is referred to as "Respondent" or the "County." The Hendry County Board of Commissioners will be referred to as the "County Commission." The Hendry County Local Planning Agency is referred to as "LPA."

The symbol "R" refers to the Appendix to this Petition and will be followed by page number(s), which correspond to the Bates page numbering at the lower right-hand corner of each page of the Appendix. The County Ordinance that is the subject of this Petition is referred to as the "PUD," "Ordinance 2011-07," or the "Ordinance." The Hendry County Comprehensive Plan is referred to as the "Comprehensive Plan" or "Plan," and the Hendry County Land Development Code is referred to as the "LDC."

STATEMENT OF FACTS AND CASE

The Seminole Tribe of Florida seeks a Writ of Certiorari quashing Ordinance 2011-07 adopted by the County, by and through its County Commission on May 24, 2011, in a quasi-judicial proceeding. R-1; R-8. The Ordinance rezones eleven contiguous parcels comprising 3,127 acres of land from general agriculture (A-2) to a Planned Unit Development ("PUD") for the purpose of

constructing a regional natural gas power plant and solar panel energy farm (hereafter "Power Plant"). R-1; R-130.

Ordinance 2011-07 was approved by the County on May 24, 2011, at a single, noticed public hearing before the County Commission. R-1. The County's LPA previously held a public hearing on May 11, 2011, at which the LPA recommended that the County Commission approve the rezoning. R-1; R-335; R-341. The County's Planning and Zoning Department submitted a staff report and a memorandum recommending approval by the County Commission at the May 24, 2011, quasi-judicial hearing. R-130; R-464. Outside of the staff report and brief memorandum, the County presented no further evidence demonstrating that the PUD meets the requirements of law, including, but not limited to, consistency with the County's Comprehensive Plan and compliance with applicable LDC provisions.

The proposed Power Plant is an effort by McDaniel Reserve Realty Holdings, LLC, in association with Florida Power & Light Company ("FPL"), to develop a regional natural gas power plant and solar panel energy farm in Hendry County. R-16; R-130-131; R-143. The rezoned site consists of 3,127 acres of land immediately abutting the Big Cypress Seminole Indian Reservation ("Big Cypress Reservation"). R-107; R-116; R-130. It is anticipated that ownership of the rezoned site will ultimately be transferred to FPL, who was not an applicant or

party in these proceedings. R-16; R-143. Another entity, McDaniel JW Sr., Inc., (hereafter "McDaniel Ranch") owns approximately 17,500 acres of land surrounding the rezoned site. This land is not part of the rezoning, but will be needed to supply groundwater to meet the substantial water demands of the proposed Power Plant. R-308; R-404-405.

Two thousand acres of the rezoned property will be used for solar panel fields, with 511 of those acres directly bordering the Big Cypress Reservation. R-107; R-116. The project also includes three natural gas plants, each of which features three 150 foot-tall smoke stacks. R-19-20; R-107; R-116. Thus, a total of nine 15-story tall smoke stacks will tower above the surrounding landscape which consists of agricultural operations, environmental preserves and ecotourism activities.

The proposed Power Plant will be constructed in phases over a ten-year period. R-6. Access to the Power Plant will be provided through two existing and one new access point along CR 833, a road that leads through the Big Cypress Reservation. R-20; R-132.

Throughout the rezoning process, the Applicant and County staff routinely deferred their analysis to the subsequent review process that will be conducted under the Power Plant Siting Act, Fla. Stat. 403.503, *et seq.*[1]

[1] The Power Plant Siting Act ("PPSA") is a centralized process for state licensure

The Seminole Tribe is a federally-recognized Indian Tribe organized pursuant to Section 16 of the Indian Reorganization Act of 1934. 25 U.S.C. § 476, *et seq.* The United States holds certain reservation lands in trust for the sole benefit, use and enjoyment of the Seminole Tribe. 25 U.S.C. § 1772d. These lands include the Big Cypress Reservation, which immediately abuts the proposed Power Plant and is located within Hendry County, Florida. R-107; R-116; R-130. Although the Big Cypress Reservation is federal trust land, Seminole Tribe members are residents of Hendry County and are entitled to participate in Hendry County government, including the right to vote in County elections.

The Seminole Tribe participated, through legal counsel, in both the LPA meeting and the County Commission hearing, providing written and oral objections to the Ordinance. R-259; R-305; R-402. The Seminole Tribe's

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of large power plants. The PPSA was passed by the legislature to minimize the adverse impact of power plants on the environment. Under the PPSA, no construction of any new electrical power plant or expansion in steam generating capacity of any existing electrical power plant may be undertaken without first obtaining certification under the Act.

Local governments and state agencies within whose jurisdiction the power plant is to be built, participate in the PPSA process. The process includes a land use determination whereby the application for certification includes a statement by the comprehensive local government that the power plant and associated facilities are consistent with plans and zoning ordinances. Unless otherwise exempt by statute, the local government having jurisdiction must still provide a finding regarding consistency of the proposed power plant with existing comprehensive plans and zoning ordinances. Once certified, the certification becomes the sole license for the power plant, incorporating all previously issues authorizations including land use approvals.

objections included concerns regarding the compatibility of the proposed Power Plant with the existing land uses on the adjacent Big Cypress Reservation and consistency of the Power Plant with Comprehensive Plan and LDC provisions regarding water rights, wildlife issues, noise, visual intrusion, air quality, fire and emergency services, traffic, and cultural resources. R-259-262; R-305-310; R-402-409.

SUMMARY OF ARGUMENT

The County's adoption of Ordinance 2011-07 departed from the essential requirements of law and was not supported by competent and substantial evidence demonstrating that the PUD rezoning of the Power Plant site complied with LDC § 1-53-5.4 which provides the substantive requirements applicable to all PUD rezonings. In adopting the PUD rezoning, the County provided no competent and substantial evidence to support any determination that the rezoning was consistent with numerous provisions of the County's Comprehensive Plan regarding protection of surface and groundwater, floodplain functioning, environmental protection and wildlife as well as cultural resources and promotion of tourism and ecotourism. However, LDC § 1-53-5.4(1) expressly requires a finding that the PUD rezoning is consistent with the Plan. In several instances, the County made no findings at all regarding consistency with many of these Plan provisions. In other instances, the County expressly stated that it made no effort to analyze the

PUD for consistency with the Plan and simply stated that substantive review – particularly of impacts to water resources and the environment – would be done by others at some later date as part of a separate review under the Power Plant Siting Act.

Similarly, the County made no determination supported by competent and substantial evidence that the PUD rezoning, which permits a massive regional power plant, is compatible with adjacent land uses – particularly the longstanding agricultural and ecotourism land uses conducted on the adjacent Big Cypress Reservation. Such a determination is expressly required as part of a PUD rezoning under LDC § 1-53-5.4(1). While acknowledging that the power plant allowed by the rezoning will require large withdrawals of ground and surface waters from both the rezoned property as well as neighboring land, no evidence was presented quantifying the amount of water needed, or evaluating whether such withdrawals would be compatible with adjacent ecotourism, agricultural and residential uses on the Big Cypress Reservation, which receives its surface and groundwater from this very same land. While some acknowledgment of incompatibility was evident in the record regarding the construction of nine 15-story tall smoke stacks adjacent to the Big Cypress Reservation, no competent and substantial evidence was presented to demonstrate that this incompatibility would (or could) be effectively addressed. The record simply lacks any evidence.

The record also demonstrates that the 3,127 acres being rezoned are insufficient to accommodate all proposed uses for the Power Plant, in violation of LDC § 1-53.5-4(5) and (6). The Power Plant will demand large quantities of water and the rezoned property will not be sufficient to provide that water. Water will have to be withdrawn from adjacent properties owned by third parties and delivered (through pipelines or other infrastructure) to the rezoned property. In effect, while rezoning only 3,127 acres, the Ordinance effectively rezones surrounding land which must necessarily be committed to provide water to the Power Plant.

Finally, the PUD rezoning, by its express terms, violates the clear limitations of LDC § 1-53-5.4(9), which requires that all PUDs terminate within three years of approval unless a site plan or subdivision plat is approved for the rezoned property. Contrary to LDC § 1-53-5.4(9), Condition 2.b. of the Ordinance holds the PUD open for an indefinite period of time as long as some undefined effort is made to obtain certification for a power plant on the site. R-3. While a variance might possibly have been available to relax this limitation, no variance was applied for, processed, discussed or approved. Further, no evidence was presented to satisfy the required showing for a variance under the County's LDC.

ARGUMENT

A. Basis for Invoking Jurisdiction

Petitioners invoke the jurisdiction of the Circuit Court pursuant to Art. V, § 5(b), of the Florida Constitution, and Fla. R. App. P. 9.100(c), which place jurisdiction in this Court to review "quasi-judicial" actions of councils, boards and commissions of local government. *Park of Commerce Associates v. City of Delray Beach*, 636 So. 2d 12, 15 (Fla. 1994); *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 479 (Fla. 1993); *City of Fort Pierce v. Dickerson*, 588 So. 2d 1080, 1081-82 (Fla. 4th DCA 1991).

The Court's jurisdiction should not be in dispute. The County has characterized, noticed and conducted its one and only public hearing before the County Commissioners regarding adoption of the Ordinance, as a quasi-judicial proceeding. R-9-10.[2]

B. Standard of Review

Certiorari review of the County's adoption of Ordinance 2011-07 is focused on determining: (1) whether procedural due process has been afforded; (2) whether the essential requirements of the law have been observed; and (3) whether the County's administrative findings and judgment are supported by competent substantial evidence. *Broward County v. G.B.V. International, Ltd.*, 787 So. 2d

[2] It should be noted that a public hearing was held by the LPA on May 11, 2011.

838, 843 (Fla. 2001); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982); *See also, Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *Metropolitan Dade County v. Blumenthal*, 675 So. 2d 598, 601 (Fla. 3d DCA 1995).

In "first tier" certiorari review, the Circuit Court, serving in its appellate capacity, must apply "strict scrutiny" to the County's actions undertaken in a quasi-judicial capacity. *Board of County Commissioners of Brevard*, 627 So. 2d at 475 (stating that the review by strict scrutiny in zoning cases appears to be the same as that given in the review of the other quasi-judicial decisions); *Machado v. Musgrove*, 519 So. 2d 629, 632 (Fla. 3d DCA 1987). As explained by the Third District Court in *Machado*, "[s]trict [scrutiny] implies rigid exactness . . . or precision . . . Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review." *Machado*, 519 So. 2d at 632.

A writ may issue upon the Seminole Tribe's showing that their procedural due process rights were violated in the proceedings before the County. No brightline test has been developed to evaluate whether due process has been observed. Instead, the Court should consider: (1) the private interest that will be affected; (2) the risk of erroneous deprivation of such interest through the

procedures used; and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest. *Keys Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948-49 (Fla. 2001).

Alternatively, the writ may issue upon a showing that the County's actions departed from the essential requirements of law. *R.W. Roberts Construction Co., Inc. v. St. Johns River Water Management District for Use and Ben. of McDonald Elec.*, 423 So. 2d 630 (Fla. 5th DCA 1982). Accordingly, a writ will issue when there has been a fundamental legal error violating a clearly established principle of law which results in a miscarriage of justice. *Martin-Johnson, Inc. v. Savage*, 509 So. 2d 1097 (Fla. 1987); *Malloy v. Gunster, Yoakley, Valdes-Fauli & Stewart, P.A.*, 850 So. 2d 578 (Fla. 2d DCA 2003); *Tedder v. Florida Parole Commission*, 842 So. 2d 1022 (Fla. 1st DCA 2003).

Finally, while the Court may not reweigh evidence or substitute its judgment for that of the County (*Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995)), the court must nevertheless determine whether the County's decision is supported by competent and substantial evidence; that is, relevant evidence that is sufficiently material such that a reasonable mind would accept it as adequate to support the conclusion reached. *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957); *State Dept. of Agriculture and Consumer Services v. Strickland*,

262 So. 2d 893, 894 (Fla. 1st DCA 1972). Decisions based on mere conclusions, without making specific detailed findings supporting those conclusions, are insufficient and adverse to the general public interest. *Irvine v. Duval County Planning Commission,* 495 So. 2d 167 (Fla. 1986) (agreeing with the dissenting opinion in *Irvine v. Duval County Planning Commission,* 466 So. 2d 357, 367 (Fla. 1st DCA 1985) (holding that "the mere conclusion to grant the application 'would be adverse to the general public interest'").[3]

C. The Seminole Tribe Has Standing to Challenge the County's Adoption of Ordinance 2011-07

The Seminole Tribe has standing to challenge the County's approval of Ordinance 2011-07 pursuant to *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). The Supreme Court in *Renard* identified three general categories of claims and corresponding standing requirements applicable to challenges to local government zoning decisions. *Id.* The Seminole Tribe has standing under *Renard* "Category Two." This category addresses standing to attack an otherwise validly enacted ordinance as being an unreasonable exercise of legislative power or not supported by competent and substantial evidence. To maintain this sort of challenge, a petitioner must demonstrate a legally recognized interest which is adversely affected by the enactment. *Id.* at 838. In considering whether a property owner has standing because its interests have been adversely affected, the court is

[3] Citing *City of Apopka v. Orange County,* 299 So. 2d 657 (Fla. 4th DCA 1974).

to consider "the proximity of [the Seminole Tribe's] property to the area to be zoned or rezoned, the character of the neighborhood . . . and the type of change proposed." *Renard,* 261 So. 2d at 837. Abutting property owners that claim their interests have been adversely impacted are routinely granted standing to challenge a zoning ordinance. *See Renard*, 261 So. 2d at 832 (rezoning of property adjoining petitioner's property conferred standing); *Paragon Group, Inc. v. Hoeksema,* 475 So. 2d 244 (Fla. 2d DCA 1985) (granting standing to owner of single family home directly across from the rezoned property); *Elwyn v. City of Miami,* 113 So. 2d 849 (Fla. 3d DCA 1959) (conferring standing to property owner adjacent to property granted a variance); *Friedland v. City of Hollywood,* 130 So. 2d 306, 309 (Fla. 2d DCA 1961) (holding that adjacent property owners had standing to challenge rezoning); and *Upper Keys Citizens Association, Inc. v. Schloesser,* 407 So. 2d 1051 (Fla. 3d DCA 1981) (holding that plaintiff who was an adjoining property owner whose interests are the subject of the action had standing).

The Seminole Tribe's Big Cypress Reservation immediately abuts the site being rezoned for the proposed Power Plant. The Seminole Tribe's existing and longstanding use of its adjacent Reservation lands will be directly impacted by the development of the Power Plant. The approved Ordinance will drastically increase the intensity of use of 3,127 acres of adjacent land from pasture and farmed lands to a large-scale regional power plant, including the construction of three natural

gas power plants (+/- 1127 acres), solar panel fields (+/- 2000 acres), **nine 150-foot tall smoke stacks**, and other necessary facilities.

Moreover, the acknowledged water demands for operation of the Power Plant are substantial and will negatively impact the Seminole Tribe's water supply and thereby impact the Seminole Tribe's interests. R-177; R-308; R-404-405; R-259-260. These interests include maintaining sufficient water supply on the Big Cypress Reservation and within the Big Cypress National Preserve and Addition Lands[4] to: (1) sustain wildlife habitat and other natural resources; (2) sustain tourism and ecotourism activities; (3) provide sufficient water supply to tribal members; (4) sustain tribal agricultural activities; (5) sustain usual and customary usage of the Big Cypress National Preserve and Addition; and (6) ensure success of several critical projects developed in coordination with the U.S. Army Corps of Engineers designed to restore and rehydrate wetlands within the Big Cypress Reservation. R-259-260.

The sheer magnitude of the proposed Power Plant will significantly disturb the Seminole Tribe's use of its Big Cypress Reservation through increased noise, degradation of air quality (smog and haze), and negative visual/aesthetic impacts,

[4] The Big Cypress National Preserve is a federally designated preserve since 1974 encompassing 582,000 acres. In 1988, the United States Congress expanded the Preserve by adding what is known as the Addition Lands, approximately 147,000 acres. Both the Preserve and the Additional Lands are in close proximity to the Big Cypress Reservation, and the Seminole Tribe has, pursuant to federal law, customary usage rights within both areas, including occupancy.

particularly from nine 150-foot high smoke stacks. The Seminole Tribe will also be adversely impacted by increased automobile and truck traffic associated with the construction and operation of the Power Plant. R-261; R-284. An industrial project of this scale is simply incompatible with the Seminole Tribe's existing tourism/ecotourism operations and residential and agricultural uses on its adjacent land. R-260-261. Success of the Seminole Tribe's tourism and ecotourism operations depends upon maintenance of natural scenic views that will be destroyed by the intrusion of nine, 150-foot tall smoke stacks towering over the landscape. R-261. The natural gas units, including the nine smoke stacks, will be located approximately 2.18 miles from the Billie Swamp Safari, which is the Seminole Tribe's main ecotourism attraction on the Big Cypress Reservation. R-107; R-116; R-307-308.

More than 550 Seminole Tribe members live on the Reservation and their use and enjoyment of their land will be negatively impacted on a daily basis by the Power Plant. R-259-262; R-305; R-307-308; R-403-408. Finally, because the Power Plant will be constructed within a recognized wildlife corridor, the noise, visual, and air quality impacts of the Power Plant will impact wildlife utilization of the Big Cypress Reservation and surrounding area, including primary habitat of the endangered Florida panther, to the financial and cultural detriment of the Seminole Tribe.

The County's roads and emergency/fire protection services will also be adversely impacted by the Power Plant, thereby adversely impacting the Seminole Tribe and its members. The lack of sufficient emergency/fire protection and adequate roads to support the Power Plant will burden roads crossing through populated areas of the reservation. The Tribe will also be exposed to risks in the event of an accident at the plant due to inadequate emergency/fire protection services. R-261. It is clear that the Seminole Tribe has definite interests that exceed general community interests shared by all residents of the County, and, is therefore entitled to bring this action.

Moreover, the Seminole Tribe is also entitled to "Category 3" standing under *Renard* as the Seminole Tribe seeks to challenge the invalid approval of Ordinance 2011-07 for failure to follow the mandated procedural requirements set forth in law, such as failure to conduct proper review or required findings, or conduct public hearings as opposed to purely substantive violations. *See, e.g., David v. City of Dunedin*, 473 So. 2d 304, 306 (Fla. 2d DCA 1985); *Bhoola v. City of St. Augustine Beach,* 588 So. 2d 666, 667 (Fla. 5th DCA 1991). In such instances, standing is conferred upon any resident of the County to bring such a challenge. *Renald,* 261 So. 2d at 838.

D. The County's Adoption of Ordinance 2011-07 Departed from the Essential Requirements of Law and was not Supported by Competent Substantial Evidence

The County departed from the essential requirements of law by rezoning the site because Ordinance 2011-07 violates the plain requirements of the County's own LDC. Moreover, the County's adoption of Ordinance 2011-07 is not supported by competent and substantial evidence because the County simply abdicated its responsibility under its own Comprehensive Plan and LDC to conduct any review of the project's compatibility with the adjacent Big Cypress Reservation and to ensure consistency of the rezoning with the policies of the County's Comprehensive Plan regarding floodplains, wetlands, groundwater, potable water wildlife, conservation, ecotourism, and historical and cultural resources.

LDC § 1-53-5.4 establishes the following standards applicable to all PUD developments:

> All PUD developments shall conform to the provisions of the adopted comprehensive plan of the county. Where standards exist in the plan and comparable standards do not exist in this code, the standards and procedures set out in the plan shall apply in addition to the standards herein.
>
> (1) Only uses which are consistent with the comprehensive plan and are deemed by the board of county commissioners to be compatible with adjacent land uses may be approved as a PUD. . . .
>
> (2) . . .
>
> (3) . . .

> (4) . . .
> (5) The land area included within the PUD development shall be of such proportions as to properly accommodate all proposed uses in keeping with the general requirements of the county and the established objectives and policies of the adopted comprehensive plan.
> (6) There shall be no specific lot requirements for individual uses; provided, however, that the area designated for any particular use shall be of sufficient size and proportion so as to properly accommodate said use and to provide for adequate open space and buffering between it and an adjacent use.
> (7) . . .
> (8) . . .
> (9) A planned unit development rezone will terminate within three years of the date of approval if either a site development plan or preliminary subdivision plat application is not filed with the county. If one of these applications is not filed within the specified time frame, the land shall revert back to the previous zoning district.

LDC § 1-53-5.4 (emphasis added).

Ordinance 2011-07 does not conform to any of the requirements cited above. The Ordinance is not consistent with the Comprehensive Plan and is not compatible with the adjacent land uses on the Big Cypress Reservation as required by LDC § 1-53-5.4(1). The Ordinance does not include sufficient land area to properly accommodate all proposed uses as required by LDC § 1-53-5.4(5) and (6), and finally, the Ordinance will not terminate in three years as required by LDC § 1-53-5.4(9).

By the County's own admission, the adoption of the Ordinance is not supported by competent and substantial evidence demonstrating compliance with the provisions of the LDC cited above. The County rezoned the property without requiring any demonstration that the project is compatible with existing land uses on the adjacent Big Cypress Reservation, and without evidence to support a finding that the PUD rezoning is consistent with the Comprehensive Plan. R-131; R-144; R-177; R-286-287; R-464; LDC § 1-53-5.4(1). In fact, the County made no findings at all with regard to the PUD's consistency with Comprehensive Plan policies concerning floodplains, wetlands, surface and groundwater, potable water, historic and cultural resources, conservation, and economic development.

"Substantial" evidence has been defined by the Florida Supreme Court as "evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred." *De Groot,* 95 So. 2d at 916. "For the 'substantial' evidence to also constitute 'competent' evidence, the evidence relied upon 'should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" *Marion County v. Priest*, 786 So. 2d 623, 625 (Fla. 5th DCA 2001), *citing Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986). In the instance case, no record evidence whatsoever was presented to the County Commission to support a finding that the PUD rezoning is consistent with the provisions of the Comprehensive Plan, is

compatible with adjacent land uses, and includes sufficient land area to properly accommodate all proposed uses.

1. Ordinance 2011-07 is not Consistent with the Comprehensive Plan in Violation of LDC § 1-53-5.4(1).

The County departed from essential requirements of law in adopting Ordinance 2011-07 because the County rezoned 3,127 acres of land to permit a regional power plant while declining to make any findings concerning consistency with several elements of its Comprehensive Plan related to environmental and conservation policies. The County's stated grounds for ignoring LDC § 1-53-5.4(1)'s requirement that the PUD be consistent with the entire Comprehensive Plan is that "[t]here are certain assessments and analysis that will be performed for the certification via the Florida Power Plant Siting Act and will not be available for the rezone application. An example is the environmental report." R-177. Thus, because studies regarding the impact of this Power Plant on the environment, wetlands, wildlife, and water will have to be done at some point in the future, the County conducted no studies or assessments, nor did they require any from the Applicant, before simply concluding that the PUD is consistent with the Comprehensive Plan simply because a regional utility facility is an allowable use within the Agricultural land use category. The County made no findings as to the consistency of the rezoning with any other provisions of the Comprehensive Plan.

The instant case is not a certification case; rather, it is a rezoning – an approval that does not fall within the purview of the PPSA. The Applicant has not filed any application for certification under the PPSA, so the PPSA has not been triggered. Ordinance 2011-07 was approved pursuant to the County's LDC and subject to the LDC requirements. The PPSA does not absolve the County from its obligation to adhere to its own LDC when it approved the Ordinance.

The County cannot simply choose to ignore its own LDC, which requires consistency with the Comprehensive Plan, based on the reasoning that the impacts, whatever they may be, will be evaluated by other agencies at some undefined future time. *See, Pinecrest Lakes, Inc. v. Shidel*, 795 So. 2d 191, 198 (Fla. 4th DCA 2001) (holding that local governments must strictly comply with the provisions of their comprehensive plans and that compliance is not discretionary). The PPSA does not preclude the County's authority to rezone property and does not absolve the County from its legal obligation to comply with its own LDC. *See* Fla. Stat., Section 403.5116. The Staff report presented to the County Commission represented that:

> The Future Land Use Map designation for the properties is Agriculture. According to Policy 2.1.1, this category allows for utilities, but requires the rezoning of the property to PUD at which time the appropriateness of the use on the particular parcel may be determined. County staff made a determination that the use was appropriate on the proposed site in a letter dated March 16, 2011 via the County Attorney.

R-131. Yet, the referenced letter makes no such determination. County Attorney Mark F. Lapp, author of the March 16, 2011 letter, merely concludes that "the construction of an electrical power plant and solar field qualify as a 'utility' within the meaning of the Comprehensive Plan." R-109. However, Mr. Lapp made no determination as to the proposed rezoning's consistency with other substantive requirements of the Comprehensive Plan. R-109. In fact, Mr. Lapp expressly notes in the letter that "[s]uch [utility] uses must undergo a rezoning to a PUD to determine the appropriateness of the proposed use on the particular parcel. Therefore, this project would need to undergo a PUD rezone." R-109.

The County presented no evidence of the PUD's consistency with provisions of the Comprehensive Plan regarding floodplains, wetlands, surface and groundwater, potable water, historic and cultural resources, conservation, and economic development element (tourism and ecotourism), aside from unsupported conclusory statements.

Therefore, the adoption of Ordinance 2011-07 was not based on competent and substantial evidence. *See, Irvine v. Duval County Planning Commission,* 495 So. 2d 167 (Fla. 1986) upholding the dissenting opinion in *Irvine v. Duval County Planning Commission,* 466 So. 2d 357, 366, 368 (Fla. 1st DCA 1985) (holding that "mere conclusion that to grant the application 'would be adverse to the general public interest' was wholly insufficient. . . .[and] [i]t is not sufficient that the cited

findings merely be general conclusions in the language of the statute or ordinance because such conclusions provide no way for the court to know on judicial review whether the conclusions have sufficient foundation in findings of fact."). *See also, Dixon v. City of Jacksonville*, 774 So. 2d 763, 764 (Fla. 1st DCA 2000) (holding that a consistency analysis made up of "little more than a comparison of the development order with the plan" is not sufficient).

a. The Ordinance is not Consistent with Comprehensive Plan Policies Regarding Groundwater and Potable Water Supplies.

Any ordinance authorizing a PUD rezoning must be consistent with the provisions of the Hendry County Comprehensive Plan as required by LDC § 1-53-5.4(1). *See also, Dixon*, 774 So. 2d at 764; LDC § 1-53-5.4(1). The Comprehensive Plan provides in Future Land Use Element ("FLUE") Policy 2.7.2 and Conservation Element Policy 7.1.2 that:

> Any land use proposed for development within one-half mile of any well designated on the map titled 'Map 2: FEMA Flood Prone Areas' as a potable water well is to be reviewed as a Special Exception in order to determine impact on groundwater resources from the proposed use and specific development.

Further, Environmental Services Element Policy 6.E.2.2 provides that:

> Land development which affects the recharge functions, discharges into groundwater or injects materials directly underground will be restricted in accordance with applicable regulations of the Florida Department of

Environmental Protection and the South Florida Water Management District.

While the Applicant acknowledged that the County's PUD application required it to document the location of well fields and cones of influence, the Applicant only produced an exhibit depicting existing permitted wells and did not document the cones of influence or document the location of unpermitted wells known to exist onsite or new wells needed for the Power Plant. Therefore, the location of the project relative to wellfields and cones of influence is unknown.[5] (R-152). Further, the County has noted that "there will be a significant water requirement onsite. [The Applicants] anticipate pulling the water from a groundwater source." R-177. Further, testimony was provided to the County Commission that the Power Plant's water demand exceeded the available onsite surface and groundwater supply and will ultimately impact adjacent properties. R-410. Despite their acknowledgement and public testimony, the record is devoid of any analyses or other competent and substantial evidence of the impact of the proposed groundwater withdrawals to support any finding that the rezoning is consistent with the Comprehensive Plan Polices cited above. In fact, no one has even tried to quantify how much water will be needed to serve the plant and there

[5] In response to the requirement that the Applicant document the location of well fields and cones of influence if applicable, the Applicant merely provided the location of permitted wells within the rezoned property. (R-152).

has been no evaluation whatsoever of what such a "significant" water withdrawal will do to water table or wells on adjacent properties.

b. The Ordinance is not Consistent with Comprehensive Plan Policies Regarding Floodplains

There is no competent and substantial evidence in the quasi-judicial record demonstrating that Ordinance 2011-07 is consistent with Comprehensive Plan policies regarding floodplain protection. Despite the fact that the rezoned property "is located in Flood Zones A and C" on the Flood Insurance Rate Maps, no analysis of the impact of the proposed Power Plant on the integrity of the floodplains has been performed and provided to support any finding that the rezoning is consistent with these provisions of the Comprehensive Plan. (R-152).

Future Land Use Element ("FLUE") Policy 2.4.10 requires that:

> In addition to density restrictions in other parts of the Comprehensive Plan, density and intensities of use in the 100-year FEMA floodplains shall be restricted to the extent necessary to preserve the flood storage capacity and other hydrological functions of the floodplain, and to protect important biological and ecological functions of a floodplain.

This requirement is echoed in FLUE Policy 2.7.7, which states that:

> No building permit, except for a single family or two-family residential unit, or land use or development permit will be issued by any agency of Hendry County until the applicant provides evidence that the requirements of the National Flood Insurance Act of 1973, as amended, have been or will be complied with by the applicant.

The County acknowledges in its Comprehensive Plan that, "[s]ince 1994, flooding in Hendry County has been somewhat of a problem." Comprehensive Plan, p. VI-13. Despite the fact that the project lies within identified Flood Zones, will require significant groundwater withdrawals, and flooding is a problem known to exist by the County, the record is devoid of any analysis of the impacts of the proposed groundwater withdrawals contemplated by the project on the storage capacity or hydrologic functions of the floodplain. Nor did the County analyze whether the project would impede the biological or ecological functions of the floodplain or whether the requirements of the National Flood Insurance Act of 1973 have been met. The County acknowledged that no such analysis was done and made no findings supported by competent and substantial evidence that the Power Plant was consistent with these policies. Instead, the County merely relied on promises by the Applicant that these issues would be addressed by others in the future in subsequent permitting applications before other government agencies. R-131; R-145; R-287-288; R-379-380; R-386. The County cannot abdicate its responsibilities to make required findings of consistency with the Plan and support those findings with competent and substantial evidence.

c. The Ordinance is not Consistent with Comprehensive Plan Policies Regarding Wetlands and Conservation

The impact of the recognized water demands of the Power Plant to onsite and adjacent wetlands was also ignored, despite Comprehensive Plan Policies

requiring consideration and protection of these resources. FLUE Policy 2.7.1 and Conservation Element Policy 7.1.1 provides that:

> Hendry County shall discourage incompatible uses within wetlands. ***Permissible uses shall include single family and two-family residential dwellings. All other uses will be directed away from wetlands***. Where incompatible uses are allowed to exist, mitigation shall be provided to compensate for loss of wetlands. Permits will be issued by any agency of Hendry County that provides evidence that the requirements of Chapters 373 and 403, Florida Statutes, Section 404 of the (Federal) Clean Water Act, and Section 10 of the (Federal) River and Harbours Act are met. Unless necessary permits have already been obtained under the foregoing laws, any permit issued by the County shall be contingent upon the issuance of state and federal permits. (Emphasis added).

Despite the fact that the Applicant acknowledged the proposed Power Plant would cause wetland impacts, the County failed to conduct or require even a preliminary analysis of wetland impacts resulting from the proposed project. R-283; R-386. In fact, the County acknowledged that no such analysis would be provided for the rezoning. R-131; R-379-380. Thus, no findings supported by competent and substantial evidence exist in the quasi-judicial record to establish consistency with this Comprehensive Plan Policy. The County simply abdicated its responsibilities to other agencies. Exacerbating the problem, the adopted Ordinance was not even made contingent upon the successful issuance of state and federal permits, which is in express violation of Comprehensive Plan FLUE Policy 2.7.1 and Conservation Element Policy 7.1.1.

Finally, Conservation Element Policy 7.2.3 provides that:

> The land development regulations adopted by the County shall continue to state that no building permit, except for a single family or two family residential unit, or development permit will be issued by any agency of Hendry County until the applicant provides evidence that the requirements of state and federal law as set forth in Policies 1.1, 1.8, 2.1, and 2.2 have been or will be complied with by the applicant and that the natural functions of designated or otherwise known environmentally sensitive lands will not be adversely affected by the use for which the application is sought. Wetlands, aquifer recharge areas, native vegetation communities, wildlife habitat, and potable water well cones of influence shall be regulated in accordance with the applicable Comprehensive Plan policies for these resources.

The rezoning, which entitles the property with the right to develop the Power Plant, does not contain any of the above-described assurances regarding wetlands, aquifer recharge areas, native vegetation communities, wildlife habitat, and potable water well cones of influence.

d. Ordinance 2011-07 is Inconsistent with Comprehensive Plan Policies Regarding Economic Development and Tourism.

The rezoned site is adjacent to rural lands with natural and scenic views which are used for established and ongoing ecotourism businesses. The Seminole Tribe's tourism and ecotourism depends on the preservation of these natural scenic views from its Reservation. This is especially true for the Seminole Tribe's main ecotourism attraction on the Big Cypress Reservation, Billie Swamp Safari, which

the Seminole Tribe specifically commented on during the public hearings. R-307-308.

Economic Element Policy 1.2.3 of the Comprehensive Plan provides that "Hendry County will support the development of ecotourism in the County." Public testimony was provided that the Ordinance had to be consistent with this Policy. R-418. Despite this clear mandate, no analysis of the Power Plant was conducted to determine its impact on the Seminole Tribe's existing ecotourism industry or to tourism/ecotourism in other parts of the County.

The aesthetic imposition of the nine 150-foot tall smoke stacks towering over the landscape, along with the resulting smoke and haze emanating from the stacks, will substantially diminish the value of the Seminole Tribe's tourism and ecotourism land uses R-259-262; R-307-308; R-405-406. The natural gas units will be located approximately 2.6 miles from Billie Swamp Safari's hiking trails. R-107; R-116; R-307-308. Each of the three plants will have a three 150-foot tall smoke stack, which the Applicant admitted will be visible from Billie Swamp Safari. R-19-20; R-146; R-285; R-397-398.[6] These smokestacks, coupled with the adverse impacts from the water demands of the Power Plant, will negatively

[6] The Seminole Tribe also stated at the same public hearing that the buffering conditions of the Ordinance would not address the visual intrusion issues. R-405-406.

impact wildlife utilization of the area, which will negatively impact the Seminole Tribe's existing ecotourism industry.

e. Ordinance 2011-07 is Inconsistent with Comprehensive Plan Policies Regarding Historic and Cultural Resources.

The Applicant has not provided a cultural resource survey to determine the potential impacts to cultural resources from the Power Plant despite requests by the Seminole Tribe and in contravention of Comprehensive Plan policies requiring identification and protection of historic and cultural resources. R-407. *See* FLUE Policy 2.4.1, 2.4.1.a, and 2.4.1.b. In Conservation Element Policy 7.1.3, the County acknowledges that there are various historical and archeological resources located within Hendry County, and the Seminole Tribe testified that the County had not sufficiently identified or considered impacts to cultural resources. R-407. FLUE Policy 2.4.4 requires the County to implement development in a manner that protects historic and natural resources. Further, FLUE Policy 2.4.6 and Conservation Element Policy 7.1.3 provide that:

> There are various Indian mounds, historic fort locations, and the Hendry County Courthouse listed in the Florida Master File of historic and archeological places. These historical sites are identified on the map titled "Historic/Archeologi-cal *[sic]* Sites" in the Conservation Element.
>
> Any development proposal which encompasses a historic and/or archeological site which is listed on the Florida Master File shall be identified and reviewed by Hendry County staff for historic significance. The developer shall

> conduct a systematic archeological, historical, and if buildings are present, architectural surveys *[sic]* to determine if significant resources are present.

Regardless, the County abdicated its own responsibilities to determine if the rezoning was consistent with these Comprehensive Plan policies and approved the rezoning without requiring a sufficient cultural resources analysis. In fact, the County made no finding whatsoever concerning historic/cultural resources and consistency with the Comprehensive Plan. Instead, the County merely required the Developer, as a condition of approval, to notify the Seminole Tribe in the event such a cultural resource is impacted.

2. *Ordinance 2011-07 Approves Uses Incompatible with the Adjacent Big Cypress Reservation in Violation of LDC § 1-53-5.4.*

The Hendry County LDC requires the County to determine that approved PUDs are compatible with adjacent land uses. The term "compatible" is not defined in the LDC, but the Florida Department of Community Affairs has defined the term "compatibility" to mean a condition in which land uses or conditions can coexist in relative proximity to each other "in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." *Katherine's Bay, LLC v. Fagan*, 52 So. 3d 19, 30 (Fla. 1st DCA 2010).

The approved use is not compatible with the longstanding and continuing uses of the Big Cypress Reservation, which is adjacent to the rezoned property.

While the Seminole Tribe brought these issues to the attention of the County prior to the adoption of the rezoning, no analysis of the compatibility of the approved project with the Big Cypress Reservation was ever conducted and no finding of compatibility was ever made that was supported by competent and substantial evidence. In fact, the County's Planning and Zoning Department's Staff Report failed to even mention the Seminole Tribe or the Big Cypress Reservation in its discussion of the Power Plant's compatibility with the surrounding areas. R-131.

a. The Anticipated Water Demand of the Project is Incompatible with the Continued Exercise of the Seminole Tribe's Water Rights.

Of primary concern to the Seminole Tribe is the compatibility of the anticipated groundwater and surface water withdrawals required for the proposed Power Plant on the Seminole Tribe's own water rights. The rezoned property lies just north of the Big Cypress Reservation. As a result of the water management and canal system constructed in the area, all surface and groundwater from the McDaniel Ranch lands, which includes the rezoned site and the surrounding land, flow, directly into the Big Cypress Reservation and ultimately into the Big Cypress National Preserve and Addition Lands. *See,* Hendry County Comprehensive Plan, p. VII-3.

As acknowledged by the County, the Power Plant will have significant water demands, yet the impact of these demands on adjacent lands were never quantified

or evaluated. In order to meet the anticipated water supply demands of the Power Plant, groundwater will need to be withdrawn from onsite wells as well as from numerous wells on the surrounding 17,500 acres, which are not owned by the Applicant nor subject to the rezoning requirements. R-308; R-404-405. Additionally, the applicant may need to withdraw water from surrounding Storage Treatment Areas (STAs). R-152. In short, the record suggests that the Power Plant will require every drop of water on the site and from the surrounding area. Yet the demand is not quantified, and there is no analysis of whether the area's supply can even support such a demand without adversely impacting the Seminole Tribe. Instead the County simply stated that surface and ground water impacts to the Big Cypress Reservation would be addressed by the South Florida Water Management District during the environmental resource permitting under the Power Plant Siting Act. R-321-322. However, as the Seminole Tribe brought to the County's attention, the County had a legal duty to consider whether the Power Plant's water demands were compatible with surrounding land uses. R-306-307; R-403-405.

The impacts of this significant water demand have also not been analyzed with respect to the Seminole Tribe's own water rights pursuant to the Water Rights Compact Among the Seminole Tribe of Florida, the State of Florida and the South Florida Water Management District, codified in § 285.165, Fla. Stat. ("1987 Water

Rights Compact"). The Seminole Tribe depends on surface and groundwater resources in every aspect of its culture. In addition to potable water needs, the Seminole Tribe relies on water resources for its agricultural uses and for the recharge of wetland habitat that serves as the basis of ecotourism on the Reservation. This fact was recognized in the 1987 Water Rights Compact that sets forth, under state and federal law, the Seminole Tribe's water entitlements. In addition, the Seminole Tribe of Florida and the U.S. Army Corps of Engineers have expended considerable resources developing critical projects to re-hydrate and restore wetlands within the Big Cypress Reservation that will be directly undermined by the proposed Power Plant. R-260. The Seminole Tribe of Florida also has federally recognized usual and customary use rights within the Big Cypress National Preserve and Addition Lands that will be negatively impacted by drawdown associated with the proposed project. R-259-260.

As discussed above with regard to the Ordinance's inconsistency with provisions of the Comprehensive Plan, the property at issue is within a 100-year FEMA floodplain. No analyses were conducted to analyze the impact of the development of the Power Plant on the flood storage capacity of the subject property. Given the flow characteristics of the area, such an analysis is critical in determining the compatibility of the rezoning with adjacent land uses on the Big Cypress Reservation. The extreme groundwater withdrawals necessary to support

the project will diminish the hydrological functions of the floodplain and will impair important biological and ecological functions of the floodplain, thereby endangering the residents and use of the Big Cypress Reservation.

The Power Plant's unquantified water demands are simply not compatible with the Seminole Tribe's existing, adjacent land uses and the 1987 Water Rights Compact, and these water demands will negatively impact the Seminole Tribe's interests. The record is devoid of evidence to support a determination that the rezoning is compatible with adjacent land uses; particularly that it is compatible with the Seminole Tribe's land uses within the Big Cypress Reservation. R-131.

b. The Power Plant will have Water Quality Impacts that Negatively Impact the Adjacent Big Cypress Reservation.

In addition to adverse water quantity impacts to the Seminole Tribe's adjacent Big Cypress Reservation, the Seminole Tribe will be negatively impacted by water quality impacts yet to be analyzed and addressed with respect to the Power Plant. As with all potential environmental impacts associated with the rezoning, the County simply failed to undertake any analysis of potential water quality impacts that render the project incompatible with the continued use and enjoyment of the Seminole Tribe's Reservation lands. While the Applicant represented that the Power Plant would lower the level of nutrients from that currently loaded into the area's waters, no competent and substantial evidence was provided to support this conclusory statement nor was there any discussion

concerning what pollutants the Power Plant would discharge. R-21. In fact, the County acknowledged that no such analyses were prepared for the rezoning application in contravention of the County's own LDCs and Comprehensive Plan requirements to consider these issues. R-131; R-379-380; R-464.

c. The Power Plant is Incompatible with the Continued Tourism, Ecotourism and Residential Land Uses Sustaining the Big Cypress Reservation.

The project area and the adjacent lands are rural lands with natural scenic views. The Seminole Tribe's tourism and ecotourism depend on the preservation of these natural scenic views from the Reservation. This is especially true for the Seminole Tribe's main ecotourism attraction on the Big Cypress Reservation, Billie Swamp Safari. Impacts to this attraction were specifically raised at the public hearings. R-307-308. The natural gas units will be located approximately 2.6 miles from Billie Swamp Safari's hiking trails and 2.18 miles from Billie Swamp Safari's northeast border. R-107; R-116; R-307-308. Each of the three plants will have a three 150-foot tall smoke stack. R-19-20; R-146. The Applicant acknowledged at the public hearing before the LPA that the smoke stacks are 150 feet, "[s]o, you see it. Nobody is going to tell you you won't see it." R-285. The Applicant further acknowledged at the public hearing before the County Commission, in response to a question from a Commissioner, that the nine smoke

stacks would be visible from Billie Swamp Safari even after the implementation of the buffering conditions imposed by Ordinance 2011-07. R-397-398.[7]

The aesthetic imposition of the nine 150-foot tall smoke stacks towering over the landscape, along with the resulting smoke and haze emanating from the stacks, will substantial diminish the value of the Seminole Tribe's tourism and ecotourism land uses R-259-262; R-307-308; R-405-406. The visual intrusion and resulting smoke and haze will also significantly diminish Seminole tribal members' use and enjoyment of tribal lands on a daily basis, including residential uses. Finally, the impacts will also diminish the property values of the Big Cypress Reservation lands and non-trust lands owned by the Seminole Tribe and/or tribal members located in proximity to the proposed Power Plant. R-308.

These smokestacks, coupled with the adverse impacts from the water demands of the Power Plant, will negatively impact wildlife utilization of the area, which the Seminole Tribe depends on for its tourism/ecotourism and cultural interests. It is acknowledged that "[t]here are approximately 1000 +/- acres of panther habitat over the area." R-176. However, the County determined that "[e]ven though there is panther habitat across some of the properties and the applicant understands they will have to mitigate, the environmental analysis will be

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[7] The Seminole Tribe also stated at the same public hearing that the buffering conditions of the Ordinance would not address the visual intrusion issues. R-405-406.

performed for the second certification step." R-177. By the terms of LDC § 1-53-5.4, and in light of the Seminole Tribe's concerns regarding compatibility of the Power Plant with its ecotourism industry on adjacent property, the County was required to analyze these wildlife impacts rather than punt the analysis to some latter review after the property is rezoned. The project will create a barrier for wildlife movement and will ultimately reduce wildlife utilization of the surrounding areas, including the Big Cypress Reservation. In addition, the project's water demand and its impact to the water table may impact identified panther habitat's ability to produce sufficient foraging opportunities for prey species. This will directly impact the Seminole Tribe's tourism and ecotourism industries.

d. Anticipated Traffic Associated with the Construction and Operation of the Power Plant Will Negatively Impact the Seminole Tribe's Adjacent Land Uses.

The adoption of the subject Ordinance was based on various traffic studies provided by the Applicant that include assumptions regarding the likely traffic patterns associated with construction and operation of the proposed Power Plant. However, no conditions were included in the final rezoning to require that construction traffic and subsequent operational traffic be restricted as assumed in the studies. Any construction or employee related traffic not diverted around the Reservation, as assumed in the Applicant's traffic study, will pass through key Tribal service centers including single-family residential areas, school zones,

medical clinics, daycare facilities, and governmental offices. R-408. The impacts of this additional traffic on the Seminole Tribe's Reservation lands were not considered. Aside from conditions of approval included in the Ordinance requiring that notification be provided to the Seminole Tribe when construction commences, the consistency of the Power Plant with the Seminole Tribe's continued use and enjoyment of its adjacent Big Cypress Reservation was not ensured.

e. Ordinance 2011-07 is not Compatible with the Seminole Tribe's Big Cypress Reservation Land Uses from a Public Safety Perspective

In determining that the Power Plant would not pose an undue burden on the County's fire protection, emergency services, and law enforcement, the County Commission and the Applicant relied upon letters from County agencies advising that the County had sufficient public safety services to accommodate the Power Plant. Specifically with regard to fire protection and emergency services, the County relied upon a letter from the County's Public Safety Director stating that there will not be undue burden on fire and emergency services due to a mutual aid agreement between the County and the Seminole Tribe. R-134; R-152. During the LPA hearing, the Seminole Tribe informed the County Commission that it was unaware of such an agreement. R-309. During the County Commission hearing, the Seminole Tribe introduced into the record a letter from the Public Safety Director advising that he was indeed mistaken and that no mutual aid agreement

exists. R-265. The County nevertheless ignored this acknowledgment by its own staff and approved the Ordinance.

With regard to sufficient law enforcement, the County and Applicant relied on a letter from the County Sheriff stating that there was sufficient law enforcement to support the Power Plant. R-122. However, the same Sheriff presented public testimony before the County Commission that unlike other counties, Hendry County does not have the capabilities to adequately respond to emergency calls and that the revenue from the Power Plant is needed. R-429. Despite the Sheriff's testimony that law enforcement is currently deficient even without the additional demands of the Power Plant, the County still approved the Ordinance.

The Big Cypress Reservation is home to 550 Tribal members and is visited by numerous visitors on a daily basis year around. R-305. To support the Tribal members living on the reservation, the Seminole Tribe operates several essential governmental facilities in close proximity to the proposed Power Plant site, including but not limited to schools, medical clinics, day care facilities, and other governmental offices. R-408. Placing a major industrial facility in close proximity to the Big Cypress Reservation without adequate public safety services is a public safety danger that demonstrates the Power Plant is not a compatible use with the

Big Cypress Reservation and the residential, tourism, and essential governmental services land uses conducted by the Seminole Tribe.

Accordingly, the County's determination that the rezoning is compatible with adjacent land uses is not supported by competent and substantial evidence and must therefore be quashed.

f. The Conditions of Approval Referencing the Seminole Tribe are Insufficient and Not Based on Competent and Substantial Evidence.

The Ordinance includes various conditions of approval that reference the Seminole Tribe of Florida. (R-4 - R-7) However, these conditions are not based on substantial and competent evidence and do not address the compatibility of the Power Plant with the adjacent land use as required by LDC § 1-53-5.4(1). Most of the conditions referencing the Tribe simply require the Applicant to provide the Seminole Tribe with notice upon the occurrence of certain events and are not directed to mitigating any of the incompatibility issues identified above. Condition f. of the Ordinance (R-4) purports to require mitigation after the fact, if an issue of incompatibility materializes. That condition reads:

> If the proposed stacks are visible from the Tribe's boundary north of the Billie Swamp Safari, then the applicant shall construct a Type "D" buffer along the E ½ of the south line of Section 29 and the S ½ of the N-S quarter-section line of the same Section totaling approximately one mile. (R-4).

Just as the aesthetic issues associated with the proposed smoke stacks were not addressed at the quasi-judicial hearing, the appropriateness or effectiveness of the additional Type "D" buffer was not identified in the Ordinance. No competent and substantial evidence was presented to support the bald assumption that such a buffer would be effective or make the incompatible use compatible. In fact, as noted earlier, the Applicant acknowledged the addition buffer would not be effective in reducing the visibility of the smoke stacks from Billie Swamp Safari. R-397-398.

For the reasons stated above, the Power Plant authorized by Ordinance 2011-07 is incompatible with adjacent land uses on the Big Cypress Reservation because of the acknowledged water demands of the project and its impacts on water quality, water quantity, flood plain values, and wetland functions. In addition, the rezoning is incompatible with the ongoing ecotourism industry on the adjacent Big Cypress Reservation and may result in unaddressed traffic and public safety impacts. While Ordinance 2011-07 contains conditions purporting to relate to and address compatibility issues between the proposed development and the Big Cypress Reservation, there is no competent and substantial evidence evaluating either the compatibility issues or the effectiveness of the proposed conditions in addressing the same. The County's adoption of Ordinance 2011-07 is not supported by any competent and substantial evidence with regard to the proposed

use's compatibility with the Big Cypress Reservation, and therefore the County has departed from essential requirements of law in adopting the same.

3. *Ordinance 2011-07 does not Include Sufficient Land Area to Properly Accommodate all Proposed Uses as Required by LDC § 1-53-5.4.*

As acknowledged by the County, the proposed Power Plant has "significant" water demands. To meet the project's anticipated water supply demands, water will be required from onsite wells, from offsite wells within the surrounding 17,500 acre McDaniel property and potentially from surrounding STAs. R-152; R-308; R-404-405. LDC § 1-53-5.4(5) and (6) require that any property subject to a rezoning as a PUD be of sufficient size to accommodate the anticipated use of the property. Such a requirement exists in order to ensure that the entire magnitude of impacts of a proposed development can be addressed all at once. The obvious intent is to avoid piecemeal development and piecemeal review of impacts. Nevertheless, that is precisely what has occurred.

The record evidences that the proposed Power Plant cannot be accommodated on the 3,127 acre rezoned property and will depend upon consuming the water resources from numerous wells on surrounding property outside of the rezoned site. This water will need to be piped onto the rezoned site through some unidentified supporting infrastructure. Therefore, the County departed from the essential requirements of law in approving the Ordinance

because the proposed use cannot be accommodated within the property. As the Seminole Tribe noted during the May 24, 2011, Public Hearing, the County is in essence "making a land use determination for the entire township[8]...[and] the tradeoff [the County is] being asked to make here today, sacrifice the entire township in order to have enough water supply . . . for a power plant." R-405.

4. Ordinance 2011-07 Violates LDC § 1-53-5.4(9), Which Requires a PUD to Terminate Within Three Years of the Date of Approval.

Despite the clear language of LDC § 1-53-5.4(9), which requires that a PUD terminate within three years of the date of approval if either a site development plan or preliminary subdivision plat application is not filed with the County, the subject Ordinance instead provides that:

> The PUD zoning shall remain in effect provided the landowner diligently pursues all regulatory approvals/licenses and shall be permanently vested upon approval of Phase I by the State of Florida Siting Board. (R-3).

The County is not permitted to depart from the express requirements of its own LDC. To the extent that the applicant could have requested such a departure, the LDC contains a very specific procedure for obtaining a variance. *See,* LDC § 1-51-5.1. However, no variance was applied for, processed or granted relieving the Applicant from the strict application of LDC § 1.53-5.4(9), which requires that

[8] The property being rezoned and the surrounding 17,500 acres, McDaniel Ranch, constitutes an entire township.

the PUD rezoning expire within three years. Moreover, the County made none of the requisite findings to grant a variance, which are set forth in LDC § 1-51-5.3 as follows:

> Approval of a petition for variance from the provisions and requirements of this code shall be granted by the board of county commissioners only on a finding that:
>
> (1) Special conditions and circumstances exist which are peculiar to the land structure, or building involved and which are not applicable to land, structures, or buildings in the same zoning district.
>
> (2) The special conditions and circumstances do not result from the actions of the applicant.
>
> (3) A granting of the variance requested will not confer on the applicant any special privilege that is denied by this code to other lands, buildings, or structures in the same zoning district.
>
> (4) Literal interpretation of the provisions of this code which [would] deprive the applicant of rights commonly enjoyed by other similarly situated properties and would work unnecessary and undue hardship on the applicant.
>
> (5) The variance granted is the minimum variance that will make possible the reasonable development and/or use of the land, building or structure.
>
> (6) The granting of the variance will be in harmony with the general intent and purpose of this code and will not be injurious to the area involved or otherwise detrimental to the public welfare.
>
> (7) There will be full compliance with any additional conditions and safeguards which the board may prescribe, including but not limited to reasonable time

> limits within which the action for which the variance is required shall be begun or completed, or both.
>
> (8) Granting of the variance will not deviate from the clear intent of the adopted comprehensive plan.

Therefore, the County departed from the essential requirements of law by ignoring its own express legal requirements regarding the expiration of PUDs in approving Ordinance 2011-07, and the decision to adopt the Ordinance was not based on competent and substantial evidence.

CONCLUSION

Based on the foregoing arguments and the cases and authorities cited herein, the Seminole Tribe respectfully requests that this Honorable Court issue an Order to Hendry County to show cause why a Petition for Writ of Certiorari should not be issued and, ultimately, to issue a Writ of Certiorari quashing Ordinance 2011-07 and remanding the matter to County for further proceedings consistent with the Court's writ and further granting any other relief necessary to carry out the Court's judgment in this matter.

Respectfully submitted this 24th day of June, 2011.

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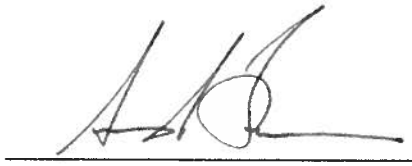
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Hendry County, 165 South Lee Street, Suite A, LaBelle, Florida , on this 24th day of June, 2011.



ANDREW J. BAUMANN

CERTIFICATE OF COMPLIANCE

Counsel for Appellant certifies that the above Petition for Writ of Certiorari has been prepared in Times New Roman 14 point font and complies with Fla. R. App. P. 9.210(a)(2).

ANDREW J. BAUMANN