SJR 2007-23

ST. JOHNS RIVER WATER MANAGEMENT DISTRICT

MARION COUNTY, FLORIDA, Petitioner, vs. C. RAY GREENE, III; ANGUS S. HASTINGS; and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondents.	)	DOAH Case No. 06-2464 SJRWMD F.O.R. No. 2006-71 CUP Application No. 97106

FINAL ORDER

This matter comes before the Governing Board for consideration of the recommended order submitted by J. Lawrence Johnston, the administrative law judge (ALJ) designated by the Division of Administrative Hearings in this matter, the parties' exceptions to the recommended order, and responses to those exceptions. Having considered the recommended order, the exceptions and responses, and the oral argument of counsel for all parties, the Governing Board enters this final order.

APPEARANCES

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For Respondent St. Johns River Water Management District	Vance W. Kidder, Esquire St. Johns River Water Management District 4049 Reid Street Palatka, Florida 32177-2529

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PRELIMINARY STATEMENT

Petitioner Marion County (Petitioner, or the County) commenced this proceeding by filing a petition challenging the intended decision of Respondent St. Johns River Water Management District (the District) to issue a consumptive use permit (CUP 97106) to Respondents C. Ray Greene III and Angus S. Hastings (the Applicants). The permit comprises two authorizations: one for dewatering (removal of surface water) necessary to continue an existing limerock mining operation (known as the Black Sink Mine) on the Applicants' property during 2006 only, and the other for withdrawing an average of 499,000 gallons per day (gpd) (amounting to 182.14 gallons per year) of groundwater from the Floridan Aquifer for bottled water use, over a twenty-year term. The Applicants expected to complete the mining operation and dewatering by the end of 2006 and proposed to commence using an existing ten-inch well on the site to withdraw groundwater at that time. The proposed use for bottled water would require the Applicants to use tanker trucks to transport the groundwater to bottled-water distributors outside Marion County. The County challenged only the groundwater allocation in CUP 97106, and the surface water allocation for dewatering is not at issue in this proceeding.

Salient among the points made by the petition are its allegations that the County was subject to an order of the District declaring a severe water shortage in Marion County and to a District rule restricting the use of water for lawn and landscape irrigation, that the County had a substantial interest in preventing such a shortage and in applying its Comprehensive Plan and Zoning Code to maintain water quality and supply, and that the District had failed to consider the

County's Plan and Code (including the requirement for a special use permit) or the water use restrictions faced by the County, as part of reviewing the application for a consumptive use permit. The respondent Applicants moved to dismiss the petition for untimeliness and lack of standing, arguing that the asserted interests related to the County's Plan and Code were not within the zone of interests meant to be protected by the pertinent statute and implementing rules. The ALJ denied the motion on September 1, 2006, ruling that the petition had been timely filed and made sufficient allegations for standing, subject to consideration of the evidence received at the formal hearing. On September 7, 2006, the Applicants filed a motion in limine, arguing that any evidence on whether the Applicants' proposed use of water was in compliance with the County's Comprehensive Plan and Zoning Code should be excluded as irrelevant to the District's decision on issuance of a consumptive use permit. On September 26, the ALJ granted the motion in limine.

Pursuant to notice, the ALJ then held a formal administrative hearing in Ocala, Florida, on October 4, 2006. After all parties filed their proposed recommended orders, the respondent District moved to strike a three-page newspaper article attached to the County's proposed recommended order, because it was not part of the record. Following the County's response to the motion to strike, the ALJ entered his recommended order on January 9, 2007, granting the District's motion and recommending that the Governing Board approve the consumptive use permit with the conditions in the Technical Staff Report. Both the District and the County filed exceptions to the recommended order on January 23, 2007, and the District timely amended its exceptions on January 24, 2007. The District filed its response to the County's exceptions on January 31, and on February 2, 2007, the Applicants timely filed their own response to the County's exceptions, thus completing the filings for the Governing Board's consideration in this

final order. By letter from counsel on January 11, 2007, the Respondent Applicants waived the deadline of forty-five days for the Governing Board to enter the final order addressing the recommended order and any exceptions to it. Accordingly, the matter was deferred until the regularly scheduled meeting of the Board on March 13, 2007.

ALJ'S RECOMMENDATION

Based on the findings of fact and conclusions of law in the ALJ's recommended order, the ALJ recommended that the District issue a final order approving the permit sought by CUP application 97106, as conditioned by the District's Technical Staff Report.

STATEMENT OF THE ISSUES

The general issue before the Governing Board is whether to adopt the recommended order of the ALJ as the District's final order approving the consumptive use permit with the conditions in the Technical Staff Report, or to reject or modify the recommended order in whole or part, under section 120.57(1)(l) of the Florida Statutes. More specifically, the issue is whether the portion of the application seeking a groundwater allocation (for bottled-water use) averaging 499,000 gpd (182.14 million gallons per year) over a term of twenty years meets the conditions for issuance in section 373.223 of the Florida Statutes, rule 40C-2.301, and the Applicant's Handbook: Consumptive Uses of Water. The Governing Board must also consider numerous narrower issues in ruling on each of the exceptions filed by the parties.

STANDARD OF REVIEW

Section 120.57(1)(l) of the Florida Statutes sets forth the standard of review that the Governing Board must follow in ruling on exceptions and deciding whether to adopt, modify, or reject the recommended order in whole or part. The ALJ is the fact finder, and the Governing Board may not reject or modify any finding of fact in the ALJ's recommended order unless the

Board first determines from a review of the entire record and states with particularity in the final order that the finding at issue was not based on competent substantial evidence or that the proceedings on which the finding was based did not comply with essential requirements of law. See Packer v. Orange County School Board, 881 S0.2d 1204, 1206 (Fla. 5th DCA 2004); Gross v. Dep't of Health, 819 So.2d 997, 1000-01 (Fla. 5th DCA 2002); Goss v. Dist. Sch. Bd., 601 So.2d 1232, 1234 (Fla. 5th DCA 1992); Heifetz v. Dep't of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); sec. 120.57(1)(l), Fla. Stat. (2006). "Competent substantial evidence" is evidence sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. See Perdue v. TJ Palm Assocs., Ltd., 755 So.2d 660, 665-66 (Fla. 4th DCA 1999), quoting from and following DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957). The term "competent substantial evidence" refers to the existence of some quantity of evidence for each essential element of a finding and to the legality and admissibility of that evidence. See Scholastic Book Fairs, Inc. v. Unemployment Appeals Comm'n, 671 So.2d 287, 289 n.3 (Fla. 5th DCA 1996). An agency may not disturb a finding of fact supported by any competent substantial evidence from which the finding could be reasonably inferred. See Freeze v. Dep't of Bus. Reg., 556 So.2d 1204, 1205 (Fla. 5th DCA 1990); Berry v. Dep't of Envtl. Reg., 530 So.2d 1019, 1022 (Fla. 4th DCA 1988). The Governing Board may not reweigh evidence admitted in the proceeding, may not resolve conflicts in the evidence, and may not judge the credibility of witnesses or otherwise interpret evidence anew. See Save Anna Maria, Inc. v. Dep't of Transp., 700 So.2d 113, 118 (Fla. 2d DCA 1997); Brown v. Criminal Justice Standards & Training Comm'n, 667 So.2d 977, 979 (Fla. 4th DCA 1996). The standard is not whether the record contains evidence contrary to the findings of fact in the recommended order, but whether

any competent substantial evidence supports each finding at issue. See Florida Sugar Cane League v. State Siting Bd., 580 So.2d 846, 851 (Fla. 1st DCA 1991).

In comparison to an agency's narrow authority to reject or modify an ALJ's findings of fact, the authority of an agency to reject or modify an ALJ's conclusions of law is less constrained. Under section 120.57(1)(l) of the Florida Statutes, the Governing Board in its final order may reject or modify any such conclusion of law (including any interpretation of an administrative rule) over which it has substantive jurisdiction, so long as the Board states with particularity its reasons for rejecting or modifying the conclusion and makes a finding that its substituted conclusion is as reasonable as or more reasonable than the rejected or modified conclusion. In interpreting the term "substantive jurisdiction" as it first appeared in the amendments to the Administrative Procedure Act in 1996, see 1996 Laws of Fla. ch. 96-159, sec. 19, the courts have continued to interpret the standard of review as requiring deference to the expertise of an agency in interpreting its own rules and enabling statutes. See, e.g., State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So.2d 607, 610 (Fla. 1st DCA 1998).

The Governing Board's authority to modify a recommended order does not depend on the filing of exceptions. See Westchester Gen. Hosp. v. Dep't of Human Rehab. Servs., 419 So.2d 705, 708 (Fla. 1st DCA 1982). When exceptions are filed, however, they become part of the record before the Governing Board, see sec. 120.57(1)(f), Fla. Stat. (2006), and in the final order the Board must expressly rule on each exception, except for any exception "that does not clearly identify the disputed portion of the recommended order by page number or paragraph, . . . identify the legal basis for the exception, or . . . include appropriate and specific citations to the record." See id. sec. 120.57(1)(k).

RULINGS ON EXCEPTIONS

Both the County and the District filed exceptions to the recommended order. The Governing Board has reviewed all the exceptions and addressed each one below. Citations to the record shall take the following forms: (T. xx) for citations to pages of the transcript of testimony at the hearing, Pet. Ex. __, at __ for citations to pages of an exhibit introduced by Petitioner Marion County, and Resp. Ex. __, at __ for citations to pages of an exhibit introduced by the Respondent Applicants. (The District did not introduce any exhibits, but the Applicants introduced the entire official file of the District on this consumptive use permit, as Respondents' Exhibit 1.)

RULINGS ON COUNTY'S EXCEPTIONS

Although the County states at the outset of its exceptions that "[t]he exceptions presented will follow the numbered paragraphs of the recommended order," Pet. Exceptions para. 1, the numbering of the paragraphs of the exceptions does not seem to bear any relation to the numbering of the paragraphs of the recommended order. Moreover, the County's exceptions actually begin with the second numbered paragraph, since the first numbered paragraph of the County's exceptions states not an exception but a recitation of the law on exceptions and a request for an explicit ruling on each exception presented. To avoid confusion over the numbering of the County's exceptions and paragraphs, however, this final order uses the same numbering for both, consistently with the County's own approach and that of the District and the Applicants in responding to the County's exceptions. The Board has also complied with the County's request and the law by addressing each of the County's exceptions below, using the County's heading for each, and taking them up in the same order as presented by the County.

County's Exception No. 1: Exceptions

As noted above, this paragraph does not take exception to anything in the recommended order, and there is nothing in it for the Governing Board to rule upon.

County's Exception No. 2: Special Use Permit

Without referring to any particular paragraph of the recommended order, the County takes exception to the absence of a condition in the recommended order that would make the consumptive use permit "subject to the issuance of a Special Use Permit" by the County. It is not clear what the County means by such a condition, but it appears that the County is seeking to condition the effectiveness of the consumptive use permit on the Applicants' first obtaining a local land use approval in the form of the special use permit.[1] Any such condition based on requirements imposed by authority other than chapter 373 of the Florida Statutes would run afoul of section 373.217, which preempts the regulation of the consumptive use of water and makes part II of chapter 373 "the exclusive authority for requiring permits" for such use. The District must follow that exclusive authority, as implemented by its adopted rules in chapter 40C-2 of the Florida Administrative Code, and has no authority to require a permit applicant to comply with local requirements that the District has not adopted by rule as criteria for issuing a consumptive use permit. See Save the St. Johns River v. St. Johns River Water Mgmt. Dist., 623 So.2d 1193, 1197-98 (Fla. 1st DCA 1993) (District was required only to determine whether permit application met the requirements imposed by the statutes and rules relating solely to the District's permitting

[1]If the County's second exception is intended only to make clear that issuance of the consumptive use permit does not relieve the Applicants from obtaining any County permit required for the Applicants' activities (other than the consumptive use of water that is preemptively regulated only by the water management districts), the standard language of such a permit already provides that clarity by including the following statement required by section 373.116(3) of the Florida Statutes to be placed in every consumptive use permit under part II and every environmental resource permit under part IV of chapter 373: "This permit does not . . . relieve the permittee from complying with any applicable local government, state, or federal law, rule, or ordinance." Indeed, the very inclusion of such a disclaimer statement in the District-issued permit shows that such compliance would have to be shown through a separate process and would not be a part of the District-issued permit. If the Applicants fail to obtain a necessary permit from the County or to comply with any other County land use or zoning requirements, the County presumably may avail itself of injunctive relief or some other remedy available to the County under its Code of Ordinances and chapters 125, 162, or 163 of the Florida Statutes.

authority, and compliance or noncompliance with another agency's requirements was irrelevant in proceeding on District-issued permit); see also Taylor v. Cedar Key Special Water & Sewerage Dist., 590 So.2d 481, 482 (Fla. 1st DCA 1991) (DER "was neither required nor authorized to deny or modify water pollution permits based on alleged noncompliance with local land use restrictions . . . , because the issuance of the permit must be based only on the applicable pollution control standards and rules"); Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So.2d 67, 68 (Fla. 3d DCA 1983) (same, for air pollution permit issued by DER); Fla. Aud. Soc'y v. South Fla. Water Mgmt. Dist., 21 F.A.L.R. 2105, 2110 (Fla. Land & Water Adjud. Comm'n 1998) ("[a]n agency's denial of an environmental permit under Chapter 373 or 403, F.S., cannot be based on noncompliance with local zoning or land use regulations, unless compliance with such regulations is required by a valid law or rule within the agency's permitting jurisdiction"). In paragraph 83 of the recommended order, the ALJ observed that the District has not adopted any of the County's land use requirements as criteria for issuing a consumptive use permit, nor any general requirement that an applicant for such a District-issued permit comply with local requirements before the District permit can issue or take effect. Competent substantial evidence supports this mixed finding of fact and conclusion of law, and the County has not identified any District rule adopting such local land use requirements.

Instead, the County asserts as the legal basis for this exception that the consumptive use permit is a "development order" under chapter 163 of the Florida Statutes authorizing "a commercial/industrial use of agriculturally zoned property" and therefore inconsistent with the County's Comprehensive Plan and zoning regulations. The County cites to section 163.3194 of the Florida Statutes, three pages of testimony in the hearing transcript, and four pages of the Applicants' first exhibit, a copy of the District's file for CUP Application 97106. But the

County does not explain how any of the cited evidence supports the assertion that the consumptive use permit is a "development order" that is inconsistent with the County's Comprehensive Plan and zoning regulations. Nor does any of the cited evidence even refer to a special use permit, let alone establishing a need to condition the consumptive use permit on the issuance of such a local permit based on considerations outside the scope of the District's jurisdiction under chapter 373 of the Florida Statutes.

The County also fails to explain in this exception how section 163.3194 of the Florida Statutes supports its argument for adding a condition in this District-issued consumptive use permit making it "subject to the issuance of a Special Use Permit by the [County]." Subsection 163.3194(1) requires that all actions taken by a governmental agency "in regard to development orders . . . be consistent with" a comprehensive plan, but the definitions in section 163.3164 make clear that a development order is a decision made by a local government, not an agency such as the District. Subsection 163.3164(7) defines "development order" (in pertinent part) as "any order granting . . . an application for a development permit," and subsection (8) of that statute in turn defines "development permit" as any building permit, zoning permit, . . . rezoning, special exception . . . *or any other official action of local government* having the effect of permitting the development of land." Sec. 163.3164, Fla. Stat. (2006) (emphasis added). Finally, in subsection 163.3164(13), "local government" is defined as "any county or municipality." Since only a county or municipality can issue a development permit, the District's issuance of a consumptive use permit is not issuance of a development order. Nowhere in these definitions can one find any hint that a permitting decision made by a water management district could be considered a development order under chapter 163 of the Florida Statutes. The rest of the act (the "Local Government Comprehensive Planning and Land Development Regulation

Act," as stated at the outset of section 163.3164) is consistent with that limitation on the meaning of "development order." The act focuses unwaveringly on the growth management planning and decisions of local governments, and the requirement that "development orders" be consistent with the comprehensive plan must be understood in the context of this focus of the act on the actions of local governments.

The statement in this second exception by the County that the permit would authorize "a commercial/industrial use of agriculturally zoned property" is misleading and may reflect a misunderstanding of the District's consumptive use permitting program as authorized by part II of chapter 373 and implemented by the District's adopted rules. The District has no authority to change the zoning classification that a local government has placed upon land within its jurisdiction, and the issuance of the permit at issue would not affect the County's zoning classification of the Applicant's property. The Technical Staff Report refers to the proposed use as a "commercial/industrial use" because that is the pertinent water-use classification in rule 40C-2.501. It is not a zoning classification. The District adopted this rule in large measure because section 373.246 of the Florida Statutes required the District to "adopt a reasonable system of water-use classification," as part of "a plan for implementation during periods of water shortage." See sec. 373.246(1), Fla. Stat. (2006). The water-use classification is also relevant to the District's determination of whether the proposed use is reasonable-beneficial under section 373.223(1), including whether it is consistent with the public interest. But a final order approving a consumptive use permit is solely for a proposed water use characterized as being within one of the District's water-use classifications, which have nothing to do with zoning or other land use considerations. Thus, an approval of such a water use (regardless of the District's water-use classification for it) has no effect on the zoning classification of the property where the

water will be withdrawn, nor on the local government's power to enforce its zoning requirements for that property.

For all the reasons set forth above in this discussion of the County's second exception, the Governing Board concludes that it has neither the duty nor the authority to add the condition requested by this exception and therefore must reject it.

County's Exception No. 3: Bottling of Water

In this exception, the County disagrees with the ALJ's finding of fact "that letters were presented from two businesses engaged in bottling water stating [*sic*] intention to purchase water." Rec. Order para. 11. The County does not explain exactly what it means by this exception. The two letters in question are in the record. See Resp. Ex. 1, at 74 & 90. They convey an "intention to purchase water" and are further corroborated by the testimony of one of the Applicants (T. 30-33). Although the County cites to some evidence in the record allegedly in conflict with the ALJ's finding, competent substantial evidence supports the finding, and the Board is not at liberty to reweigh the evidence. See, e.g., Perdue v. TJ Palm Assocs., 755 So.2d at 665; Heifetz, 475 So.2d at 1281-82. This exception therefore lacks merit and is rejected.

County's Exception No. 4: Groundwater

The County's fourth exception objects to the ALJ's finding that a hydrogeologic study for the Applicants had "determined that water withdrawn from the well could be marketed as spring water. See Rec. Order para. 8. The County cites to evidence in the record supporting an inference that the Applicants propose to withdraw groundwater (rather than water directly from a spring), but that has never been in question. Aside from the dewatering for the mining operation (not at issue in this proceeding), the application expressly seeks an allocation of groundwater, see Resp. Ex. 1, at 11, 22-24, and the recommended order is replete with references to groundwater,

as noted by the County itself in this exception. Instead, this exception attacks the finding that such groundwater could be marketed as spring water. None of the evidence cited by the County undercuts that finding. To the contrary, the regulation that the County cites as a legal basis for rejecting the finding actually offers some support for it. See 21 C.F.R. sec. 165.110(a)(2). Promulgated by the Food and Drug Administration (FDA), this federal rule provides that water collected through a well (a "borehole," in the rule) from the same underground hydrogeologic formation that also produces a natural spring may also be called "spring water." See id. Sec. 165.110(a)(2)(vi); see also Testimony of Troy Kuphal (T. 218-19) (site of Applicants' well is in the recapture zone—an area of groundwater recharge—for Silver Springs); Pet. Ex. 5, at xvi (Silver and Rainbow Springs discharge from the Floridan Aquifer); id. Appendix V (maps of recapture zones for Silver and Rainbow Springs); Pet. Ex. 1, at 118 (Applicants' proposed withdrawal is from the Floridan Aquifer).

Moreover, the County does not explain the relevance of this "marketing" issue to the criteria for issuance of a consumptive use permit. The only conceivable relevance is to the requirement that the Applicants demonstrate the need for the amount of water requested. The Applicants met that criterion by introducing the letters from bottled-water distributors and supporting testimomy discussed in the ruling on the County's third exception above. Because competent substantial evidence supports the ALJ's findings both on this narrow "marketing" issue and on the broader related issue of need, the Governing Board must likewise reject the County's fourth exception.

County's Exception No. 5: Groundwater Supply

The County takes this exception to the ALJ's allegedly having found on page 13 of the recommended order that the County's "groundwater needs" will not become an issue until the

Applicants' consumptive use permit expires. In support of this exception, the County states "the public interest . . . in available groundwater during the [term] of the permit" and cites to two of its exhibits—but to no particular pages of either document.

This exception is both inaccurate in its premise and vague in its support. In paragraph 26 of the recommended order (on page 13), the ALJ actually found that the County has projected that the availability of groundwater to supply all anticipated uses of water will become limited in twenty to thirty years from now—and that this limit will "not become an issue until after the [Applicants'] permit expires." In other words, the ALJ found that by the County's own projection, there will be enough water to meet the County's groundwater needs for the next twenty or more years—all through the term of this permit. Thus, the finding at issue appears to be completely consistent with the County's asserted "public interest" in ensuring that there will be enough groundwater to supply all anticipated uses for the next twenty years, and the County does not explain how the finding is inconsistent. Competent substantial evidence of record supports this finding (T. 176-77, 223). Instead of showing (or even stating) that such evidence does not support the finding, the County cites only generally to two exhibits (without explanation) and again implicitly invites the Governing Board to reweigh the evidence, which it cannot do. See, e.g., Perdue, 755 So.2d at 665; Heifetz, 475 So.2d at 1281-82. Accordingly, the Governing Board must reject the County's fifth exception as having no basis in law or fact.

County's Exception No. 6: Allocation of Groundwater

The County takes exception to the ALJ's finding (apparently located in paragraph 30 of the recommended order) that the Applicants' proposed withdrawal would not result in any environmental harm. The County does not cite to any portion of the record to support this exception. Competent substantial evidence of record shows that the District considered the

potential for harm from this withdrawal over the entire term of the twenty-year allocation and concluded that there would be no such harm. The County failed to take exception to the ALJ's findings in paragraphs 18 through 24 on the modeling and analysis of harm performed by the Applicants and reviewed by the District. Those findings support the ultimate finding of fact to which the County takes this sixth exception. The County's vague and conclusory statement that this exception is based in part on "the District's current restrictions on landscape irrigation" is a red herring. Those restrictions apply throughout the District, were imposed for reasons that had nothing to do with the proposed withdrawal at issue, and would remain in effect even if the present application were denied. Moreover, the proposed use for human consumption of bottled water is an extremely efficient and beneficial use and is in no way inconsistent with the purposes of the landscape irrigation requirements in rule 40C-2.042 to eliminate inefficient and wasteful use of water. The Governing Board therefore rejects this exception as meritless.

County's Exception No. 7: Public Interest

In this exception, the County objects to another alleged finding that the ALJ did not actually make. The County takes issue with a "finding that the District's determination of public interest allows it to disregard that necessary county land use approvals have not been obtained, [and] disregard impacts related to local roads from trucks transporting the water and other impacts not related to water resources." Pet. Exceptions para. 7. In a mixed finding and conclusion of law in paragraph 41 of the recommended order, the ALJ actually found and concluded that the District does not take into consideration such land use issues and transportation impacts or other impacts not related to water resources because "[n]o such requirements are included in the District's adopted permitting criteria." As part of the basis for

this exception, the County quotes section 373.116(3) of the Florida Statutes, which requires that all District permits include the following language:

> This permit does not convey to the permittee any property rights or privileges other than those specified herein, nor relieve the permittee from complying with any applicable local government, state, or federal law, rule or ordinance.

Sec. 373.116 (3), Fla. Stat. (2006). Contrary to the County's position in this exception, the quoted statute makes clear that the District's consumptive use permitting decision is completely separate from any additional approvals required by local (or other) governmental entities, such as county land use approvals that may take into consideration such impacts as those from tanker trucks on local roads and other potential impacts from an applicant's activities unrelated to the consumptive use of water. In effect, by requiring the District permit to serve notice that the permittee must still obtain necessary local approvals, this statute preserves local authority over local land use decisions and distinguishes them from the District's permitting decision, which must be based on the authority of chapter 373 of the Florida Statutes. Because the quoted statute provides no authority for the District to apply a local government's criteria for land use decisions in deciding whether to issue or deny a consumptive use permit, it likewise lends no support to this exception by the County. For further discussion of and case law on the District's lack of authority to apply a local government's criteria for land use decisions, see the ruling on the County's second exception above.

The only other support offered by the County for this exception to the District's not requiring land use approval as a permitting criterion is the testimony of a witness that the District had not issued a consumptive use permit for another applicant until the applicant had "got that dealt with." A review of the testimony of the District witness in question, however, shows that staff have not required land use approval as a condition precedent to the issuance of a

consumptive use permit. For example, if a permit applicant has not applied for local land use approval, the District staff have not required it to be obtained as part of the consumptive use permitting process. However, in the unusual circumstance when a local land use approval has been denied before or during the District's permit review, and the denial precludes the activity that would necessitate the amount and timing of the need for water as set forth in an application, District staff have considered the denial of local land use approval as evidence in determining whether the applicant has provided reasonable assurance of need under rule 40C-2.301(4)(a), part of the District's reasonable-beneficial use criteria. In short, the District takes into consideration a local government's denial of land use approval when the local decision is evidence relevant to the District's determination of need for a proposed consumptive use under review. The local decision is evidence, not a criterion. The only criteria that District staff apply in reviewing an application for the consumptive use of water are those adopted by rule under chapter 373 of the Florida Statutes.

Thus, the testimony cited by the County actually supports the ALJ's finding, rather than undercutting it. Because competent substantial evidence and the requirements of chapter 373 support the finding at issue, the Governing Board must reject this exception as unfounded.

County's Exception No. 8: Permitting Requirements

The County's eighth exception raises the same issue as in Exceptions No. 2 and No. 7, but focuses more narrowly on whether "the District can limit its consideration of the public interest by limiting consideration of requirements . . . not included in the District's adopted permitting criteria." The only support offered for this exception is chapter 373 in general and the reasonable beneficial use test of section 373.223 in particular—but without any explanation or

analysis. This exception must be rejected as baseless for the same reasons and under the same case law presented in the ruling on the County's second exception above.

County's Exception No. 9: Landscape Irrigation Restrictions

Citing only to section 373.223 of the Florida Statutes as support, the County objects here to an alleged inconsistency between the ALJ's finding that the District has imposed restrictions on landscape irrigation to limit the wasteful use of water and the finding that the Applicants' proposed use will be a "highly efficient use of water." The two findings are consistent, reflecting the District's requirement that the use of water be efficient rather than wasteful. The County's reason for viewing these findings as inconsistent appears to be the County's own characterization of the proposed use as being "for the financial gain of one property owner." This exception does not identify any basis for objecting to the finding on the requirements for lawn and landscape irrigation. Instead, the exception attacks two other findings by the ALJ. In paragraph 43 of the recommended order, the ALJ found that the proposed use of water is highly efficient, resulting in little or no waste of water. See also the discussion in the ruling on the County's sixth exception above. In paragraph 44 of the recommended order, the ALJ made a mixed finding of fact and conclusion of law that in considering the consistency of a proposed use with the public interest (and thus in deciding whether to approve a consumptive use permit), the District does not take into account the amount of financial gain the applicant may receive from the proposed use. Nearly every consumptive use permittee derives some financial benefit or advantage from its water allocation; there is no criterion in chapter 373 or the District's rules implementing it that would preclude or limit such gain. Competent substantial evidence supports both findings, and the County makes no attempt to show how the ALJ's findings (and

conclusion) in these two paragraphs are inconsistent with anything in section 373.223. The Governing Board rejects this exception too as lacking any merit.

County's Exception 10: Financial Gain

In this tenth exception, the County again raises the spectre that the Applicants will make a profit from its proposed use of groundwater as authorized by the consumptive use permit. Aside from citing to testimony indicating the amount of the gross revenue that the Applicants could receive from selling all the water that they could pump at the maximum allocation for a year, this exception adds nothing to the County's ninth exception and must be rejected for the same reasons, as well as for the well-settled principle (under the case law cited in the ruling on the County's second exception above) that the District cannot evaluate a permit application by criteria that the legislature has not authorized by statute or the District has not adopted by rule.

County's Exception 11: Defective Notice

The County's eleventh exception takes issue with the ALJ's finding in paragraphs 50 and 51 of the recommended order that the District's noticing of the permit application was adequate and appropriate, given that the County suffered no prejudice from it. The asserted basis for this exception is that sections 373.116 and 373.229 of the Florida Statutes require that the notice identify the place of the use and the location of the well. Section 373.116 requires that notice be given but does not refer to specification of the location of a well as part of the content required for the notice. Section 373.229(1)(h) does require that the notice include "[t]he location of the well" but does not state how specific the identification of the well's location must be. Competent substantial evidence in the record shows that the District's notice of the application at issue identified the well location by section, township, and range and that the County filed comment letters while the application was being reviewed and a timely petition to challenge the District's

intended decision. The ALJ's further finding that the County suffered no prejudice from the notice rests on the same evidence. The Governing Board concludes that the District's notice of the application did comply with the statutes cited by the County and therefore rejects the County's eleventh exception as unfounded in law or fact.

County's Exception 12: Economic Impact

In this exception, the County disagrees with the ALJ's conclusion in paragraph 67 of the recommended order that the economic impacts from the proposed use will be positive. Significantly, the County did not take exception to the findings of fact in paragraph 28 of the recommended order (under the heading "No Evidence of Economic or Environmental Harm") and in paragraph 40 (sale of bottled water for human consumption is "a legitimate, beneficial economic enterprise," and "no detrimental impacts . . . will result from this use"), on which the conclusion in paragraph 67 presumably was based. Competent substantial evidence supports those findings and thus the conclusion at issue in this exception. The only support that the County asserts for this exception is the reasonable-beneficial use test of section 373.223, the existing restrictions on landscape irrigation, the financial benefit to one property owner, and the lack of necessary land use approvals. Competent substantial evidence supports all the findings of fact (and the conclusion of law in paragraph 79) showing that the Applicants met the reasonable-beneficial use test, and the County does not make an allegation to the contrary. Nor does the County explain how any of the other reasons given for this exception undercuts the conclusion at issue. The Governing Board's rulings on several of the County's other exceptions above (Nos. 2, 6, 7, 8, 9, and 10) address and dispose of those same issues. The Governing Board therefore rejects this exception as lacking any basis in law or in fact.

County's Exception No. 13: Existing Legal Users

Citing again only to the reasonable-beneficial use test of section 373.223 as support for this exception, the County takes issue with the ALJ's alleged "conclusion that the District can restrict its consideration of public interest to legal users existing at the time the application is submitted." This exception appears to confuse two very different conclusions located on the page (32) of the recommended order cited by the County as the location of the conclusion at issue. In paragraph 78, the ALJ concludes that in determining whether a proposed use would interfere with "existing legal uses," the District does not consider "speculative, potential future uses" not yet permitted or in existence to qualify as "existing legal uses" protected from such interference. The context of that conclusion is interference with existing legal uses, not consistency with the public interest.[2] The ALJ then turns to the evaluation of the proposed use for its consistency with the public interest, in paragraphs 80 and 81. Neither of those conclusions addresses the meaning of "existing legal uses." By mixing up the public interest evaluation (of an application for a proposed use or the renewal of an existing use) with the issue of interference (by a proposed use, with any existing legal use already authorized), the County's thirteenth exception objects to a purported conclusion that does not exist in the recommended order. Because the exception fails to clearly identify a portion of the recommended order to which it objects, the Governing Board need not rule on it in this final order. See sec. 120.57(1)(k), Fla. Stat. (2006).

Nonetheless, because the gist of the County's thirteenth exception seems to take issue with the District's restrictive interpretation of "existing legal uses" as excluding those not in

[2] Similarly, the finding (in paragraph 27 of the recommended order) on which this conclusion rests is focused on interference with existing legal uses, not consistency with the public interest. The County did not object to that finding of fact.

existence at the time the application is submitted, the Governing Board will address that core objection here.

The source of the phrase ("existing legal uses") and interpretation at issue is a portion of section 373.223 of the Florida Statutes, the very statute cited by the County as its sole basis for this exception. The exact language of the statutory provision is instructive: a proposed use must "not interfere with any presently existing legal use of water." See sec. 373.223(1)(b), Fla. Stat. 2006) (emphasis added). Although the plain meaning of the word "existing" (in distinction from "former" or "future") itself can refer to what is in present existence, the use of "presently" before "existing" makes that distinction crystal clear and eliminates any possibility that uses not yet in existence are not included in the prohibition, regardless of whether they are anticipated as possible or even likely. In the context of the criteria for issuing a consumptive use permit, the word "legal" further restricts the pool of existing uses protected by this prohibition to those that have a District permit or are exempt from the requirement to obtain a permit, thus excluding existing uses that do not qualify for a permit exemption and are not yet permitted, though already in existence. The same exclusion applies with even greater force to uses not yet in existence and not yet permitted.[3]

Moreover, the District adopted rules implementing and interpreting this statutory language on which the conclusion of law at issue in this exception by the County is based. Rule 40C-2.301(3) of the Florida Administrative Code makes it clear that the phrase "presently existing legal use" in subsection (2)(b) of the same rule and in section 373.223(1)(b) of the

[3] For the purposes of providing temporary grandfathering when chapter 373 of the Florida Statutes was enacted, the legislature uses the phrase "existing uses" in section 373.226 to mean any uses already in existence before the first rules implementing the consumptive use permitting requirements of chapter 373 were adopted. Significantly, the same section limits the grandfathering protection of such uses to two years from the date of such rule adoption, expressly requiring an application for a permit for each such use within those two years and making issuance of the first permit conditional on a showing that the existing use is reasonable-beneficial under section 373.019 and allowable under Florida common law.

Florida Statutes means a legal use that exists "at the time of receipt of the application for the consumptive use permit." See Fla. Admin. Code R. 40C-2.301(2)-(3). The County has not challenged these rules under section 120.56 of the Florida Statutes or even cited or addressed these rules anywhere in its exceptions. An agency must follow its adopted rules in applying criteria for decisions affecting substantial interests. See, e.g., Wise v. Dep't of Mgmt. Servs., 930 So.2d 867, 872 (Fla. 2d DCA 2006) (concurring with ALJ's conclusion that agency cannot exercise discretion inconsistently with its own rule requirements); Flamingo Lake RV Resort, Inc. v. Dep't of Transp., 599 So. 2d 732, 733 (Fla. 1st DCA 1992) (agency had no authority to apply a nonrule policy in conflict with a rule that the agency had properly adopted). The conclusion to which the County objects in this exception accurately reflects the interpretation embodied in those rules, and the Governing Board will not depart from it. The Board must therefore reject the County's thirteenth exception.

County's Exception No. 14: Comprehensive Planning

This is another exception in which the County objects to the District's excluding the County's land use requirements from the District's evaluation of a proposed use for consistency with the public interest. Specifically, the County's takes issue here with the ALJ's conclusion that the District "can" (i.e., has the authority to) exclude such land use requirements from its consideration of the public interest. As the sole basis for this exception, without explanation or analysis, the County cites only two statutes, neither of which supports a conclusion that the District must take into account a local government's land use requirements in its determination of whether an application for a consumptive use permit is in the public interest.

Moreover, as the ALJ found and concluded, the District has not adopted any such local requirements as permitting criteria and therefore has no authority to enforce such requirements.

For the reasons given in the ruling on the County's second exception, the Governing Board concurs with the ALJ's conclusion at issue and rejects the County's fourteenth exception as having no merit.

County's Exception No. 15: District Criteria

Finally, the County takes exception to the ALJ's conclusion that District-adopted criteria can limit "the Reasonable-Beneficial use and Public Interest requirements." There is no such conclusion on the page of the recommended order cited in this exception, and the County has not identified any particular limiting criterion imposed by rule on the statutory requirements. Since there is nothing specifically identified to which the County objects in this exception, there is nothing specific for the Governing Board to rule upon—and no requirement to do so, under section 120.57(1)(k) of the Florida Statutes. The only support offered for this exception is the citing of the same two statutes (sections 163.3194 and 373.223) discussed in numerous exceptions above. To the extent that the County intended this exception to question the District's legal authority to adopt rules interpreting the reasonable-beneficial use test and other portions of section 373.223 as not authorizing consideration of local land use requirements in deciding whether to issue a consumptive use permit, the Governing Board rejects this exception because the issue that it poses can be raised only in a rule challenge proceeding under section 120.56 of the Florida Statutes, and the County has not followed that procedure. The Board also rejects this exception as having no more merit than the previous exceptions raising the same or highly similar issues.

RULINGS ON DISTRICT'S EXCEPTIONS

The District filed three exceptions, two of them raising questions of law and the third posing a mixed issue of law and fact. Neither the County nor the Applicants filed any response to the District's exceptions.

District's Exception No. 1: Failure to Rule on the Applicability of Section 373.223(3)

The District first takes exception to the failure of the ALJ to include in the recommended order any ruling on the argument in the District's proposed recommended order that section 373.223(3) of the Florida Statutes does not apply to the proposed use at issue. In the proposed recommended order, the District correctly points out that because the challenged proposed use is solely for bottled water, the special set of additional factors to consider in evaluating whether a proposed transport and use of water across county boundaries is consistent with the public interest do not apply. (The District does not dispute that the less elaborate test for consistency with the public interest provided as the third prong of the reasonable-beneficial use test of section 373.223(1) does apply to this proposed use.) The District urges that the Governing Board include a conclusion of law in the final order recognizing that the overlay of additional public interest factors for inter-county transfers of water does not apply to this application.

Whether deemed a rejection or a modification of the ALJ's implicit conclusion of law that the District's requested conclusion was either erroneous or unnecessary to the resolution of the issues raised by the petition, the addition of such a conclusion of law must meet the same standard:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such [a] conclusion of law . . . , the agency must state with particularity its reasons for rejecting or modifying [the] conclusion of law . . . and must make a finding that its substituted

> conclusion of law . . . is as [reasonable as] or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

Sec. 120.57(1)(l), Fla. Stat. (2006); see also Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So.2d 1140, 1142 & n.2 (Fla. 2d DCA 2001) (interpreting "substantive jurisdiction" as "administrative authority" or "substantive expertise").

In view of this standard, the Governing Board accepts the District's first exception, in substantial part, and concludes that the limited applicability of section 373.223(3) to the proposed use must be clarified. Strictly speaking, the first paragraph of section 373.223(3) does apply to the proposed use, precisely because that paragraph excepts bottled-water use from the additional overlay of public interest factors in the remainder of subsection (3) that the District otherwise would have to consider when faced with a proposed inter-county transport and use of water. Such factors include several issues raised by the County, including the adequacy of existing and anticipated sources of water to supply . . . reasonably anticipated future needs of the water supply planning region where the proposed water source is located, and consultations with local governments affected by the proposed transport and use. But because the Florida Legislature expressly excepted bottled-water use from these additional requirements, the Governing Board concludes that the additional public interest factors enumerated in paragraphs (a) through (g) of section 373.223(3) of the Florida Statutes do not apply to the Applicants' proposed use. The Board makes this additional express conclusion of law and applies the statutory exception based on a reading of the plain language of the statute in question, in order to clarify the distinction between the public interest requirement of section 373.223(1)(c) and the additional public interest considerations of section 373.223(3)(a) through (g), and to avoid the potential for considering public interest factors not relevant to the proposed use for bottled water.

For these reasons, the Governing Board finds that this additional conclusion is more reasonable than the omission of such a conclusion in the recommended order.

District's Exception No. 2: Admissibility of Two Exhibits

The District's second exception objects to the ALJ's admission of the County's Exhibits 5 and 6 into evidence. The exhibits in question are the County's report on strategies for protecting Silver and Rainbow Springs (Pet. Ex. 5) and the County's summary of draft preliminary determinations made as part of its "50 Year Water Study Project" on water supply needs, sources, and management issues (Pet. Ex. 6). At the hearing, the ALJ had reserved ruling on the objections of the Applicants and the District to the admissibility of these two exhibits, but on page 4 of the recommended order he overruled the objections without explanation. The ALJ's evidentiary ruling is a legal conclusion imbued with fact-finding (about the nature of the evidence and its relevance to the issues, as a foundation for admissibility), and ordinarily such a ruling is a conclusion of law outside the substantive jurisdiction of the District and therefore protected by section 120.57(1)(l) from rejection or modification by the District. See Barfield v. Dep't of Health, 805 So.2d 1008, 1011-12 (Fla. 1st DCA 2002) (agency lacked substantive jurisdiction to reject evidentiary conclusion). However, the District argues that the exhibits at issue are irrelevant as a matter of law to the criteria for permit issuance. The District rather summarily rests this argument on the same considerations that it raised in its first exception—i.e., that section 373.223(3) excepts bottled-water use from being subjected to the additional public interest scrutiny imposed by the remainder of that statute on other inter-county transfers of water. That statute is within the substantive jurisdiction of the District, and the District's first exception raised a pure issue of law in interpreting that statute. But given the factual elements inherent in the ALJ's evidentiary ruling on the exhibits in question, the apparent (though slight)

relevance of the two exhibits to potential environmental impacts (on springs), and the District's own observation that the ALJ seems not to have relied on either of the exhibits as a basis for any findings of fact, the Governing Board is unable to find that a rejection of the ALJ's admission of this evidence would be as reasonable as or more reasonable than the ALJ's ruling, as required by the standard in section 120.57(1)(l) for rejecting or modifying a conclusion of law. Cf. Wise v. Dep't of Mgmt. Servs., 930 So.2d at 871 (reversing agency's final order in part because the substituted conclusions of law and interpretation of administrative rule were not more reasonable than that which was rejected or modified); Deep Lagoon Boat Club, 784 So.2d at 1143-44 (concurring with DEP Secretary's view that his substantive jurisdiction did not extend to overturning ALJ's mixed findings and conclusions on the applicability of collateral estoppel to limit scope of review of secondary impacts from previously permitted project for which the permit had expired). Moreover, because the admission of the two exhibits has played no role in the ALJ's findings of fact or in the dispositive (non-evidentiary) conclusions of law recommending approval of the consumptive use permit, the District's second exception appears to be immaterial—lacking the capacity (whether accepted or rejected) to make a difference in the decision on permit issuance. The Board therefore declines to overturn the ALJ's ruling that admitted these two exhibits into evidence and denies the District's second exception.

District's Exception No. 3: Request to Change Allocation and Expiration Dates in Permit

The District's third exception asks the Governing Board to change the ALJ's recommendation (that the permit be approved with the conditions set forth in the Technical Staff Report) and approve the permit with changed conditions that take into account the delay caused by the County's challenge to the District's intended approval. As a result of that unavoidable delay, District asks that the permit expiration and annual allocation dates (as well as the

deadlines for five-year compliance reports) specified in the Technical Staff Report and draft permit be changed to reflect the District's intended decision to issue a permit with a twenty-year allocation of groundwater. (The District has not requested a change in the expiration date for the one-year allocation of surface water (for dewatering), because that portion of the permit was not at issue in this proceeding.)

The decision in a final order must be fully supported by the findings of fact and conclusions of law set forth in it (including those adopted by the Governing Board from the ALJ's recommended order). In the proceedings below, the parties did not present evidence or propose findings and conclusions addressing the issue whether such changes in the permit conditions were warranted. The parties did not list this issue in their prehearing stipulation, and the Applicants and the District each concluded their proposed recommended order with the same recommendation that the ALJ made—that the permit be issued with the conditions in the TSR. The Governing Board must decline the implicit invitation by this exception to add findings of fact and conclusions of law on an issue that the parties themselves did not raise, so as to support a change in permit terms that may be at variance with the modeling or other evidence of cumulative impacts in the record. The Board therefore rejects the District's third exception.

ACCORDINGLY, IT IS ORDERED: The Recommended Order dated January 9, 2007, is adopted in its entirety by this final order, with the express addition of one conclusion of law as set forth in the ruling on the District's Exception No. 1.

DONE AND ORDERED this 13th day of March 2007 in Palatka, Florida.

ST. JOHNS RIVER WATER
MANAGEMENT DISTRICT

BY: David G. Graham
DAVID G. GRAHAM, Chairman

RENDERED this 13 day of March 2007.

BY: Robert Nawrocki
ROBERT NAWROCKI
DISTRICT CLERK

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARION COUNTY, FLORIDA, Petitioner, vs. C. RAY GREENE, III; ANGUS S. HASTINGS; and ST. JOHNS RIVER WATER MANAGEMENT DISTRICT, Respondents.	)	Case No. 06-2464

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, J. Lawrence Johnston, held a formal administrative hearing in the above-styled case on October 4, 2006, in Ocala, Florida.

APPEARANCES

Petitioner Marion County:

Thomas D. MacNamara, Esquire
Marion County Attorney's Office
601 Southeast 25th Avenue
Ocala, Florida 34471-2690

Respondent St. Johns River Water Management District:

Vance W. Kidder, Esquire
St. Johns River Water Management District
4049 Reid Street
Palatka, Florida 32177-2529

Exhibit A

Respondents, C. Ray Greene, III, and Angus S. Hastings:

Wayne E. Flowers, Esquire
Lewis, Longman and Walker, P.A.
245 Riverside Avenue, Suite 150
Jacksonville, Florida 32202-4924

STATEMENT OF THE ISSUE

The issue in this case is whether the portion of Consumptive Use Permit (CUP) Application Number 97106 seeking an allocation of 499,000 gallons per day (gpd) of groundwater for commercial/industrial uses (supply bulk water to bottling plants) meets the conditions for issuance as established in Section 373.223, Florida Statutes, Florida Administrative Code Rule 40C-2.301, and the Applicant's Handbook, Consumptive Uses of Water.[1] The County does not oppose or contest the portion of the CUP application authorizing use of 6.0 million gpd of surface water for limerock mining operations.

PRELIMINARY STATEMENT

In April 2006, the St. Johns River Water Management District (SJRWMD or District) issued its Notice of Intent to grant a CUP to Respondents, C. Ray Greene, III, and Angus S. Hastings (Greene and Hastings, or Applicant) authorizing the use of 182.14 million gallons per year (gpy) (499,000 gpd average) of groundwater from the Floridan aquifer for commercial/industrial use (supply bulk water to bottling plants) and 1,416.0 million gpy (6.0 million gpd average) of surface

water for commercial/industrial use (limerock mining operation). The groundwater allocation is recommended for a 20-year term, and the allocation of surface water is recommended to extend through the end of 2006. Marion County (County) filed its Petition for Administrative Hearing (Petition) on June 26, 2006, contesting the District's Notice of Intent to issue a CUP to Greene and Hastings for the amounts of water noted above. Thereafter, this matter was referred to the Division of Administrative Hearings for appointment of an Administrative Law Judge to conduct a formal hearing on the County's Petition pursuant to Section 120.57(1), Florida Statutes.

On June 26, 2006, Greene and Hastings filed a Motion to Dismiss Petition. On September 1, 2006, an Order was entered denying the Motion to Dismiss. On September 7, 2006, Greene and Hastings filed a Motion in Limine, seeking exclusion of testimony and exhibits regarding the County's Comprehensive Plan or the County's Land Development Regulations (LDRs). An Order was entered on September 21, 2006, granting the Motion in Limine.

A pre-hearing stipulation was filed on September 29, 2006.

At the final hearing, Greene and Hastings presented testimony from C. Ray Greene, III; Marty Sullivan, an expert in geotechnical engineering, environmental engineering, and groundwater modeling; Dr. Marc C. Minno, an expert in wetlands

ecology, and assessment of environmental impacts associated with groundwater withdrawals; and Dwight T. Jenkins, an expert in hydrogeology and consumptive use permitting and regulation. Greene and Hastings introduced their Exhibits 1-7, which were received in evidence.

The County presented testimony at the hearing from: Michael May, an expert in requirements of the Marion County Land Development Code, whose testimony was received only as a proffer based on the pre-hearing Order granting the Motion in Limine; Mounir Bouyounes, an expert in roadway design, whose testimony was received only as a proffer based on the Order on the Motion in Limine; and Troy Kuphal, an expert in water resources planning. Counsel for the County also presented a summary proffer of the testimony of Chris Rison, whose testimony was excluded based on the Order granting the Motion in Limine. County Exhibits 2-6 were received in evidence. An objection to County Exhibit 1 was sustained, and ruling was reserved on objections to County Exhibits 5 and 6, which are now overruled.

At the conclusion of the hearing, it was agreed that proposed recommended orders (PROs) would be filed by the parties no later than three weeks following filing of the transcript of testimony. A Transcript of the testimony was filed on October 24, 2006, but the parties' request to extend the time

for filing PROs to November 22, 2006, was granted. Each party timely-filed a PRO.

On November 27, 2006, SJRWMD filed a Motion to Strike an attachment to the County's PRO. The County filed a Response in opposition on December 6, 2006; Greene and Hastings did not file a response in the time allotted by Rule 28-106.204(1). Based on the filings, the Motion to Strike is granted.

Except for the attachment to the County's PRO, the PROs have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The Parties

1. The County is a political subdivision of the State of Florida. The County operates a water supply utility that supplies water for a variety of uses, including providing untreated water, in bulk, for bottling purposes. The County is currently engaged in a long-range planning effort designed to assess water supply demands and sources to supply those demands in the County over the next 50 years. The County also has completed a study of the two major springs in the County (Rainbow Springs and Silver Springs), and the County's Board of County Commissioners is in the process of enacting certain recommendations contained in the study.

2. The well for the proposed CUP allocation is located on approximately 160 acres in northern Marion County. Hastings and Greene's father owned the property from 1978 until the latter's death. In 1993, the latter's interest was transferred to Greene and two brothers, who now hold title to the property along with Hastings.

3. The District is a special taxing district created by Chapter 373, Florida Statutes, and is charged with the duty to prevent harm to water resources of the District, and to administer and enforce Chapter 373, Florida Statutes, and the rules promulgated thereunder. The District has implemented Chapter 373, Florida Statutes, in part, through the adoption of Rule Chapters 40C-2 and 40C-20, and the Applicant's Handbook, Consumptive Uses of Water.

Historic Uses of Water on the Mine Site

4. Since the 1980s, the property where the proposed withdrawals will occur has been used for mining of limerock and has been known as the "Black Sink Mine."

5. A ten-inch diameter well has been located on the Black Sink Mine property for 35 years. The well was originally used to provide water to augment water levels in canals in and around the Black Sink Mine property. Later the well was used to irrigate watermelons grown on the property before the mining operation began.

6. The limerock mining operation at Black Sink Mine uses approximately 6 million gpd of surface water. The mine pit at the site is divided by an earthen berm that separates a larger, previously mined area from a smaller area where active mining is occurring. Surface water is pumped from the actively mined portion of the pit to the larger, previously mined portion of the pit, to enable mining of the limerock material to be conducted at levels below the water table. Dewatering is necessary in order to remove the limerock. A majority of the property is mined to a depth of 55 feet below land surface. The limerock material extracted from the site is transported by trucks from the site, approximately 100 trucks per day, to various sites across North Florida.

The Need for the Proposed Use of Groundwater

7. If mining of limerock continues at the current pace, the limerock material at the Black Sink Mine will be exhausted within a year. Recognizing that the productive use of the property for limerock mining was nearing an end, Greene and Hastings began exploring other potential uses for the property, including use of the existing well on the property for production of bottled water.

8. To explore the feasibility of producing water for bottling from the existing well, in 2004 Greene and Hastings engaged an engineering firm with expertise in water resources to

conduct a hydrogeologic study of the mine property and well. The results of the study, showing water of sufficient quality and quantity for production of bottled water, motivated Greene and Hastings to submit the CUP application which was the subject of the hearing. The study also determined that water withdrawn from the well could be marketed as spring water.

9. Greene and Hastings also determined through market research that the demand for bottled water has increased at the rate of ten percent per year for the last 4-5 years and that Florida bottlers were interested in purchasing water from the well on the mine site in bulk for bottling.

10. In order to provide reasonable assurance that the water use proposed by Greene and Hastings is in such quantity as is necessary for economic and efficient utilization, Greene and Hastings must show that the amount to be used is consistent with what would typically be required for the activity being supplied; that the water will be used efficiently with loss or waste minimized; and that there is a demonstrated need for the water proposed for allocation.

11. To demonstrate a need for the 499,000 gpd of groundwater requested in the application for an allocation of 499,000 gpd of groundwater, Greene and Hastings provided letters from two businesses engaged in bottling of water stating an intent to purchase specific quantities of water produced from

the Greene and Hastings well should the CUP be granted. One of the letters of intent came from a bottler in Jacksonville, Florida, stating its intention to initially purchase 100,000 gpd of Greene and Hastings's water. The other was from a bottler in Stuart, Florida, dated January 9, 2006, stating its intention to purchase 125,000 gpd of water from Greene and Hastings within "the next 12-24 months." Based on these letters Greene and Hastings initially requested an allocation of 200,000 gpd of groundwater for the first year of the permit.

12. Prior to completion of the CUP application, Greene and Hastings learned that because the Stuart bottler's facility was located outside the geographic boundaries of the District, to transport water from the Black Sink Mine to the Stuart facility would require additional data and information related to inter-district transfers of groundwater. Greene and Hastings elected to reduce the requested allocation for the first year of the permit to 100,000 gpd, relying on the letter from the Jacksonville bottler.

13. Based on the current market demand for bottled water, and based on the fact that there are other bottlers of water within the boundaries of the District purchasing water for bottling, it is reasonable to conclude that Greene and Hastings can sell 499,000 gpd of water from the well on the Black Sink Mine property by the end of the fifth year of the proposed CUP.

These facts support the conclusion that there is a need for the amount of water requested by Greene and Hastings.

14. In addition, the permit is conditioned to require a compliance review at five-year intervals during the term of the permit. Should Greene and Hastings not be successful in selling the full 499,000 gpd allocated by the fifth year of the permit, the District has the ability as part of the five-year compliance review to modify the permit to reduce the allocation based on the amount of water actually used for bottled water.

Efficiency of the Proposed Use of Water

15. The production of water in bulk for shipment to a bottler is a highly efficient use of water. There is very little if any water lost in the withdrawal and loading of the water; almost all the water goes to the end product. The evidence establishes that the use proposed by Greene and Hastings is an efficient use of water.

Potential Impacts from the Proposed Groundwater Allocation

16. The source of the groundwater proposed for use by Greene and Hastings is the Floridan aquifer. Because there is no confining layer in the vicinity of the Black Sink Mine that would retard movement of water between the Upper Floridan aquifer and the surficial aquifer, both the Upper Floridan aquifer and the surficial aquifer essentially behave as one unit. Thus, any drawdown in the surficial aquifer associated

with groundwater withdrawals at this location will be the same as the related drawdown in the Upper Floridan aquifer as a result of groundwater withdrawals.

17. The Floridan aquifer is capable of producing the amount of groundwater requested by Greene and Hastings in the application.

18. To assess the level of drawdown expected to occur in both the Floridan aquifer and the surficial aquifer as a consequence of the proposed groundwater withdrawals, Greene and Hastings engaged a consultant, Andreyev Engineering, Inc., to run a groundwater model to simulate the proposed withdrawal and predict the anticipated drawdown.

19. The groundwater model selected for use for this application was the North Central Florida Regional Groundwater Flow Model, a model developed for the District by the University of Florida for use in Marion County and surrounding areas. This model is an accepted and reliable tool for predicting aquifer drawdown associated with groundwater withdrawals at the location of the withdrawals proposed in this application and is used extensively by the District in its CUP program.

20. To simulate the drawdown associated with the withdrawal of 499,000 gpd from the Florida aquifer, Greene and Hastings's consultant inserted a pumping well in the model grid where the Black Sink Mine is located. The model then simulated

pumping from the well at 499,000 gpd. The model results are graphically depicted on maps showing drawdown contours overlain on the Black Sink Mine Site, illustrating the level of drawdown in the aquifer and the distance the level of drawdown extends out from the well site.

21. The model predicts a drawdown of 0.03 feet in the Floridan and surficial aquifers in the immediate vicinity of the well on the Black Sink Mine property, and a drawdown of 0.02 feet in the Floridan and surficial aquifers extending out to a distance of approximately 5,000 feet from the well, less than 1/3 of an inch of drawdown. The model results represent a reasonable estimation of the drawdown that will occur as a consequence of withdrawal of 499,000 gpd of groundwater at the Black Sink Mine as proposed in the application.

22. The impact of the 0.02-0.03 foot drawdown predicted by the model was variously characterized by the experts who testified at the final hearing as "not practically measurable," an "insignificant impact," "very small," or "de minimus."

23. The use of water proposed by Greene and Hastings will not cause significant saline water intrusion, nor will it further aggravate any existing saline water intrusion problems. The use of water proposed by Greene and Hastings will not induce significant saline water intrusion to such an extent as to be inconsistent with the public interest.

24. Because the predicted drawdown is so small, it will not interfere with any existing legal uses of water. Neither will the predicted drawdown cause serious harm to the quality of the source of the water proposed for use by Greene and Hastings.

25. With regard to the issue of interference with existing legal users, the County argued that the District should have considered whether there is sufficient groundwater available to meet all projected needs for water in the County during the 20-year term of the permit, as well as the additional cost County citizens will need to bear to secure alternative water supplies as a result of any future shortfalls in available groundwater.

26. The County projects, based on planning estimates, that use of groundwater to supply all anticipated uses of water in the County will be limited within 20-30 years from the present. Such "limits" would not become an issue until after the Greene and Hastings permit expires. Thereafter, water users in the County will have to rely on alternative water sources, conservation, reuse of reclaimed water, and surface water. The anticipated growth in demand in the County's planning estimates includes anticipated growth in the commercial/industrial category of uses. The County's estimated limits on groundwater use will occur whether or not the CUP requested by Greene and Hastings is approved.

27. The District does not base its permitting decisions on a pending CUP application on the possibility that the source of water may become limited at some future time for water uses not presently permitted, provided the application meets all permitting criteria. The District allocates water for recognized beneficial uses of water, such as commercial/industrial uses, as long as the water is available and the application meets District criteria. The District allocates water as long as an allocation does not cause harm to the resource. Based on these facts, the proposed use of water by Greene and Hastings will not interfere with any existing legal use of water.

No Evidence of Economic or Environmental Harm

28. Because the predicted drawdown associated with the proposed use of water is so small, and because no impacts are anticipated on any surrounding properties or water uses, Greene and Hastings have provided reasonable assurance that any economic harm caused by the proposed use has been reduced to an acceptable amount.

29. For purposes of determining whether an applicant has provided reasonable assurance that any environmental harm caused by a proposed use of water is reduced to an acceptable amount, the District examines modeling results showing the level of drawdown predicted for the use and also examines the resources

in and around the site of a withdrawal to determine the likely impact of the drawdown predicted for the withdrawal on those resources.

30. The District's environmental scientists examined the Black Sink Mine site and the surrounding landscape and determined that, based on the characteristics of the landscape in and around the site of the proposed withdrawal and based on the negligible drawdown impact predicted for the proposed water use in both the Floridan and surficial aquifers, there will be no environmental harm resulting from the allocation of groundwater contained in the CUP.

31. The use of water proposed by Greene and Hastings will not cause damage to crops, wetlands, or other types of vegetation. The use of water proposed by Greene and Hastings will not cause the water table to be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased, or otherwise controlled by Greene and Hastings. The CUP will not use water that the District has reserved pursuant to Section 373.223(3), Florida Statutes, and Rule 40C-2.301(4).

No Impact on Established Minimum Flows or Levels

32. No minimum surface or groundwater levels or surface water flows have been established by the District pursuant to

Rule Chapter 40C-8 for any of the water bodies in Marion County that may be affected by the proposed water use.

33. The closest water body for which the District has established a minimum flow is the St. Johns River at the State Road 44 bridge located more than 50 miles from the Black Sink Mine property. The closest water body for which the District has established a minimum level is Star Lake in Northwest Putnam County, more than nine miles from the mine site. Because of the distance of these water bodies from the withdrawal site and because of the negligible drawdown expected to be caused by the proposed use of water, the use will not cause an established minimum flow or level to be exceeded during the term of the permit.

Other Reasonable-Beneficial Use Considerations

34. All available conservation measures that are economically, environmentally, and technically feasible are proposed for implementation in the application by Greene and Hastings for the uses proposed by them. Greene and Hastings submitted to the District, as part of the application, a conservation plan that complies with the requirements of A.H. Section 10.3(e).

35. Reclaimed water, as defined in the District's rules, is not currently available to be used in place of the water proposed for use by Greene and Hastings in the application.

36. The use of water proposed by Greene and Hastings in the application will not cause or contribute to a violation of water quality standards in receiving waters of the state.

37. The use of water proposed by Greene and Hastings in the application will not cause or contribute to flood damage.

The Use is Consistent With the Public Interest

38. With regard to the determination of whether reasonable assurance was provided that the proposed use is consistent with the public interest, the County contends that: 1) Greene and Hastings must show that any necessary approvals required by the County's Comprehensive Plan and/or its LDRs for use of the site for producing bottled water have been obtained; 2) that the District did not properly consider the effect of existence of lawn watering restrictions affecting citizens in the County in evaluating the application; and 3) that the District should have considered the amount of money the applicant may stand to gain from the use of the water requested in the application.

39. In examining whether an application is consistent with the public interest, the District considers whether a particular use of water is going to be beneficial or detrimental to the people of the area and to water resources within the state. In this inquiry, the District considers whether the use of water is efficient, whether there is a need for the water requested, and whether the use is for a legitimate purpose; and the inquiry

focuses on the impact of the use on water resources and existing legal users.

40. Sale of water for bottling for human consumption is recognized by the District as a legitimate, beneficial economic enterprise. Use of water for human consumption is among the highest and best uses permitted by the District. For reasons outlined above in the Recommended Order, there are no detrimental impacts that will result from this use of water.

41. The District does not consider whether local government approvals have been obtained prior to issuance of a CUP for purposes of determining whether the application is consistent with the public interest. Neither does the District consider impacts related to local roads from trucks transporting the water or other impacts not related to water resources. No such requirements are included in the District's adopted permitting criteria.

42. There are no water shortage orders in effect in the District at present. In evaluating a CUP application, the District considers whether its permitting criteria will be met during periods of normal weather as well as during periods of drought. Withdrawals authorized in CUPs can be restricted by order of the District during periods of water shortage, such as droughts. Thus, the possibility of a water shortage order being entered in the County in the future, or the fact that such

orders may have been in effect there in the past, does not mean the application is not consistent with the public interest.

43. The District critically examines the efficiency of all water uses for purposes of enacting its regulatory requirements regarding CUPs and in evaluating CUP applications. The District has adopted restrictions on landscape irrigation (which apply to all such users throughout the District's jurisdiction, not just in Marion County) limiting landscape irrigation to no more than two days per week. The limitations on landscape irrigation exist because this type of use has been determined to be a highly inefficient, wasteful use of water without such restrictions. By contrast, the use of water proposed by Greene and Hastings is a highly efficient use of water, resulting in little or no loss or waste of water.

44. The District does not consider the level of financial gain or benefit an applicant will derive from a permitted use of water for purposes of determining whether the proposed use is consistent with the public interest. Most, if not all permitted users of water derive some level of economic benefit from the water they use, and the District's rule criteria do not provide standards for evaluating such gain or that otherwise limit the amount of such gain.

45. For the foregoing reasons, the Applicant has provided reasonable assurance that the use of water proposed in the application is consistent with the public interest.

Groundwater is the Lowest Quality Source for this Use

46. The County contends that groundwater is not the lowest quality source of water available for the use proposed by Greene and Hastings, in that surface water from the mine pit on the site could be treated and used for bottling in place of groundwater.

47. From the testimony, it is clear that Greene and Hastings's ability to market water for bottling from the Black Sink Mine is dependent on such water being capable of being labeled as spring water, and on such water being delivered without having gone through any treatment processes. The testimony also establishes that because of the connection between the surficial aquifer and the Upper Floridan aquifer at the site, using surface water instead of groundwater to supply the proposed use would result in little if any reduction in impacts to the Floridan aquifer.

48. More importantly, because the application proposes use of water for direct human consumption, the District's rules do not require use of a lower quality source of water.

49. For the foregoing reasons, groundwater is the lowest quality source of water suitable for use for bottled water for human consumption.

The District's Noticing Was Adequate and Appropriate

50. The District provided notice of its receipt of the Greene and Hastings CUP application by publishing notice in the Ocala Star-Banner, a newspaper of general circulation in Marion County, on January 25, 2005, with an amended notice being published on February 16, 2005, and also by letters to the County dated January 20, 2005, and February 10, 2005. In each notice, the location of the proposed use was identified by section, township, and range. The County responded to the notices by sending a letter of objection to the application dated February 14, 2005. Thus, the County received sufficient information regarding the location of the proposed use to enable it to prepare and file a letter of objection to the application, and suffered no prejudice as a consequence of the notice.

51. The District provided personal notice of its intent to issue a CUP to Greene and Hastings by letter dated April 5, 2006. In this notice, the location of the proposed use was identified by section, township, and range. The County responded by filing petitions that have resulted in this proceeding. Thus, the County received sufficient notice of the location of the use addressed in the District's intent to issue

to enable it to initiate administrative proceedings regarding the permit, and suffered no prejudice as a consequence of the notice.

CONCLUSIONS OF LAW

Burden of Proof and Initial Burden of Presenting Evidence

52. Greene and Hastings, as applicants for the CUP in issue here, have the initial burden of presenting a prima facie case of entitlement to the permit. Florida Dept. of Transportation v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

53. Applicant's burden of proof is to provide reasonable assurance, rather than absolute guarantees, that the conditions for issuance of a CUP have been met. See City of Sunrise v. Indian Trace Community Development District, et al., DOAH Case No. 91-6036, 1991 Fla. ENV LEXIS 6997, 92 ER FALR 21 (DOAH 1991, SFWMD 1992); Manasota-88 Inc. v. Agrico Chemical Co. and Department of Environmental Regulation, DOAH Case No. 87-2433, 1990 Fla. ENV LEXIS 38 (DER 1990). The term "reasonable assurance" means "a substantial likelihood that the project can be successfully implemented." Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644, 648 (Fla. 3rd DCA 1992).

The Applicable Permit Criteria

54. In order for Greene and Hastings to meet the burden of proof described above, they were required to demonstrate

compliance with the criteria included in Section 373.223, Florida Statutes. This statutory provision establishes a three-prong test requiring that a proposed use of water: (1) is a reasonable-beneficial use of water; (2) will not interfere with any presently existing legal use of water; and (3) is consistent with the public interest. The District's Conditions for Issuance of Permits, which implement the three-prong test, are contained in Rule 40C-2.301. The Criteria for Evaluation of Permits are found in Part II, Applicant's Handbook, Consumptive Uses of Water. The Applicant's Handbook has been adopted by reference in Rule 40C-2.101(1).

55. Rule 40C-2.301(2)-(4) provides in pertinent part as follows:

> (2) To obtain a consumptive use permit for a use which will commence after the effective date of implementation, the applicant must establish that the proposed use of water:
>
> (a) Is a reasonable beneficial use; and
>
> (b) Will not interfere with any presently existing legal use of water; and
>
> (c) Is consistent with the public interest.
>
> (3) For purposes of subsection (2)(b) above, "presently existing legal use of water" shall mean those legal uses which exist at the time of receipt of the application for the consumptive use permit.
>
> (4) The following criteria must be met in order for a use to be considered beneficial:

(a) The use must be in such quantity as is necessary for economic and efficient utilization.

(b) The use must be for a purpose that is both reasonable and consistent with the public interest.

(c) The source of the water must be capable of reducing the requested amounts of water.

(d) The environmental or economic harm caused by the consumptive use must be reduced to an acceptable amount.

(e) All available water conservation measures must be implemented unless the applicant demonstrates that implementation is not economically, environmentally or technologically feasible. Satisfaction of this criterion may be demonstrated by implementation of an approved water conservation plan as required in Section 12.0., Applicant's Handbook: Consumptive Uses of Water.

(f) When reclaimed water is readily available it must be used in place of higher quality water sources unless the applicant demonstrates that its use is either not economically, environmentally, or technologically feasible.

(g) For all uses except food preparation and direct human consumption, the lowest acceptable quality water source, including reclaimed water or surface water (which includes stormwater), must be utilized for each consumptive use. To use a higher quality water source an applicant must demonstrate that the use of all lower quality water sources will not be economically, environmentally or technologically feasible. If the

applicant demonstrates that use of a lower quality water source would result in adverse environmental impacts that outweigh water savings, a higher quality source may be utilized.

(h) The consumptive use shall not cause significant saline water intrusion or further aggravate currently existing saline water intrusion problems.

(i) The consumptive use shall not cause or contribute to flood damage.

(j) The water quality of the source of the water shall not be seriously harmed by the consumptive use.

(k) The consumptive use shall not cause or contribute to a violation of state water quality standards in receiving waters of the state as set forth in Chapters 62-3, 62-4, 62-302, 62-520, and 62-550, F.A.C., including any anti-degradation provisions of Sections 62-4.242(1)(a) and (b), 62-4.242(2) and (3), and 62-302.300, F.A.C., and any special standards for Outstanding National Waters set forth in Sections 62-4.242(2) and (3), F.A.C. A valid permit issued pursuant to Chapters 62-660 or 62-670, F.A.C., or Section 62-4.240, F.A.C., or a permit issued pursuant to Chapters 40C-4, 40C-40, 40C-42, or 40C-44, F.A.C., which authorizes the discharge associated with the consumptive use shall establish that this criterion has been met, provided the applicant is in compliance with the water quality conditions of that permit.

(l) The consumptive use must not cause water levels or flows to fall below the minimum limits set forth in Chapter 40C-8, F.A.C.

56. In addition to the foregoing, Rule 40C-2.301(5)(a) sets forth the reasons for denial of a CUP application, providing:

> (5)(a) A proposed consumptive use does not meet the criteria for the issuance of a permit set forth in subsection 40C-2.301(2), F.A.C., if such proposed water use will:
>
> 1. Significantly induce saline water encroachment; or
>
> 2. Cause the water table or surface water level to be lowered so that stages or vegetation will be adversely and significantly affected on lands other than those owned, leased, or otherwise controlled by the applicant; or
>
> 3. Cause the water table level or aquifer potentiometric surface level to be lowered so that significant and adverse impacts will affect existing legal users; or
>
> 4. Require the use of water which pursuant to Section 373.223(3), Florida Statutes, and Rule 40C-2.301(6), F.A.C., the Board has reserved from use by permit; or
>
> 5. Cause the rate of flow of a surface watercourse to be lowered below any minimum flow which has been established in Chapter 40C-8, F.A.C.; or
>
> 6. Cause the level of a water table aquifer, the potentiometric surface level of an aquifer, or the water level of a surface water to be lowered below a minimum level which has been established in Chapter 40C-8, F.A.C.

These criteria are also found in A.H. Section 9.4.

The Proposed Use Is a Reasonable-Beneficial Use

57. Reasonable assurance has been provided that the reasonable-beneficial use criteria listed in Rule 40C-2.301(4)(c), (e), (f), (h), (i), and (k) are met. These same criteria are found in A.H. Sections 10.3(c), (e), (f), (h), (i) and (k).

58. Bottling water for human consumption is a highly efficient use in that very little if any water devoted to the use will be lost or wasted. Virtually all of the water withdrawn will go into the product.

59. Also with regard to this criterion, the amount of water requested for the use is appropriate for this type of use, and Applicant has the ability to market the water in the quantities allocated.

60. In addition to the letter of intent in the permit file from a Jacksonville bottler stating its intent to purchase the 100,000 gpd allocated for the first year of the permit, Greene and Hastings presented evidence establishing that the market for this product is rapidly expanding, supporting the ability to use the amounts of water allocated through Year 5 of the permit.

61. Should Greene and Hastings be unable to use the full 499,000 gpd allocation of groundwater by the fifth year of the permit, the District retains the ability, as part of the five-year compliance reviews provided for by condition in the permit,

to review and modify the allocation, to adjust for any part of the allocation that is unused.

62. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(4)(a) and A.H. Section 10.3(a).

63. In order to provide reasonable assurance that the proposed use of water is for a purpose that is both reasonable and consistent with the public interest, Greene and Hastings presented evidence that bottling of water from the well on the Black Sink Mine property is a legitimate, economically beneficial commercial enterprise. In addition, Greene and Hastings presented evidence establishing that there will be no adverse economic or environmental impacts resulting from the proposed use.

64. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(4)(b) and A.H. Section 10.3(b).

65. In order to establish that the economic or environmental harm, if any, caused by the proposed use will be reduced to an acceptable amount, Greene and Hastings presented expert testimony regarding groundwater modeling done in support of the application. The results of the modeling showed that the predicted drawdown in the Floridan and surficial aquifers expected to be caused by the withdrawal of 499,000 gpd of

groundwater is so small that it will have no effect on any other users of water in the region.

66. Further, the evidence presented by Greene and Hastings established that, based on the results of the groundwater modeling combined with an expert field evaluation of the landscape surrounding the site of the withdrawals, there will be no harm to any environmental features on or in the vicinity of the mine site.

67. The economic impacts resulting from the proposed use will be positive.

68. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(4)(d), and A.H. Section 10.3(d).

69. In order to provide reasonable assurance that the proposed use of groundwater represents use of the lowest quality source of water suitable for the use, Greene and Hastings presented evidence that the use is for human consumption. Because the use is for human consumption, pursuant to the terms of Rule 40C-2.302(4)(g), an applicant is relieved of any requirement to demonstrate that a lower quality source (lower quality than groundwater) is not feasible for the proposed use.

70. In addition, the evidence presented by Greene and Hastings demonstrated that the alternate, lower-quality source advocated by the County, surface water from the mine pit, could

not be substituted for groundwater because the surface water would require treatment to make it suitable for consumption. Greene and Hastings cannot market water from the property to the bottlers who have expressed intentions to purchase water from them if the water has been treated prior to providing it to the bottlers. Therefore, in addition to increasing the cost of production, assuming the water from the mine pit could be treated to levels appropriate for human consumption, Greene and Hastings would be left with a product that could not be sold.

71. In addition to the foregoing, because of the close connection between the surficial aquifer and the Floridan aquifer at the site, withdrawing water from the open mine pit would reduce water levels in the Florida aquifer. Thus, there would be little or no reduction in drawdown impacts in the Floridan aquifer if the withdrawals were made from the mine pit instead of from the Floridan aquifer.

72. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(4)(g) and A.H. Section 10.3(g).

73. In order to provide reasonable assurance that the source of the water for the proposed use will not be seriously harmed by the use, Greene and Hastings presented the previously-mentioned modeling information demonstrating that the drawdown in the Floridan aquifers is not predicted to exceed 0.03 feet,

approximately one-third of an inch. This almost immeasurable drawdown, according to the uncontraverted expert testimony presented by Greene and Hastings, will have no adverse impact on the Floridan aquifer.

74. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(4)(j) and A.H. Section 10.3(j).

75. In order to provide reasonable assurance that the proposed use will not cause a minimum flow for a surface watercourse or a minimum level for an aquifer or a surface water body, established pursuant to Chapter 40C-8, Florida Administrative Code, to fall below the established minimum flow or level, Greene and Hastings presented evidence that, due to the inconsequential drawdown predicted for the proposed withdrawals and due to the distance between the site of the withdrawals and the few water bodies where established minimum flows or levels exist, there will be no such impact.

76. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(1).

Interference With Existing Legal Users

77. In order to provide reasonable assurance that the proposed use will not interfere with any existing legal use of water existing at the time of submission of its application, Greene and Hastings presented the results of the modeling effort

showing a predicted drawdown of 0.03 feet or less as a consequence of the use. This was supported by expert testimony that because of the small drawdown expected to be caused by the use there will be no impact on any existing legal users.

78. Rule 40C-2.301(3) makes it abundantly clear that, for purposes of application of the criterion related to interference, "existing legal users" means only legal uses existing at the time the application is submitted. Thus, speculative, potential future uses, not presently in existence, and not permitted by the District are not considered existing legal uses for purposes of this test.

79. Greene and Hastings provided reasonable assurance that the proposed use complies with Rule 40C-2.301(2)(b).

Consistency with the Public Interest

80. Pursuant to A.H. Section 9.3, "public interest" means:

> ...those rights and claims on behalf of people in general. In determining the public interest in consumptive use permitting decisions, the Board will consider whether an existing or proposed use is beneficial or detrimental to the overall collective well-being of the people or to the water resources of the area, the District and the State.

81. In order to provide reasonable assurance that the proposed use of water is consistent with the public interest, Greene and Hastings presented testimony that the water will be used for a productive, beneficial economic activity and that

there will no adverse impacts to the source of the water, to environmental resources, or to any adjoining landowners. These are the considerations generally encompassed and addressed by the District's permitting criteria. With regard to these criteria, there was no evidence offered showing any detrimental impacts resulting from the proposed use of water.

82. The County argues that the District should have evaluated and considered whether the activity associated with the proposed use complies with the County's comprehensive plan or zoning code, or that Greene and Hastings should be required to obtain such approvals or authorizations from the County before being permitted to proceed with the CUP process.

83. The District has not adopted, either directly or by reference, any of the County's land use requirements as criteria for which an applicant must provide reasonable assurance in order to be granted a CUP. Neither has the District adopted rule provisions making any other related approvals, such as comprehensive plan amendments, a pre-requisite for applying for a CUP. The District, in fact, is prohibited from requiring compliance with local government regulations which have not specifically been adopted as the part of the District's rule criteria. See Council of the Lower Keys v. Charley Toppino & Sons, Inc., 429 So. 2d. 67 (Fla. 3rd DCA 1983); Save the St. Johns River v. St. Johns River Water Management District,

623 So. 2d. 1193 (Fla. 1st DCA 1993). The County's position on this point, as previously determined in the Order granting Greene and Hastings's Motion in Limine, is without merit.

84. The County's argument, that the District should consider the amount of money a permittee stands to make from a use of water as a component of the public interest test, is equally without merit. Nowhere in the District's rule criteria is the amount of economic return a permittee receives from water use made a test or factor in determining whether an applicant should be granted a permit or not. Further, even if this factor could be considered by the District, there is no guidance in the District's permitting criteria that would instruct the District or applicants regarding how much a permittee may be allowed to earn before the use ceases to be consistent with the public interest. The County's position on this point is without merit.

85. The County also argues that the District should consider that, within the County's 50-year planning horizon, there will be limits on the availability of groundwater for all water uses in the County, and should deny the application because the alternative water sources will be required for County water uses at some point in the future. In essence, the County seeks to have a viable source of water ruled off-limits to this particular user, in favor of unpermitted and as-yet unidentified alternative groundwater uses.

86. If a source of water is available for use, and a beneficial use can be made of water from the source, and if a proposed use of the source meets all of the District's criteria for such use, the District has no basis on which to deny that applicant's request for a permit to use water from the source.

87. Finally, with regard to consistency with the public interest, the County suggests that the existence of restrictions on the frequency of landscape irrigation is a factor that should have been considered by the District in evaluating the application. In fact, the restrictions enacted by the District for all water users, in all counties in the District, are intended to maximize efficiency for this particular use (landscape irrigation). Commercial/industrial uses also have efficiency standards and the use proposed by Greene and Hastings is highly efficient. This argument has no merit.

Reasons for Recommendation of Denial Not Established

88. None of the reasons for recommendation of denial of a CUP application listed in Rule 40C-2.301(5)(a) or A.H. Section 9.4 were established by the evidence offered at the hearing. To the contrary, all applicable criteria have been met by Greene and Hastings.

Adequacy of the Notices Provided

89. The County contends that the notice of receipt of application and the notice of intended action on the application

were inadequate because they described the location of the activity by section, township, and range.

90. Section 373.229(1), Florida Statutes, provides that notices for CUPs shall contain, among other things: 1) the place of use; and 2) the location of the use. Nothing in the statute prescribes that such notices must be given by address or anything more specific than section, township, and range.

91. The County does not suggest, nor did it present evidence suggesting that the notices were inaccurate or misleading. The District complied with the requirements of the statute, in that the notice provides a location for the use. See Ray, et al. v. St. Johns River Water Management District et al., DOAH Case Nos. 97-0803 and 97-0804, 1997 Fla. ENV LEXIS 121, (DOAH July 14, 1997, SJRWMD Aug. 13, 1997).

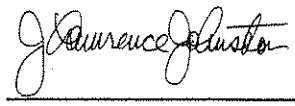
92. The notices did not prevent the County from presenting its position or asserting its rights during the permitting process.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the District enter an order granting CUP No. 97106 to Greene and Hastings with the conditions recommended in the District's Technical Staff Report.

DONE AND ENTERED this 9th day of January, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 9th of January, 2007.

ENDNOTE

[1]/ Unless otherwise indicated, all statutory references are to the 2006 codification of the Florida Statutes, and all rule references are to the current codification of the Florida Administrative Code. References to the Applicant's Handbook, Consumptive Uses of Water, will use the abbreviation "A.H."

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.