IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NOS.: 3D14-1467, 3D14-1451, 3D14-1465, 3D14-1466
CONSOLIDATED

DOAH CASE NO.: 09-3575, OGC CASE NO.: 09-3107

MIAMI-DADE COUNTY, CITY OF SOUTH MIAMI, VILLAGE OF PINECREST, and CITY OF MIAMI,

Appellants,

vs.

FLORIDA POWER & LIGHT COMPANY and STATE OF FLORIDA SITING BOARD,

Appellees.

INITIAL BRIEF OF APPELLANT CITY OF MIAMI

AN APPEAL FROM A FINAL ORDER OF THE FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

VICTORIA MÉNDEZ, City Attorney
JOHN A. GRECO, Deputy City Attorney
FORREST L. ANDREWS, Assistant City Attorney
MATTHEW HABER, Assistant City Attorney
Counsel for City of Miami
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130-1910
Tel.: (305) 416-1800
Fax: (305) 416-1801
jagreco@miamigov.com

TABLE OF CONTENTS

TABLE OF CONTENTS…….. ii

TABLE OF AUTHORITIES…… iv

INTRODUCTION……1

STATEMENT OF CASE AND FACTS……...2

1. The Project……2

2. Overview of the Power Plant Siting Process…… 5

3. Miami's Proposed Conditions of Certification……..……..8

4. The Certification Hearing And Recommended Order……..10

5. The Power Plant Siting Board's Review…….. 13

ISSUES ON APPEAL……...15

SUMMARY OF ARGUMENT…… 15

STANDARD OF REVIEW…….. 17

ARGUMENT…… 18

I. THE GOVERNOR AND THE CABINET, ACTING AS THE SITING BOARD, ERRED WHEN CERTIFYING THE TRANSMISSION LINE CORRIDORS BY FAILING TO CONSIDER LOCAL REGULATIONS AS REQUIRED BY § 403.509(3)……...18

A. The Power Plant Siting Act Requires Consideration Of Local Regulations.……..……....19

1. The Siting Board Refused To Consider Local Regulations In The Conditions Of Certification……....22

2. Nothing In The Certification Test Permits The Siting Board To Ignore Local Regulations……...24

3. All Elements Of The Certification Test Apply To Transmission Lines By Statutory Definition……....27

4. The Siting Board's Interpretation Is Contrary To The Clear Statutory Language……...28

5. The ALJ Hampered Discovery Concerning The Need To Include Local Regulations In The Conditions Of Certification……...29

B. The Siting Board's Incorrectly Applied A "Development" Exception…….....32

1. The "Development" Exception Does Not Apply To The Entire Corridor…….....33

2. Construction Of A Transmission Line On Land That Is Not Established As A Right-Of-Way Constitutes "Development"……...35

3. DEP Improperly Advised The Siting Board Concerning The "Development" Exception And Standard of Review……...39

II. THE GOVERNOR AND THE CABINET, ACTING AS THE SITING BOARD, ERRED BY CONCLUDING THAT THEY HAD NO AUTHORITY TO REQUIRE UNDERGROUNDING OF THE TRANSMISSION LINES IN THE CONDITIONS OF CERTIFICATION……...42

CONCLUSION…… 46

CERTIFICATE OF SERVICE……..47

CERTIFICATE OF COMPLIANCE…… 48

TABLE OF AUTHORITIES

CASES

A. Duda & Sons, Inc. v. St. Johns River Water Mgmt. Dist.,
17 So. 3d 738 (Fla. 5th DCA 2009) 35

And Justice For All, Inc. v. Florida Dept. of Ins.,
799 So. 2d 1076 (Fla. 1st DCA 2001) 42

Atlantis at Perdido Ass'n, Inc. v. Warner,
932 So. 2d 1206 (Fla. 1st DCA 2006) 27, 33

Bd. of County Comm'rs of Monroe County v. Fla. Dep't of Cmty Affairs,
560 So. 2d 240 (Fla. 3d DCA 1990) 36, 38

Bd. of Trs. of Northwest Fla. Cmty. Hosp. v. Dep't of Mgmt. Servs., Div. of Ret.,
651 So. 2d 170 (Fla. 1st DCA 1995) 41

Beans v. Chohonis,
740 So. 2d 65 (Fla. 3d DCA 1999) 25

C.f. HTS Indus., Inc. v. Broward County,
852 So. 2d 382 (Fla. 4th DCA 2003) 22

Cherry Communications, Inc. v. Deason,
652 So. 2d 803 (Fla. 1995) 39, 40

Citizens of the State of Fla. v. Pub. Serv. Comm'n,
425 So. 2d 534 (Fla. 1982) 36

City of Riviera Beach v. Florida Dept. of Envtl. Regulation,
502 So. 2d 1337 (Fla. 4th DCA 1987) 27

Clipper Bay Investments, LLC v. State Dep't of Transp.,
117 So. 3d 7 (Fla. 1st DCA 2013) 38, 39

Doyle v. Dep't of Bus. Regulation,
794 So. 2d 686 (Fla. 1st DCA 2001) 18

Florida Dept. of Revenue v. Florida Mun. Power Agency,
789 So. 2d 320 (Fla. 2001) 36, 37

Florida Hosp. v. Agency for Health Care Admin.,
823 So. 2d 844 (Fla. 1st DCA 2002) 17

Florida Power Corp. v. Seminole County,
579 So. 2d 105 (Fla. 1991) 43, 44

Friends of Mantanzas, Inc. v. Dep't of Envtl. Prot.,
729 So. 2d 437 (Fla. 5th DCA 1999) 38

Garcia v. Federal Ins. Co.,
969 So. 2d 288 (Fla. 2007) 25

Harvey Covington & Thomas, LLC v. WMC Mortg. Corp,
85 So. 3d 558 (Fla. 1st DCA 2012) 31

Hechtman v. Nations Title Ins. of NY,
840 So. 2d 993 (Fla. 2003) 27, 38

James v. County of Volusia,
683 So. 2d 555 (Fla. 5th DCA 1996) 36

Lambert v. State ex rel. Mathis,
77 So. 2d 869 (Fla. 1955) 18

Leon Cnty. Bd. Of Cnty. Comm'rs v. Karimipour,
4 So. 2d 777 (Fla. 1st DCA 2009) 38

Love PGI Partners, LP v. Schultz,
706 So. 2d 889 (Fla. 5th DCA 1998) 38

Lowe v. Broward County,
766 So. 2d 1199 (Fla. 4th DCA 2000) 21

McAlpin v. Criminal Justice Standards and Training Com'n,
120 So. 3d 1260 (Fla. 1st DCA 2013) 40, 41

Miami-Dade County. v. Gov't Sup'rs Ass'n of Florida, OPEIU AFL-CIO, Local 100,
907 So. 2d 591 (Fla. 3d DCA 2005) 17

Moonlit Waters Apartments, Inc. v. Cauley,
666 So. 2d 898 (Fla. 1996) 26

Parlato v. Secret Oaks Owners Ass'n,
793 So. 2d 1158 (Fla. 1st DCA 2001) 17, 18

Rinker Materials Corp. v. Town of Lake Park,
494 So. 2d 1123 (Fla. 1986) 35, 38

Robbins v. City of Miami Beach,
664 So. 2d 1150 (Fla. 3d DCA 1995) 38

Sloban v. Fla. Bd. of Pharmacy,
982 So. 2d 26 (Fla. 1st DCA 2008) 27, 38

St. Johns Cnty. v. Dep't of Cmty. Affairs,
836 So. 2d 1034 (Fla. 5th DCA 2002) 36, 38

Sw. Florida Water Mgmt Dist. v. Save the Manatee Club, Inc.,
773 So. 2d 594 (Fla. 1st DCA 2000) 18

S.Z. v. Dep't of Children & Family Servs.,
873 So. 2d 1277 (Fla. 3d DCA 2004) 31

Trushin v. State,
475 So. 2d 1290 (Fla. 3d DCA 1985) 36

STATUTES, RULES, AND LEGISLATION

§ 120.57, Fla. Stat. 13, 41

§ 120.68, Fla. Stat. 14, 17, 27

§ 366.04, Fla. Stat. 3, 43

§ 380.04, Fla. Stat. ..... *passim*

§ 403.502, Fla. Stat. 5, 19

§ 403.503, Fla. Stat. ..... *passim*

§ 403.5064, Fla. Stat. 5

§ 403.50665, Fla. Stat. 8, 26, 37

§ 403.507, Fla. Stat. 8

§ 403.508, Fla. Stat. 5, 6, 26, 37

§ 403.509, Fla. Stat. ..... *passim*

§ 403.510, Fla. Stat. 21

§ 403.511, Fla. Stat. 7, 23, 24, 42

§ 403.5113, Fla. Stat. 6, 7

§ 403.513, Fla. Stat. 14

§ 403.517, Fla. Stat. 26, 37

§ 403.5175, Fla. Stat. 26, 37

§ 403.519, Fla. Stat. 5

§ 403.524, Fla. Stat. 37

§ 403.529, Fla. Stat. 29

§ 712.03, Fla. Stat. 38

Ch. 89-292, Laws of Fla. 44

Ch. 95-146, Laws of Fla. 44

Fla. Admin. Code R. 62-17.133 8

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY (Deluxe 9th ed. 2009)……... 34

In re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy & Jose Gutman, Teresa Badillo, and Jeff Lessera, PSC-02-0788-PAA-EI (Florida Public Service Commission June 10, 2002) 44

Lisa O. O'Neill, *Florida Electrical Power Plant Siting Act: Perpetuating Power Industry Supremacy in the Certification Process*, 36. U. Fla. L. Rev. 817 (1984)…….. 5

Op. Att'y Gen. Fla. 97-08 (1997) 21

Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line, Conditions of Certification, DEP case no. TA0513A, OGC case no. 09-3192 (Florida Department of Environmental Protection) 23

INTRODUCTION

The City of Miami appeals a final order issued by the Governor and Cabinet in their capacity as the head of the Florida Department of Environmental Protection. The final order certifies the location of two additional nuclear reactors at Turkey Point and miles of new transmission lines, including 105-foot poles to be erected throughout suburban and urban Miami-Dade County.

The Power Plant Siting Act governs this process, requiring that any project certification must account for the substance of local regulations. The order on appeal does not incorporate local regulations into the conditions of certification that control these transmission lines as mandated by section 403.509(3), Florida Statutes. This is critical, not only because the statute requires the consideration and inclusion of local regulations, but also because facilities erected pursuant to the order are subject only to the conditions of certification. In addition, the Governor and Cabinet, as the Power Plant Siting Board, incorrectly restricted their jurisdiction to exclude the consideration of undergrounding of transmission lines as a condition of certification.

Consequently, if the order is permitted to stand, Miami's neighborhoods and transportation routes will be crowded with ten-story transmission lines that do not conform to local regulations or meet state building code standards for hurricane safety.

STATEMENT OF THE FACTS AND THE CASE

1. The Project

The final order issued by the Governor and Cabinet acting as the Power Plant Siting Board (Siting Board) certifies an application submitted by Florida Power & Light Company (FPL) for the expansion of its Turkey Point power plant site along with towering transmission lines placed throughout Miami-Dade County. The company has proposed the largest utility project contemplated in over 40 years: construction of two new nuclear reactor units, the associated transmission lines, the usage of millions of gallons per day of potable and reclaimed county water, radial collector wells in the Biscayne Bay Aquatic Preserve, and deep injection wells for waste water. [R172.33898-99 (Recommended Order, ¶ 2); T1.77-79; T3.303, 311].[1]

Key to the instant appeal, the project approved includes the creation of two separate transmission line corridors – one in the east and another in the west –

[1] Citations to the record will be "R" followed by volume number and page number, for example, R1.5. All transcripts in the record are separately numbered and paginated volumes. Transcripts for the certification hearing before the Administrative Law Judge, referred to as the "Final Hearing" in the record on appeal, will be "T" followed by volume number and page number, for example, T1.50. The transcript for the Meeting of the Governor and the Cabinet, where the Siting Board hearing occurred, has only one volume and will be "C" followed by a page number, for example, C.50. "A" refers to the appendix to this initial brief, citations to the appendix will be "A" followed by page number. All appendix citations include corresponding record or transcript citations. Filings by the City of Miami will use the "COM" abbreviation.

where FPL will erect miles of oversized transmission poles and lines. [T1.102; A.13 (R242.47648)]. Initially, FPL planned to construct the western transmission line corridor through Everglades National Park pending a land swap with the National Park Service. Simultaneously, FPL hoped to erect an eastern transmission line corridor through the densely populated urban and residential neighborhoods of the municipalities participating in this appeal. The transmission line poles proposed for these neighborhoods stretch out 4 feet in diameter, tower up to 105 feet tall, and may feature steel cables anchored from the top of the pole to the ground extending several feet in the shape of a triangle. [A.17-21 (R242.47654-58); T13.1815-17]. In effect, each pole will rise to the height of a ten-story building.

Significantly, the poles will only be required to meet National Electrical Safety Code standards (NESC). § 366.04(6), Fla. Stat. (2013). Unlike the Florida Building Code, the NESC standards are not specifically prepared for the intense hurricanes common to South Florida. Designs using NESC standards are **substantially less hurricane resistant** than those required by the Florida Building Code, which reflects engineering lessons learned following Hurricane Andrew.[2] [T54.7591,7594-7603, 7605, 7608].

[2] Accounting for the different load factor used by each code, the NESC designs for the equivalent of 115 mph winds under the version of the Florida Building Code in force at the time the application was submitted. In contrast, that version of the Florida Building Code designed for 146 mph winds. Hence, $146^2/115^2 = 1.612$, meaning that **NESC standards are 61% less hurricane resistant**.

Per FPL's proposal, these poles will run every 200 to 400 feet through the City of Miami. [T13.1900-01]. FPL's projected route approaches downtown from U.S. 1, via the Roads neighborhood and the West Brickell area, before ending at the Miami substation on the riverfront.[3] Once inside the City, the aboveground portions of this line will travel approximately 5.5 miles (about 28,550 feet). [A.25-26, 30, 39 (R242.47709-10, 47714, 47723)]. However, the entire eastern transmission line will run approximately 37 miles through several municipalities. [T1.48:21; A.11, A.13 (R242.47648), and A15 (R241.47611)].

The majority of poles will either be placed next to homes or next to the Metrorail. [R243-44.47851-48149 (FPL Ex. 315)]. In some locations, the Metrorail's 30-foot structures and walkways will be shorter than FPL's poles, increasing the risk of a pole collapse to the Metrorail, and will require special precautions. [A.34 (R242.47718)]. Compliance with the substantive provisions of Miami's local regulations would have obviated the need for such special precautions. [A.127-37 (R102.20154-64)]. Once FPL's proposed lines reach I-95, the company plans to construct them within a predominantly residential area that has recently benefitted from redevelopment initiatives with new buildings providing underground electric lines. [R243-44.47851-48149 (FPL Ex. 315)].

[3] For a detailed overview of the projected route, see FPL Exhibit 313, specifically route segments 1-9. [A.26-39 (R242.47710-23)].

2. Overview of the Power Plant Siting Process

The Power Plant Siting Act (the Act) governs the certification of new plants and associated facilities. The Act attempts to balance energy needs against their environmental consequences to ensure new projects have minimal adverse impacts on local communities and Florida's natural resources.[4] § 403.502, Fla. Stat. (2013). The legislative intent section of the statute states that "the location and operation of electrical power plants … **will not unduly conflict with the goals established by the applicable local comprehensive plans**." *Id*. (emphasis added).

Pursuant to the Act, the certification of new power plants, and associated transmission lines, involves multiple steps.[5] *See* §§ 403.5064, 403.508, 403.509, 403.519, Fla. Stat. (2013). The certification process includes: a certification hearing before an Administrative Law Judge (ALJ), assigned by the Division of Administrative Hearings (DOAH), who renders a recommended order for review by the Governor and Cabinet acting as the Siting Board. *See* § 403.508, Fla. Stat. (2013). The Siting Board is the Florida Department of Environmental Protection's

[4] For a review of the procedures at issue, see Lisa O. O'Neill, *Florida Electrical Power Plant Siting Act: Perpetuating Power Industry Supremacy in the Certification Process*, 36. U. Fla. L. Rev. 817 (1984). [A.77-95].

[5] For a chart depicting the steps in the power plant siting process, see [A.97].

(DEP) agency head and chief decision-maker. *Id*. After these hearings, there is a post-certification review process.[6] *See* § 403.5113, Fla. Stat. (2013).

During its hearing, the Siting Board must decide whether to approve, deny, or modify the new project by considering seven criteria articulated in the Act's certification test. § 403.509(3), Fla. Stat. (2013). To be approved, the application submitted must, among other requirements:

> a) Provide reasonable assurance that operational safeguards are technically sufficient for the public welfare and protection.
>
> **b) Comply with applicable nonprocedural requirements of agencies.**
>
> **c) Be consistent with applicable local government comprehensive plans and land development regulations.**
>
> ***
>
> f) Minimize, through the use of reasonable and available methods, the adverse effects on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life.
>
> g) Serve and protect the broad interests of the public. § 403.509(3), Fla. Stat. (2013) (emphasis added).

§ 403.509(3), Fla. Stat. (2013) (emphasis added).

For projects that include a transmission line component, such as the project at issue, the Act subjects transmission line corridors to the same certification test as

[6] The post-certification review process has not yet occurred and is not the subject of this appeal.

the rest of an electrical power plant project. § 403.509(4)(a), Fla. Stat. (2013). Nevertheless, FPL's project – as proposed – will not comply with the height restrictions, location constraints, operational safeguards, effects on human health, and other municipal requirements accounted for in the certification test above.[7]

Notably, the Siting Board does not review or certify the specific locations occupied by the transmission line. Instead, the Siting Board must review a proposed area up to one-mile wide, called a transmission line corridor, within which the final route of the transmission line will be located. § 403.503(11), Fla. Stat. (2013). The project applicant chooses its pole locations from within this corridor, without the Siting Board's involvement, during the post-certification review process based solely on the requirements contained in the final order's conditions of certification. *See* §§ 403.503(27), 403.5113, Fla. Stat. (2013).

These conditions of certification are critical to the siting and post-certification review process because many project design details are not finalized until after the Siting Board adopts its final order on certification. Once a project has been certified, it is subject only to these conditions of certification. *See* § 403.511(2)(a), Fla. Stat. (2013). Accordingly, when the project applicant files its Final Design and Document submittal during post-certification review, it is evaluated against the conditions of certification.

[7] For a review of the substantive regulations at issue, and the project's lack of compliance, see Miami's Agency Report. [A.127-38 (R102.20154-65)].

3. Miami's Proposed Conditions of Certification

FPL filed its Site Certification Application (the Application) in June 2009. Before the Application had been completed, each local government was required to file a determination of consistency with local land use and zoning ordinances. § 403.50665, Fla. Stat. (2013). In its filing, Miami determined that the transmission lines associated with the project would be consistent only if placed on established rights-of-way and comply with all land use and zoning laws as represented to the City by FPL. [R21.4051].

Once FPL's Application was complete, each agency and local government affected by the project prepared an agency report. *See* § 403.507(2)(a), Fla. Stat. (2013). Miami's report identified the local nonprocedural requirements relevant, under the Act, to the welfare of the City's inhabitants and also proposed conditions of certification as required. *See* Fla. Admin. Code R. 62-17.133. The requirements identified by Miami included provisions of the comprehensive plan, substantive conditions of zoning approvals, and other land development regulations. [A.138 (R102.20165)]. The proposed conditions of certification cited to these nonprocedural requirements and were intended to help FPL's project achieve consistency with Miami's zoning code and other regulations. [A.127-37 (R102.20154-64)].

Many of Miami's conditions sought greater cooperation with FPL. Coordinating efforts to preserve historic and archeological resources and collaborating to ensure that all designs promote Crime Prevention Through Environmental Design (CPTED) principles, which reinforce safe environments through design, are important municipal requirements. [A.131 (R102.20158)]. Miami's proposed conditions, such as undergrounding the transmission lines, are a "grid-wide safety and aesthetic improvement" that will reduce the danger of collapsed transmission poles or power outages caused by hurricanes. [A.128 (R102.20155)]. Although Miami concluded that FPL's Application failed to comply with local nonprocedural requirements, it emphasized two facts important to protecting the welfare of its citizens through the agency report and proposed conditions of certification. First, the City is a densely populated community. There is little to no remaining buildable land within its jurisdiction. Hence, the ability to accommodate commercial, transit, and residential uses in a single location is critical. Second, Miami is "continuously pounded by and subject to hurricanes and storms." [A.137 (R102.20164)]. Therefore, preventing ten-story poles from toppling near residences or public transit is critical to community safety. [A.126, A.128, A.137 (R102.20153, 20155, 20164)]. All of the municipalities involved in this process have agreed that undergrounding the transmission line is the most direct way to avoid this risk. [T37.5307; T42.5973; T58.8104].

4. The Certification Hearing And Recommended Order

The certification hearing commenced on July 8, 2013, with DEP's Deputy General Counsel representing that agency throughout the proceeding. [T1.1, 3]. During the hearing, Miami presented testimony illustrating the importance of consistency with its land development regulations and the problems associated with placing such large poles in a dense, urban area. For instance, the City identified public safety consequences related to fitting the poles within narrow rights-of-way while attempting to prevent obstructions to the view of oncoming traffic. [T54.7522, 7529-30]. In addition, the steel cables anchored from the pole to the ground that will be featured on many of these approximately ten-story structures tend to create pedestrian hazards and are not likely to fit within established rights-of-way. [T55.7669-70]. Likewise, the City provided expert testimony that the only FPL project of this magnitude constructed since the 1970s used **underground lines**. [T55.7671].

Miami also presented evidence that sea level rise and storm surges were not adequately considered for the facilities associated with the reactors and questioned the extent to which FPL's proposed water uses will harm wetlands, ground and surface waters, Biscayne Bay, and the Biscayne Bay Aquatic Preserve. [T1.95:23-96:13; T2.86:8-16; T38.5528:4-11; T54.7591:20-25; T55.7730:11-7747:9, 7748:8-7767:16].

Most significantly, DEP refused to consider local land development regulations or comprehensive plans to the transmission line portions of the Application, despite the statutory requirement to do so:

> ATTORNEY: As to the project and the transmission line portions of it on the FPL [eastern transmission line corridor], when reviewing the agency reports, **you did not consider any of the land use plan recommendations or land development regulations for your conditions of certification**, is that correct?
>
> DEP OFFICIAL: CDMP and zoning regulations, no.
>
> ATTORNEY: No, you did not consider
>
> DEP OFFICIAL: **No, we did not**.

[A.115 (T40.5738:10-19) (emphasis added)]. The same DEP official stated, regarding the proposed conditions of certification submitted by local governments, that "[i]n the case of the transmission line, **if the comp plan or zoning regulations were cited to, we would strike those** because we don't feel they are applicable." [A.117-18 (T40.5740:23-25; 5741:1) (emphasis added)].

At the close of the certification hearing, the ALJ issued a Recommended Order that: 1) supported approval of FPL's Application, and 2) contained suggested conditions of certification that do not take into consideration local land development regulations based on DEP's interpretation of the Act. The ALJ's order dismissed local regulations because:

> [DEP] interprets the [Act], and in particular section 403.509, to mean that there are no "applicable" local government comprehensive plans

> or [land development regulations] for the proposed transmission lines
> . . . .

[A.103 (R172.34013)]. Moreover, the Recommended Order deferred to FPL business practices on the issue of requiring the company to underground its lines, stating that "FPL generally uses underground design where overhead construction is not feasible or the requesting entity pays the incremental cost of underground construction." [R172.34038 (Recommended Order, ¶ 433)]. However, even FPL's witness, Daniel Hronec, could only recall two instances where any city ever paid to underground transmission lines. [T21.2787:14-2789:21].

The conditions of certification attached to the Recommended Order were punctuated by use of the phrase "to the extent practicable," rendering impotent and useless the constraints placed on FPL during any post-certification review process. Within the document:

> "Practicable" means reasonably achievable considering a balance of land use impacts, environmental impacts, engineering constraints, and costs.

[R173.34236]. In addition, where Miami's agency report sought to coordinate with FPL to preserve important local historic and archeological resources, the conditions of certification rendered by the ALJ require only notice to the City. [R174.34400, 34403]. This is even the case where FPL decides that damaging a historical resource is unavoidable. [R174.34403].

5. The Power Plant Siting Board's Review

As the head of DEP, the Governor and the Cabinet, sitting as the Siting Board, are given the ALJ's Recommended Order to decide whether to approve, deny, modify the utility's application, or defer certification until after the nuclear reactors receive federal approval.[8] In this role, the Governor and the Cabinet review policy and conclusions of law *de novo* and are authorized to reject or modify the ALJ's finding of fact where it is not supported by competent substantial evidence. § 120.57(l)(l), Fla. Stat. (2013).

At the Siting Board hearing on May 13, 2014, it was announced that the DEP General Counsel would assume the neutral role of parliamentarian and attorney to the Siting Board. [C.46:19-23]. During the same hearing, the Deputy General Counsel advocated in favor of FPL's application. Notwithstanding his "neutral" role, DEP's General Counsel twice deferred to his Deputy when asked a question by the Cabinet. [C.75, 103]. On one of these occasions, DEP's General Counsel allowed his Deputy to advise the Governor and the Cabinet that "land development regulations are not applicable to transmission lines" and that "transmission lines are not development under [chapter] 380." [C.105:16-23]. Similarly, DEP's General Counsel represented to the Governor and the Cabinet

[8] FPL stipulated during the DOAH proceeding that it would not begin construction of the portion of the eastern transmission line corridor that runs through Miami until after receiving its federal license. [T14.1938-39].

that the Siting Board, as a matter of law, may not require the undergrounding of the transmission lines as a condition of certification. [C.90:17-23].

After the completion of all presentations and public comment, the Governor and the Cabinet approved FPL's Application. In addition to the portions of FPL's project related to the nuclear reactors, this approval gave the company access to two corridors – each up to a mile in width – within which the transmission lines may be located. *See* § 403.503(11), Fla. Stat. (2013). Ultimately, the Final Order altered FPL's primary transmission line corridor in the west to avoid Everglades National Park but included the same conditions of certification attached to the ALJ's Recommended Order. [R189.37215]. Thus, the Final Order ignored local regulations in its conditions and concluded:

> … demonstration of compliance with [local] regulations is not required for electrical transmission lines because local government land use plans and zoning ordinances are not "applicable" nonprocedural requirements for those facilities …. **[The Act] excludes certain facilities, including electrical transmission lines, from those facilities that the Siting Board will consider for purposes of applying land use and zoning requirements**.

[A.99-100 (R186.36659-60)(emphasis added)]. Accordingly, Miami appeals this action under sections 403.513 and 120.68(2)(a), Fla. Stat. (2013).

ISSUES ON APPEAL

I. Whether the Governor and the Cabinet, acting as the Siting Board, erred by failing to consider local regulations, when certifying the transmission line corridors that are part of this proposed electrical power plant project as required by sections 403.509(3)(b) and (c), Fla. Stat. (2013)?

II. Whether the Governor and the Cabinet, acting as the Siting Board, erred by concluding that they are not able to address the undergrounding of transmission lines in the conditions of certification for a proposed electrical power plant project?

SUMMARY OF ARGUMENT

The conditions of certification attached to the Final Order must account for local regulations as applied to the transmission line corridors. This step is necessary to confirm the consistency of the proposed transmission line structures after final design submittals are sent to the City of Miami during the post-certification review process. Nevertheless, the Governor and the Cabinet, acting as the Siting Board, failed to consider local nonprocedural requirements and land development regulations as mandated by the Act. This Court should remand the matter to DOAH for fact-finding concerning compliance of the transmission line corridors with local regulations and the section 403.509(3) certification test.

Moreover, DEP and its agency head, the Siting Board, misinterpreted the Act by excluding transmission line corridors from the Siting Board's consideration of local regulations. The Act incorporates the substance of these regulations in its certification test and this test does not reference the chapter 380 "development" exception. Moreover, chapter 380 does not permit the Siting Board to omit entire corridors, or work conducted on rights-of-way that have not been established, from regulation as "development." Therefore, local regulations must be considered and incorporated into the conditions of certification that govern construction of structures ultimately erected within the approved transmission line corridors.

Instead, the Siting Board misunderstood chapter 380 to mean that local regulations do not apply to transmission line corridors and unfortunately circumvented the entire review process. Miami seeks a remand so that the ALJ may properly consider the impacts of FPL's application on local communities, thoroughly investigate which portions of the Application should be consistent with local regulations, and correctly apply the certification test.

In addition, the Governor and the Cabinet, as the Siting Board, have the authority to condition approval of FPL's application on undergrounding the transmission lines at the company's expense. Despite DEP's representations to the Siting Board, there is no legal basis, within the Act or case law, that prevents undergrounding from being included as a condition of certification. The Act

requires the Siting Board to consider the proposed project's consistency and compliance with local regulations. If achieving consistency necessitates undergrounding, it is within the Siting Board's authority to include such a requirement at the applicant's expense.

STANDARD OF REVIEW

The court reviews *de novo* an administrative agency's conclusions of law. *Parlato v. Secret Oaks Owners Ass'n*, 793 So. 2d 1158, 1162 (Fla. 1st DCA 2001). Under chapter 120, "[t]he court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate when it finds that: . . . . [t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action . . . ." § 120.68(7)(d), Fla. Stat. (2013). Although case law accords deference to administrative agencies, and warns that an agency's interpretation of a statute it implements should not be reversed unless clearly erroneous, there are exceptions to this general rule. *Miami-Dade Cnty. v. Gov't Sup'rs Ass'n of Florida, OPEIU AFL-CIO, Local 100*, 907 So. 2d 591, 593-94 (Fla. 3d DCA 2005).

Two exceptions are relevant to this case. First, a "court need not defer to an agency's construction or application of a statute if special agency expertise is not required . . . ." *Florida Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002). Second, a "court need not defer to an agency's

construction if the language of the statute is clear and therefore not subject to construction." *Doyle v. Dep't of Bus. Regulation*, 794 So. 2d 686, 690 (Fla. 1st DCA 2001).

Similarly, the court reviews *de novo* an agency's interpretation of prior case law. *See Parlato*, 793 So. 2d at 1162; *Sw. Florida Water Mgmt Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000). Likewise, administrative rulings – although persuasive – are not binding. *Lambert v. State ex rel. Mathis*, 77 So. 2d 869, 871 (Fla. 1955).

ARGUMENT

I. THE GOVERNOR AND THE CABINET, ACTING AS THE SITING BOARD, ERRED WHEN CERTIFYING THE TRANSMISSION LINE CORRIDORS BY FAILING TO CONSIDER LOCAL REGULATIONS AS REQUIRED BY § 403.509(3)

In power plant certification proceedings, the Siting Board is required to consider the substantive requirements of agencies and land development regulations. The Final Order on review in this case refused to consider these criteria in violation of Florida law. Therefore, the Final Order must be reversed and remanded for DOAH, and ultimately the Siting Board, to consider local regulations pursuant to the section 403.509(3) certification test.

A. The Power Plant Siting Act
Requires Consideration of Local Regulations

Section 403.502 makes explicit the legislative intent that consideration of local regulations is required in the certification of a power plant and associated transmission lines:

> The Legislature recognizes that the selection of site and the routing of associated facilities, **including transmission lines**, will have a significant impact upon the welfare of the population, the location and growth of industry, and the use of the natural resources of the state. The Legislature finds that the efficiency of the permit application and review process at both the state and local level would be improved with the implementation of a process whereby a permit application would be centrally coordinated and all permit decisions could be **reviewed on the basis of the standards and recommendations of the deciding agencies**. It is the policy of this state that … the location and operation of electrical power plants … **will not unduly conflict with the goals established by the applicable local comprehensive plans**. (Emphasis added).

Most importantly, the Act mandates that the Siting Board apply a certification test, which contains seven specific criteria that cannot be ignored or substituted, when approving a power plant and associated facilities:

> In determining whether an application should be approved in whole, approved with modifications or conditions, or denied, the board … **shall consider whether, and the extent to which, the location, construction, and operation of the electrical power plant will:**
>
> a) Provide reasonable assurance that operational safeguards are technically sufficient for the public welfare and protection.

> **b) Comply with applicable nonprocedural requirements of agencies.**
>
> **c) Be consistent with applicable local government comprehensive plans and land development regulations.**
>
> d) Meet the electrical energy needs of the state in an orderly, reliable, and timely fashion.
>
> e) Effect a reasonable balance between the need for the facility as established pursuant to s. 403.519 and the impacts upon air and water quality, fish and wildlife, water resources, and other natural resources of the state resulting from the construction and operation of the facility.
>
> f) Minimize, through the use of reasonable and available methods, the **adverse effects on human health, the environment, and the ecology of the land and its wildlife and the ecology of state waters and their aquatic life.**
>
> g) **Serve and protect the broad interests of the public**.
> § 403.509(3), Fla. Stat. (2013) (emphasis added).

Below this language, the Legislature included the requirement that:

> **[a]ny transmission line corridor** certified by the board … **shall meet the criteria of this section**. § 403.509(4)(a), Fla. Stat. (2013).

Moreover, section 403.503(21) defines "nonprocedural requirements of agencies" to mean:

> …any agency's regulatory requirements established by statute, rule, ordinance, **zoning ordinance, land development code, or comprehensive plan**, excluding any provisions prescribing forms, fees, procedures, or time limits for the review or processing of information submitted to demonstrate compliance with such regulatory requirements. (Emphasis added.)

An "agency" is defined under this chapter to include local governments. § 403.503(3), Fla. Stat. (2013). Therefore, the certification test codified in section 403.509(3) clearly requires inclusion of local comprehensive plans and land development regulations. DEP and FPL have agreed with this interpretation.[9] Thus, per statute, local comprehensive plans, substantive conditions of zoning approvals, and other land development regulations must be considered in the power plant siting process.

The Attorney General, in reviewing the requirements of the Act, opined that local, substantive requirements cannot be ignored by the Siting Board:

> … the [Act] clearly contemplates that a local government … may impose substantive regulatory requirements [that] will be considered by the Siting Board …. **[A]ny deviation from those substantive requirements and recommendations, therefore, should only be made after careful consideration**.[10]

---

[9] DEP and FPL stated that "[c]ompliance with the local government's nonprocedural requirements, whether contained in environmental regulations, **the local government's comprehensive plan, or substantive conditions of a zoning approval**, **is to be considered at the certification hearing**." [R108.21247 (Joint Mot. to Define Scope of Land Use Determination)(emphasis added)].

[10] As a related point, the Act preempts local procedure, but not local substance. Although section 403.510 states that "[t]he state hereby preempts the regulation and certification of electrical power plant sites and electrical power plants as defined in this act," local substantive regulations are supposed to be considered in, not preempted by, the state's siting process. Preemption entails conflict, and a conflict between statutes usually means "one must violate one provision in order to comply with the other." *See Lowe v. Broward County*, 766 So. 2d 1199 (Fla. 4th DCA 2000). The City's land development regulations do not conflict with the Act and no evidence has shown that FPL's application could not simultaneously comply with both bodies of law. In addition, ambiguity should be resolved in favor

AGO 97-08 (emphasis added).

Accordingly, the Siting Board must examine and incorporate the substance of the City of Miami's local provisions in the same manner that it has examined and incorporated local environmental protection regulations, noise ordinances, drainage requirements, and all other conditions currently in the Final Order. These local laws are among those that must be considered and which the Siting Board must determine how to apply.

As demonstrated below, DEP's argument that "land development regulations are not applicable to transmission lines" is incorrect, overbroad, and **infects** the entire Final Order. [C.105:17-19]. By excluding entire transmission line corridors from consideration, the Final Order permits the construction of ten-story transmission poles without regard to the height restrictions, location constraints, and other municipal requirements accounted for in the Act's language.[11]

1. The Siting Board Refused to Consider Local Regulations In The Conditions Of Certification

The conditions of certification issued with the Final Order are the method by which the Siting Board considers and incorporates local regulations. They contain all of the rules governing FPL's project. For example, conditions of certification

---

of local government. *See C.f. HTS Ind., Inc. v. Broward County*, 852 So. 8d 382 (Fla. 4th DCA 2003).

[11] For a review of the substantive regulations at issue, see Miami's Agency Report. [A.127-38 (R102.20154-65)].

may restrict the areas within the transmission line corridor where the lines themselves may be located or simply insert variances to local ordinances within those conditions.[12] *See* §§ 403.503(11), 403.511(2)(b)(1), Fla. Stat. (2013). In this case, the conditions of certification governing the transmission line corridors completely **ignore** local regulations, meaning that FPL's project will not meet the certification test criteria.[13] [A.115-18 (T40.5738:10-19, 5740:23-25, 5741:1)].

During the certification hearing at DOAH, each local government submitted proposed conditions of certification with its agency report. Rather than incorporate these proposed conditions for thorough consideration under the certification test, DEP officials struck every proposed condition of certification that cited a comprehensive plan or zoning code. [A.115-18 (T40.5738:10-19, 5740:23-25, 5741:1)]. Subsequently, the ALJ stated, "there are no 'applicable' local government [land development regulations]" when that term is read with the

[12] For instance, there is a variance attached to the wastewater treatment plant portion of this project. [R174.34311 (Conditions of Certification Section B.VII.E.8)].

[13] In contrast, the conditions of certification issued, pursuant to the Transmission Line Siting Act, with another final order expressly mandated "[a]ll lines crossing Hillsborough County right-of-way and/or other county property will be designed for compliance with applicable non procedural [sic] county standards . . . ." and that "[the utility] **shall comply with applicable nonprocedural requirements of … the Future Land Use Element of the County's Comprehensive Plan** . . . ." Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line, Conditions of Certification, DEP case no. TA0513A, OGC case no. 09-3192, at 30-31 (Florida Department of Environmental Protection) (emphasis added), *accessible at* http://tinurl.com/transmission-conditions.

section 380.04 "development" exception. [A.103 (R172.34013)]. Therefore, the record reviewed by the Siting Board is incomplete without any consideration of local regulations as applied to the transmission line corridors.

The Siting Board's failure to incorporate local requirements in its conditions of certification is critical. Normally, when the Siting Board certifies a corridor, the applicant is entitled to select, and then acquire, a series of sites that eventually become the right-of-way described in section 403.503(27). However, construction of the transmission line in this statutory right-of-way is **subject only** to the conditions of certification during the post-certification review process. *See* § 403.511(2)(a), Fla. Stat. (2013).

2. Nothing In The Certification Test Permits The Siting Board To Ignore Local Regulations

The Siting Board misinterpreted the statutory language to categorically exclude transmission lines from consideration of local regulations under the certification test:

> **The Final Order adopts the ALJ's conclusion that demonstration of compliance with these regulations is not required for electrical transmission lines because local government land use plans and zoning ordinances are not "applicable" nonprocedural requirements for those facilities.** The ALJ properly concluded that the Legislature enacted the [Act] to empower the Siting Board to decide on a "state position with respect to each proposed [power plant] site and its associated facilities." (RO ¶ 822). The [Act] clearly and unambiguously states the Legislature's intent that the [Act's]

> provisions preempt any provision of law that attempts to regulate and certify power plants and associated facilities. The local governments contend that the [Act] includes the requirement for local government review for land use and zoning impacts throughout the statute. *See* § 403.50665, Fla. Stat. **The Final Order adopts the ALJ's conclusion that the [Act] excludes certain facilities, including electrical transmission lines, from those facilities that the Siting Board will consider for purposes of applying land use and zoning requirements.** The [Act] excludes from consideration those facilities that are not defined as "development" under chapters 163 and 380, F.S., and thus are otherwise excluded from regulation by local land use plans and zoning requirements. § 403.50665(1), (2)(a), Fla. Stat. ("The applicant shall include in the application a statement on the consistency of the site and any associated facilities that constitute a 'development' as defined in s. 380.04, with existing land use plans and zoning ordinances ...; "each local government shall file a determination ... on the consistency of the site, and any associated facilities that are not exempt from the requirements of land use plans and zoning ordinances under chapter 163 and s. 380.04(3) .... ").

[A.99-100 (R186.36659-60)(emphasis added)].

For support, the Siting Board relied on the word "applicable" in the certification test. *See* §§ 403.509(3)(b) and (c), Fla. Stat. (2013). The Act does not include a statutory standard or definition for "applicable" because it is not necessary. The term is not ambiguous in the context of the certification test. Moreover, absent a statutory definition, words should be given their plain and ordinary meaning, and "[o]ne looks to the dictionary for the plain and ordinary meaning of words." *Garcia v. Federal Ins. Co.*, 969 So. 2d 288, 292 (Fla. 2007) (*citing Beans v. Chohonis*, 740 So. 2d 65, 67 (Fla. 3d DCA 1999)). Instead of

simply giving effect to the word "applicable," the Siting Board has used the term as a justification to ignore entire provisions of the statute.

Likewise, the Act's citations to section 380.04, which are referenced by the Final Order, do not relate to the certification test, the Siting Board, or the word "applicable." The Legislature has demonstrated that it is capable of referencing section 380.04 explicitly elsewhere in the Act. *See* §§ 403.50665, 403.508, 403.517(2), and 403.5175(3), Fla. Stat. (2013). However, those provisions also explain how this definition should be used. Hence, section 380.04 requires significant consideration only within those proceedings framed around the ALJ's fact-finding mission.[14] Moreover, the seven criteria listed within the certification test are specific, extensive, and exclusive. *See* § 403.509(3), Fla. Stat. (2013). Without an express citation, nothing in the plain language of section 403.509 enables the Siting Board to ignore the criteria listed in the certification test when approving a transmission line corridor. *See* § 403.509(4)(a), Fla. Stat. (2013); *see also Moonlit Waters Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996).

[14] Part I.B. of this brief explains that the application of section 380.04 is limited. At most, it applies only to work in certain locations where poles will be sited. Regarding DEP's argument above, the ALJ cited several cases to claim that the Florida Supreme Court, and others, "have all confirmed [DEP's] construction of the statute." [A.106-107 (R173.34182)]. None of these cases demonstrate that the term "applicable" in the Act exempts transmission line corridors from local regulations. For a more detailed discussion, see footnote 19.

Thus, the Final Order's construction of the Act is an "implausible and unreasonable statutory interpretation" that does not require deference. *See Atlantis at Perdido Ass'n, Inc. v. Warner*, 932 So. 2d 1206, 1213 (Fla. 1st DCA 2006) (citations omitted). The Act expressly incorporates local regulations. It is an error to interpret the statute so that there are no applicable local government comprehensive plans or land development regulations. *See Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 33 (Fla. 1st DCA 2008) (*citing Hechtman v. Nations Title Ins. of NY*, 840 So. 2d 993, 996 (Fla. 2003)("words in a statute should not be construed as mere surplusage")). The explicit omission of transmission lines and transmission line corridors from consideration of local regulations fell outside the range of discretion delegated to the agency by law and was inconsistent with the Act's requirements. *See* §§ 120.68(7)(d) and (e)(1), Fla. Stat. (2013); *see also* §§ 403.509(3) and (4)(a), Fla. Stat. (2013); *Atlantis*, 932 So. 2d at 1214.

3. All Elements Of The Certification Test Apply To Transmission Lines By Statutory Definition

The statutory definition of "electrical power plant" also makes it clear that all of the certification test criteria apply to transmission lines. Within the Act, "electrical power plant" is an all-inclusive term that includes the site of the electrical generating facility, substations, resource recovery facilities, and **new and associated transmission lines**. *See City of Riviera Beach v. Florida Dept. of Envtl. Regulation*, 502 So. 2d 1337(Fla. 4th DCA 1987). Under section 403.503(14), the

term "electrical power plant" includes "the site … **and associated transmission lines** …." (Emphasis added). Turning to the first part of the certification test, it is clear that local regulations must apply to the transmission line portion of FPL's application:

> In determining whether an application should be approved in whole, approved with modifications or conditions, or denied, the board … shall consider whether, and the extent to which, the location, construction, and operation of the **electrical power plant** will [comply with the seven criteria listed in the certification test].

§ 403.509(3), Fla. Stat. (2013)(emphasis added). Because "electrical power plant" includes the transmission lines, the provisions of sections 403.509(3)(b) and (c) require the Siting Board to consider whether the "electrical power plant" (that is, the plant site **and** associated transmission lines) complies and is consistent with Miami's comprehensive plan and zoning regulations.

4. The Siting Board's Interpretation Is Contrary To The Clear Statutory Language

Comparing the text of the Transmission Line Siting Act reinforces the conclusion that local regulations apply to transmission line corridors. Mirroring the Act, this statute is in the same chapter and contains its own certification test:

> In determining whether an application should be approved in whole, approved with modifications or conditions, or denied, the board … shall consider whether, and the extent to which, the location of the transmission line corridor and the construction, operation, and maintenance of the transmission line will: …

> c) Comply with **applicable** nonprocedural requirements of agencies;
> d) Be consistent with **applicable** provisions of local government comprehensive plans, if any; ….

§ 403.529(4), Fla. Stat. (2013)(emphasis added). The language is nearly identical. If the term "applicable" referenced section 380.04 to permit the Siting Board's omission, then no comprehensive plan or zoning ordinance would ever be considered under the Transmission Line Siting Act because that statute affects **transmission lines only**. Equating "applicable" with section 380.04 to expunge entire subparagraphs of statutory text is an unreasonable and erroneous interpretation.

5. The ALJ Hampered Discovery Concerning The Need To Include Local Regulations In The Conditions Of Certification

The ALJ's expedited discovery process and denial of Miami's motion for continuance insulated FPL's application from thorough review. [T3.287-88; T14.1952:19-1957:3]. Ultimately, the siting of a nuclear power plant is no simple task and the federal approval process will continue through late 2016. Although the state level process has been ongoing for years, DOAH permitted FPL to serve its proposed list of exhibits and experts less than 20 days before the first hearing and allotted only 60 workdays to conduct numerous depositions on incredibly technical

subject matters.[15] [R149.29334 (Notice of Filing FPL's (Proposed) Exhibit List 6/19/13); T1.1; R141.27879 (Notice of FPL's Witness Disclosure 4/23/13); R130.25657-58]. Witness testimony covered complex topics like hydrostratigraphy, civil engineering, econometrics, and wildlife biology, among others. [T4.461-70; T6.824-31, 871-77; T39.5592-97].

Far from being harmless, the ALJ's denial prevented comprehensive consideration of all the facts necessary to meet the criteria in the statutorily required certification test. For example, the certification test criteria include the minimization of adverse effects on human health. § 403.509(3)(f), Fla. Stat. (2013). Nevertheless, population density was not considered while formulating the conditions of certification. [T40.5735-36; 5765:25; 5766:1-5].

Likewise, there was no consideration given to the danger presented by snapped poles or the availability of preexisting rights-of-way within FPL's preferred corridors. During the proceeding, there was no reference to a single plat, identification of any reservations in perpetuity, or any measure taken to specify which, if any, established rights-of-way FPL had or might utilize within the one-mile wide transmission line corridors the company had proposed. In addition,

[15] Here, the 60 workdays excludes weekends, Memorial Day (5/27/13), Independence Day (7/4/2013), and the day of the first hearing, during which it would not have been possible to schedule a deposition. The fact that FPL's counsel is not local and required travel arrangements further complicated the coordination of discovery.

discovery requested by Miami relating to the history of snapped transmission lines was never provided. This information concerns a critical part of the certification test and is necessary to "serve and protect the broad interests of the public."[16] § 403.509(3)(g), Fla. Stat. (2013). Miami's inability to examine, and the Siting Board's refusal to review, this information skewed consideration of the transmission line corridors, their likely impacts on dense population centers, and thus resulted in injustice to the City. *See Harvey Covington & Thomas, LLC v. WMC Mortg. Corp.*, 85 So. 3d 558, 559 (Fla. 1st DCA 2012).

Moreover, the City's request was made at the beginning of the proceeding in recognition of the voluminous and technical matters to be considered. At this early stage, the additional time would not have prejudiced FPL's Application. Nevertheless, the ALJ denied Miami's motion for a continuance, which the City requested to better investigate the specialized issues essential to this case.[17] [T3.287-88; T14.1952:19-1957:3]. The end result was a determination that failed

[16] Similarly, Miami-Dade County sought, but never received, information necessary to determine the consistency of transmission lines not located within an established right-of-way. [R130.25674 (Miami-Dade County's Determination Regarding Land Use and Zoning Consistency)].

[17] The ALJ rejected Miami's argument because the City had been a party since 2009. However, the parties could not begin meaningful discovery at that time or even once the March 2013 Pre-Hearing Order was issued. [T21.2863:16-20]. Meaningful discovery was not possible until FPL's expert reports were finalized. For example, the transmission line Overhead Reports, FPL Ex. 313-14, are both dated May 25, 2013. [R242.47707; 47760]; *see S.Z. v. Dep't of Children & Family Servs.*, 873 So. 2d 1277 (Fla. 3d DCA 2004).

to minimize the adverse effects on human health, the environment, and the ecology of the land. *See* § 403.509(3)(f), Fla. Stat. (2013).

Indeed, the more than 70,000-page record ultimately produced represents not the depth of review but that FPL's Application contemplates the largest such project seen in almost half a century. [R172.33898-99 (Recommended Order, ¶ 2)].

B. The Siting Board Incorrectly Applied A "Development" Exception

Section 380.04 also does not permit the wholesale exemption of transmission line corridors from the Siting Board's consideration of local regulations. The relevant portion excludes from the definition of "development":

> Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing **on established rights-of-way** any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, ...

§ 380.04(3)(b), Fla. Stat. (2013) (emphasis added).

From this language, the Siting Board incorrectly determined that a "demonstration of compliance with [local] regulations is not required for electrical transmission lines because local government land use plans and zoning ordinances are not 'applicable' nonprocedural requirements for those facilities." [A.99-100 (R186.36659-60)]. This decision assumes that transmission line corridors are categorically excluded from consideration by the definition of "development" in section 380.04. [A.103 (R172.34013)].

As explained below, the Siting Board's interpretation is incorrect because: 1) the exception cannot be applied to an entire corridor; and 2) the exception only applies to land currently dedicated as a right-of-way. Moreover, FPL indicated that its final transmission line path will be created through a mixture of public rights-of-way and private easements. [T54.7546].

If the Final Order is permitted to stand, the ten-story transmission line poles at issue in this proceeding will be constructed without regard to local requirements regardless of whether or not those structures are installed within an established right-of-way. Through this reading, a utility may avoid compliance with local land development regulations merely by filing a request for certification of a transmission line corridor and the entire corridor will be exempt from local regulations. This interpretation eviscerates the language in the certification test, at once requiring the Siting Board to consider local requirements while simultaneously invalidating them. *See Atlantis*, 932 So. 2d at 1213.

1. The "Development" Exception Does Not Apply To The Entire Corridor

The Siting Board does not certify a right-of-way. It certifies an entire **corridor**. The only relation between the two terms is that a right-of-way ultimately must be chosen from within the corridor. Under the Act:

> (11) **"Corridor"** means the **proposed area** within which an associated linear facility right-of-way is to be located. **The width of the corridor proposed for certification as an associated facility, at**

> **the option of the applicant, may be the width of the right-of-way or a wider boundary, not to exceed a width of 1 mile**. The area within the corridor in which a right-of-way may be located may be further restricted by a condition of certification. **After all property interests required for the right-of-way have been acquired by the licensee, the boundaries of the area certified shall narrow to only that land within the boundaries of the right-of-way** ….
>
> ***
>
> (27) **"Right-of-way"** means **land necessary** for the construction and maintenance of a connected associated linear facility, such as a railroad line, pipeline, or transmission line as owned by or proposed to be certified by the applicant …. The right-of-way shall be located within the certified corridor and shall be identified by the applicant **subsequent to certification** in documents filed with the department prior to construction.

§§ 403.503(11) and (27), Fla. Stat. (2013) (emphasis added).

This distinction is crucial because, at the certification stage of the power plant siting process, only the whole width of the corridor – up to 1 mile – will be identified.[18] The final route, and individual parcels of land, on which the ten-story poles will be erected remains unknown until after the Siting Board enters the final order on certification and the post-certification review begins. [T8.1082:1-7].

[18] The corridor itself is not subject to the "development" exception under section 380.04(3)(h) either. The ALJ pointed to this provision, which exempts from "development" the "creation . . . of rights of access, easements, or other rights in land." § 380.04(3)(h), Fla. Stat. (2013); [A.105-06 (R173.34181-82)]. However, certification of the corridor, by definition, does not constitute creation of a right in land. *See* BLACK'S LAW DICTIONARY 14, 585-86 (Deluxe 9th ed. 2009). The corridor is simply a proposed area from within which the applicant will later identify the property interests it **intends** to acquire and the parcels of land where new structures will be erected. *See* § 403.503(11) and (27), Fla. Stat. (2013).

Thus, the "development" exception **cannot** be applied to the entire width of the corridor, as was done here, because the corridor is comprised of many parcels outside of established rights-of-way, some of which are privately owned. Since the Siting Board does not know if construction will actually occur within an established right-of-way or a private easement, the "development" exception cannot exempt transmission line corridors from the consideration of local regulations required by the Act. *See A. Duda & Sons, Inc. v. St. Johns River Water Mgmt. Dist.*, 17 So. 3d 738, 744-745 (Fla. 5th DCA 2009)("[a]n agency may not redefine statutory terms to modify the meaning of a statute").

2. Construction Of A Transmission Line On Land That Is Not Established As A Right-Of-Way Constitutes "Development"

The "development" exception is limited to work conducted on "**established** rights-of-way" without further qualification. § 380.04(3)(b), Fla. Stat. (2013)(emphasis added). Courts interpreting section 380.04 use "established" interchangeably with the word "existing," indicating that rights-of-way must already exist to qualify for this exception. While discussing this "development" exception, Florida's Supreme Court concluded that certain infrastructure improvements were not subject to a town's comprehensive plan because "there is nothing in the record to suggest that the improvements envisioned by this project are outside the Town's **existing** rights of way…." *Rinker Materials Corp. v. Town of Lake Park*, 494 So. 2d 1123, 1126 (Fla. 1986). The Fifth District Court of

Appeal also recognized the narrow scope of the "development" exception, stating that similar improvements could be exempted "as long as they are constructed within **existing** rights-of-way." *St. Johns Cnty. v. Dep't of Cmty. Affairs*, 836 So. 2d 1034, 1037 (Fla. 5th DCA 2002) (emphasis added).

Thus, section 380.04 is clear and its words have their plain meanings. *See Bd. of County Comm'rs of Monroe County v. Fla. Dep't of Cmty Affairs*, 560 So. 2d 240, 242 (Fla. 3d DCA 1990) (citing *Citizens of the State of Fla. v. Pub. Serv. Comm'n*, 425 So. 2d 534 (Fla. 1982)); *Trushin v. State*, 475 So. 2d 1290 (Fla. 3d DCA 1985). The statute uses "established," which is the past tense. This distinction is critical to understanding the limited scope of the "development" exception because the use of a particular verb tense in a statute can reveal the Legislature's intent. *See James v. County of Volusia*, 683 So. 2d 555, 556 (Fla. 5th DCA 1996). By using the past tense, the "development" exception applies only to existing rights-of-way.

As a result, the Siting Board's interpretation impermissibly rewrites the statutory language to strike the word "established." When faced with a comparable agency interpretation, the Florida Supreme Court warned "[t]his Court does not have the authority to strike a modifying clause where such a revision would substantively change the entire meaning of the statute …." *Florida Dept. of Revenue v. Florida Mun. Power Agency*, 789 So. 2d 320, 324 (Fla. 2001). Based

on the plain language of the "development" exception, a right-of-way must be established to exempt the transmission line and pole. In this case, the right-of-way has not been established and there is **no** exemption from local regulations.

Furthermore, the Legislature qualifies "established" when its goal is to include rights-of-way that do not yet exist. For example, the Transmission Line Siting Act contemplates rights-of-way for roads, etc., and "include[s] rights-of-way **established at any time**." § 403.524(2)(c)(emphasis added). The Power Plant Siting Act does not contain this qualification. *See* §§ 403.50665, 403.508, 403.517(2), and 403.5175(3), Fla. Stat. (2013). Thus, the exclusion of the language "established at any time" demonstrates the Legislature's intent that section 380.04's exception applies only to rights-of-way established at the time that the Application is reviewed and cannot be exploited to disregard local regulations. *See Florida Dept. of Revenue*, 789 So. 2d at 324. This is the only way that the Siting Board can practically consider the issue during the certification process.

Nonetheless, the Final Order applied section 380.04's exception at the corridor level, without clarifying what rights-of-way actually existed, to justify the exclusion of entire proposed transmission lines from regulation as "development."[19] [R186.36659-60]. FPL argued for this interpretation, stating that

[19] The Final Order adopted this view on the ALJ's recommendation. [A.105-07 (R173.34181-82, 34185)]. However, the ALJ's rationale lacks support. A review of the case law cited by the ALJ reveals that each case is inapplicable to the matter at

"[a]n 'established' right-of-way is not the same as an 'existing' or 'pre-existing' right-of-way. An established right-of-way is one for which the right of access is acquired by the utility at any time." [A228 at n.5 (R158.31268)]. However, interpreting the statute to cover future rights-of-way renders the term "established" superfluous. *See Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 33 (Fla. 1st DCA 2008) (*citing Hechtman v. Nations Title Ins. of NY*, 840 So. 2d 993, 996 (Fla. 2003)). Consequently, FPL's interpretation defies the plain meaning of the statute.

In addition, Florida courts have held that a plan to create a right-of-way in the future is not a right-of-way. *See Clipper Bay Investments, LLC v. State Dep't of Transp.*, 117 So. 3d 7 (Fla. 1st DCA 2013). In *Clipper Bay*, the First District interpreted section 712.03(5), Florida Statutes, which provides that marketable title does not extinguish property interests in the nature of "rights-of-way." The First District rejected the Florida Department of Transportation's (FDOT) argument for

---

hand because it involved either: 1) a pre-existing, specifically identified right-of-way, 2) an agricultural exemption from ad valorem taxation, or 3) an exemption from "development" for agriculture. [A.106-07 (R173.34182-83)]; *see Rinker Materials Corp. v. Town of Lake Park*, 494 So. 2d 1123 (Fla. 1986); *St. Johns Cnty. V. Dep't of Cmty. Affairs*, 836 So. 2d 1034 (Fla. 5th DCA 2002); *Robbins v. City of Miami Beach*, 664 So. 2d 1150 (Fla. 3d DCA 1995); *Bd of County Comm'rs of Monroe County v. Fla. Dep't of Cmty. Affairs*, 560 So. 2d 240 (Fla. 3d DCA 1990); *Love PGI Partners, LP v. Schultz*, 706 So. 2d 889 (Fla. 5th DCA 1998); *Friends of Mantanzas, Inc. v. Dep't of Envtl. Prot.,* 729 So. 2d 437 (Fla. 5th DCA 1999); *Leon Cnty. Bd. Of Cnty. Comm'rs v. Karimipour*, 4 So. 2d 777 (Fla. 1st DCA 2009).). In sum, none of the cases cited apply to the current situation, where FPL proposes to build a new transmission line outside of existing rights-of-way on land that, in many places, it does not currently own.

the existence of a right-of-way based on an unrecorded right-of-way map, without supporting testimony or proof that "the land at issue was ever 'devoted to or required for' right-of-way purposes." *Id*. at 15. Even without the word "established" in the statute, the **intent** to create a right-of-way did not constitute an actual right-of-way.[20] *Id*. at 9.

3. DEP Improperly Advised The Siting Board Concerning The "Development" Exception And Standard Of Review

During the Siting Board hearing, a DEP lawyer must assume the neutral role of parliamentarian and attorney to the Siting Board itself; here, that role fell to DEP's General Counsel. [C.46:19-23]. However, he abandoned his neutral role at this hearing by allowing the Deputy General counsel to advise the Siting Board **and** advocate on behalf of FPL's application. [C.103:22-25]; *see Cherry Communications, Inc. v. Deason*, 652 So. 2d 803 (Fla. 1995)(Agency attorneys may not act in a dual capacity by advocating one position and advising the final decision maker). At this point, the Deputy General Counsel incorrectly declared "land development regulations are not applicable to transmission lines" and that "transmission lines are not development under [chapter] 380." [C.105:16-23].

[20] In this case, the record suggests that FPL may choose to install poles outside of existing rights-of-way. [T9.1339, 1341-42; T54.7546-49]. Section 380.04's exception to the definition of "development" – by including the word "established" – only applies to specific activities conducted within a right-of-way that already exists. Therefore, structures built outside an existing right-of-way, but within the corridor, are not exempt from a demonstration of consistency with local regulations.

In this case, DEP was not an impartial participant. During the initial DOAH certification hearing, the Deputy General Counsel "cross-examined witnesses, [and] made objections," in favor of FPL's application. *See Cherry*, 652 So. 2d at 805. Moreover, DEP jointly filed several times with FPL, including their Proposed Recommended Order and Exceptions to the Recommended Order and sided with FPL throughout the certification proceeding.[21]

Instead of providing options to the Siting Board himself, the DEP General Counsel allowed his subordinate to advocate for a specific decision. The General Counsel knew that his Deputy had already made objections and cross-examined witnesses at the DOAH hearing. Nevertheless, he permitted his agency to promote FPL's application, rebut presentations in opposition to it, **and** advise the Siting Board at the final hearing through one attorney: the Deputy General Counsel. *See id*.; *McAlpin v. Criminal Justice Standards and Training Com'n*, 120 So. 3d 1260, 1262-63 (Fla. 1st DCA 2013). Moreover, the DEP General Counsel allowed his Deputy to advise the Siting Board in a way that promoted FPL's application. [C.105:16-23]. The end result was a violation of the City's due process rights.

[21] [*See, e.g.,* R176.34747 (FPL/DEP Exceptions to the Recommended Order); R108.21233 (Joint Mot. to Define Scope of Land Use Determination 12/1/11); R139.27520 (Joint Mot. for Issuance of an Order of Pre-Hearing Instructions 3/19/13); R166.32837 (Joint Mot. for Official Recognition 11/5/13); R167.32880 (Joint Proposed Recommended Order); R191/37736 (DEP & FPL's Joint Resp. in Opp'n to COM Mot. for Recons. 6/18/14)].

Further complicating matters, DEP applied the wrong standard of review to the Siting Board at the hearing and in the Final Order. At the Siting Board hearing, the DEP Deputy General Counsel mistakenly advised the Governor and Cabinet, "[Y]ou are simply acting as an appellate review as the Secretary said." [C.104:14-15]. This was reflected in the Final Order, which incorrectly applies the "clearly erroneous" standard to the Siting Board's review of the Recommended Order. [R186.36689]. The "clearly erroneous" standard is reserved for agency review of an ALJ determination regarding an unadopted rule or judicial review of an agency's interpretation of a statute when that task requires special expertise. *See* § 120.57(1)(e)(3), Fla. Stat. (2013)*; Bd. of Trs. of Northwest Fla. Cmty. Hosp. v. Dep't of Mgmt. Servs., Div. of Ret.,* 651 So. 2d 170, 173 (Fla. 1st DCA 1995). Neither situation applies here.

In essence, DEP advised the Siting Board that they could do no more than approve the Recommended Order. This mistake produced a Final Order that incorrectly ignored local government regulations and undermined the Siting Board's function as an unbiased decision maker. *See McAlpin*, 120 So. 3d at 1263.

II. THE GOVERNOR AND THE CABINET, ACTING AS THE SITING BOARD, ERRED BY CONCLUDING THAT THEY HAD NO AUTHORITY TO REQUIRE UNDERGROUNDING OF THE TRANSMISSION LINES AS CONDITIONS OF CERTIFICATION

The Siting Board incorrectly concluded that it did not have the authority to require undergrounding and it was an error not to consider undergrounding the transmission lines to achieve compliance with the certification test criteria. The case must be remanded for DOAH, and ultimately the Siting Board, to consider the City's assertion and proof that consistency with local regulations mandates undergrounding the transmission lines.

Where the scope of an agency's regulatory jurisdiction is concerned, "stricter scrutiny is undertaken by the reviewing court and less deference is given to the agency's interpretation . . . ." *And Justice For All, Inc. v. Florida Dept. of Ins.*, 799 So. 2d 1076, 1078 (Fla. 1st DCA 2001).

According to the Act, the Governor and the Cabinet are empowered to make certification of a utility's application subject to conditions expressed in the Final Order. *See* § 403.511, Fla. Stat. (2013). Although the Act specifically lists the kinds of conditions that may not be included in a power plant certification, nothing prevents the Governor and the Cabinet from conditioning certification of a power plant on undergrounding a transmission line at the project applicant's expense. *See* § 403.511(2)(b)(2), Fla. Stat. (2013).

In contrast, the Siting Board adopted the reasoning in the Recommended Order and based its position that undergrounding is outside of its jurisdiction on an incorrect reading of one Florida Supreme Court case. [C.90:17-91:7; A.109-13 (R172-73.33993-94, 34179-81)]. The Florida Supreme Court has never taken a position as to whether undergrounding may be required as a condition of certification in the licensing of a transmission line corridor. However, it has held that 1) "the legislature did not intend that cities and counties could dictate the decision of whether public utilities should convert their overhead systems to underground," and 2) "the Public Service Commission is vested with the authority to require conversion of distribution lines to underground where 'feasible' if the commission finds this to be 'cost-effective.'" *Florida Power Corp. v. Seminole County*, 579 So. 2d 105, 108 (Fla. 1991). First, the *Seminole County* case has no bearing on whether the Siting Board has authority to require undergrounding; there, the local governments were attempting to "unilaterally mandate the conversion of the overhead lines to underground," and the decision did not involve action by the state government through the Act or the requirements of its certification test. *See id*. at 108. Second, the Court's determination regarding the Public Service Commission (PSC) was based on statutory language that the Legislature has since deleted from section 366.04.[22]

[22] The deleted language directed the PSC to study the cost-effectiveness and

Likewise, DEP erred when it advised the Governor and the Cabinet that "the Florida Supreme Court in the Seminole County case has been very clear that the cost causer has to bear the increased cost of undergrounding." [C.90:17-23]. *Seminole County* does not mention the cost causer principle.[23] According to the Act, the Siting Board must consider whether FPL's power plant and transmission lines are consistent with local regulations. *See* § 403.509(3), Fla. Stat. (2013). This is a statutory requirement, not a request by local governments for special service.

Even the PSC has acknowledged "[w]here the governmental authority exercising jurisdiction over structure location has issued a permit for, or otherwise approved, specific locations for the supporting structures, that permit or approval shall govern." In re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy & Jose Gutman, Teresa

---

feasibility of undergrounding transmission lines statewide. Ch. 89-292, § 2, at 3, Laws of Fla. The language was removed once the study was completed. Ch. 95-146, §13, at 210, Laws of Fla.

[23] In contrast, the PSC has articulated a preference that, "where practical, the additional costs of requests for special services, such as facilities relocation, should be borne by those customers who request such services and thus cause those costs." In re: Complaint against Florida Power & Light Company regarding placement of power poles and transmission lines by Amy & Jose Gutman, Teresa Badillo, and Jeff Lessera, PSC-02-0788-PAA-EI, 5 (Florida Public Service Commission June 10, 2002), *available at* http://www.psc.state.fl.us/dockets/orders/. The current case does not concern a proceeding before the PSC, nor is such a cost causer principle applicable.

Badillo, and Jeff Lessera, PSC-02-0788-PAA-EI, 5 (Florida Public Service Commission June 10, 2002) (quoting NESC section 231(B)(4)), *available at* http://www.psc.state.fl.us/dockets/orders/. Here, that authority belongs to the Siting Board. Hence, the jurisdiction conferred upon the PSC does not include the sole authority to dictate the specific location, and by extension the undergrounding, of new lines. Moreover, as stated previously, the Siting Board is obligated to consider land use and zoning ordinances. As such, the Siting Board has the authority to require FPL to underground the transmission lines as a condition of certification to be consistent with land use and zoning regulations.

CONCLUSION

Based upon the foregoing arguments and authorities, the City of Miami respectfully requests that this Court reverse the Final Order and remand it for further proceedings before DOAH, and ultimately before the Siting Board, including the taking of new evidence and argument to properly consider local, substantive regulations and compliance with section 403.509(3) in determining whether the application should be approved, including but not limited to undergrounding as a condition of certification.

Respectfully submitted,

VICTORIA MÉNDEZ, City Attorney
JOHN A. GRECO, Deputy City Attorney
FORREST L. ANDREWS, Assistant City Attorney
MATTHEW HABER, Assistant City Attorney
Counsel for City of Miami
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130-1910
Tel.: (305) 416-1800
Fax: (305) 416-1801
jagreco@miamigov.com

By: *s/Victoria Méndez*
Victoria Méndez
Florida Bar. No. 0194931

By: *s/John A. Greco*
John A. Greco
Florida Bar. No. 991236

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to counsel listed below by email this 23rd day of January, 2015:

By: *s/John A. Greco*
John A. Greco, Deputy City Attorney

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman and the size is 14-point font.

By: *s/John A. Greco*
John A. Greco, Deputy City Attorney