

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for Original Certificate of Authorization and Initial Rates and Charges for Water and Wastewater Service in Duval, Baker and Nassau Counties, Florida by FIRST COAST REGIONAL UTILITIES, INC.

DOCKET NO. 20190168-WS

NOTICE OF FILING

First Coast Regional Utilities, Inc., by and through its undersigned attorneys, hereby gives notice of filing its Rebuttal Testimony of Robert Kennelly in the above-referenced docket.

Respectfully submitted on this
31st day of July, 2020, by:

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CERTIFICATE OF SERVICE

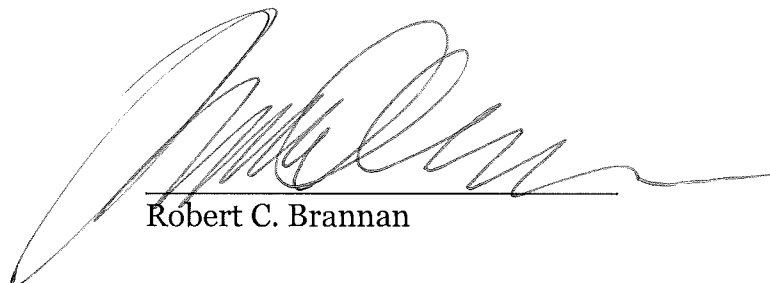
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Docket No.: 20190168-WS

REBUTTAL TESTIMONY

OF

ROBERT KENNELLY

ON BEHALF OF

FIRST COAST REGIONAL UTILITIES, INC.

1 **Q. Please state your name, profession and address.**

2 A. My name is Robert Kennelly and I am the Robert Kennelly that provided direct testimony in
3 this case.

4 **Q. Is your plan to build water, wastewater and refuse facilities on-site to serve your
5 proposed development contrary to the Comprehensive Plan?**

6 A. No, it is my understanding that the Comprehensive Plan prohibits JEA from investing in
7 facilities in that part of the County where our development is to be located. The planned
8 unit ordinance passed by the City of Jacksonville (“Ordinance”), as amended, specifically
9 requires that *we* build water, wastewater and reuse facilities *on-site to serve the needs of*
10 *the development*. Moreover, the comprehensive plan specifically allows for nonregional
11 utility facilities, so long as certain conditions are met. *See* Exhibit SRW-4, pages 32 and
12 50. Accordingly, building on-site, non-regional facilities is not only in compliance with
13 the Comprehensive Plan, it is mandated by the Ordinance.

14 **Q. Is JEA’s demand that JEA provide water and wastewater service to the development in
15 compliance with the Ordinance and/or the Comprehensive Plan?**

16 A. No. JEA’s proposed off-site regional facilities plans, to be located in the vicinity of
17 Cecil Field, violate the Comprehensive Plan if JEA finances and builds it as JEA proposed
18 in our April 9, 2019 meeting, that proposal also violates the Ordinance if we finance and
19 build it, or both. JEA is prohibited from investing in facilities in our area. Consequently,
20 in order to skirt this prohibition, and the lack of any demonstrated need other than that
21 within the proposed territory, JEA wants First Coast to build regional water, wastewater
22 and reclaimed water facilities and give them to JEA. In so doing, we would be in
23 violation of significant conditions of the Ordinance granting our development
24 entitlements. Further, building regional facilities in the area is, according to JEA,

1 completely unnecessary. In its Response to FCRU's First Set of Admissions, Request 3,
2 JEA denied that there was any need for water and wastewater services in the Cecil Field
3 area yet they want us to violate the Ordinance to build unnecessary regional facilities for
4 them. The fact is that JEA is seeking to do through an impermissible exaction what it
5 cannot legally do under the Comprehensive Plan or the Ordinance.

6 **Q. Does your plan conform to the conditions set forth in the Comprehensive Plan?**

7 Yes. The facilities will meet all federal, state, regional, and local environmental
8 regulations; we will, through subcontractors, operate and maintain the facilities; we have
9 offered to sell the facilities to the City, specifying the date and manner of transition; we are
10 willing to reimburse the City for costs of enforcement of violations of water quality standards
11 and effluent limitations; and our facilities will provide at least 1.0 MGD of capacity.

12 **Q. Does the Ordinance require that the developer gift the water, wastewater and reuse
13 facilities to JEA?**

14 A. No, definitely not. The language in the Ordinance is different from dedication language.
15 Typically, dedication language basically states that the developer build and give certain
16 utility assets to the utility serving the area. In our case, the language does not require that
17 we dedicate the fee interest in the facilities to JEA. Instead, it provides that JEA could
18 enter into some sort of a contract operation arrangement with First Coast. Contrary to
19 JEA's contention, it was never the intention of the parties to dedicate the ownership of
20 the facilities to JEA. During our due diligence prior to purchasing the subject properties
21 we discussed this language with representatives of ICI, the previous owner of the
22 property, who negotiated this provision. We were informed that it was never the intent
23 or understanding of either of the parties that the legal title would be transferred to JEA.
24 It was always the intent and understanding of the parties that JEA would have the option

1 to bid on a contract for operation of the subject facilities, should it desire to do so. Think
2 about it, if we were required to turn the facilities' ownership over to JEA why would JEA
3 specifically negotiate for the options to enter into either an operation and maintenance
4 agreement or a contract operations agreement? If JEA expected to own the facilities they
5 would not need to enter into a contract with themselves to operate it. JEA's interpretation
6 of the Ordinance language just doesn't make sense. That said, we are still open to JEA
7 bidding on an operations contract with FCRU.

8 **Q. Would it be possible to gift the utility facilities to JEA as they claim?**

9 A. No. As is customary, the facilities will be financed utilizing revenue bonds which will require
10 that the bondholders have a first lien on both the revenues of the facilities and the assets.
11 Gifting the facilities to JEA prior to amortization of the debt would result in default on the
12 debt.

13 **Q. Has 301 Capital Partners ("Partners") tried to work with JEA to resolve these issues?**

14 A. Yes. We attempted to resolve this matter both before we began work on the FPSC
15 Application and since we filed the Application. The discussions have thus far been fruitless.

16 **Q. Why do you believe that is so?**

17 A. In addition to the disagreement surrounding the dedication language and other issues
18 discussed in my direct and this rebuttal testimony, JEA has been in a state of flux the entire
19 time. When we initially approached JEA, they were in the process of trying to sell their water
20 and wastewater utility systems. When that fell through both the JEA Board of Directors and
21 all of the senior management were either fired or resigned. Now, the current senior
22 management is operating in an interim status and, unless something changes, will be gone or
23 replaced by the end of this year. Consequently, we never know who really has the authority
24 to negotiate and make final decisions on these matters as the players keep changing. In short,
25 JEA has been in a chaotic state and not conducive to coming to any sort of timely negotiated

1 resolution.

2 **Q. JEA claims that it can provide service to your development that benefits from their**
3 **economies of scale due to their ownership of numerous other water, wastewater and**
4 **reuse facilities. Do you agree?**

5 A. I don't see how. First, our utility facilities are required to be built on-site, to specifically
6 serve our development. JEA has no treatment facilities even close to our development.
7 According to Joseph Orfano, JEA provides service within the urban and suburban areas of
8 Jacksonville, Florida, primarily the eastern portion of Duval County. Our property is located
9 in the far northwest part of the County. The nearest interconnect point to JEA's pipelines is
10 over seven miles away and requires that lines cross under some of CSX's busiest tracks.
11 Thus, as a stand-alone utility, without any feasible nearby interconnect possibilities, I don't
12 see how we could benefit from JEA's distant wells and treatment facilities.

13 **Q. JEA claims that it has the necessary stability and financial resources to benefit the**
14 **utility customers of your development. Do you agree?**

15 A. JEA is in turmoil, both financially and organizationally. I will defer to our consultants to
16 cover the specifics with regard to the financial aspects. However, it is common knowledge
17 that since we began this process the members of the senior management team and board of
18 directors have either been fired or resigned, and there is an ongoing federal grand jury
19 investigation into the previous management's activities. The current senior management is
20 primarily serving on short-term interim status. Because of this, and JEA's legal efforts to
21 negate its commitment to a nuclear plant under construction, JEA's debt has been
22 downgraded and may be downgraded further. In June, 2020, Moody's Investor Service
23 assigned an A2 rating to the issuance of JEA's Water & Sewer Revenue Bonds and stated
24 that the outlook for JEA is negative citing governance and social risks relating to pending
25 litigation and significant ongoing organizational changes, and exposure to nuclear

1 construction risk and its power purchase agreement.

2 **Q. Have you considered the Prefiled Testimony of JEA Witness Julia E. Crawford?**

3 A. Yes, I have. I understand the purpose of Witness Crawford's testimony was to compare the
4 rates of First Coast to those of the JEA and her conclusion was that First Coast customer rates
5 are more than double those of JEA.

6 **Q. How would you address this disparity?**

7 A. I will defer to the analysis of our rate consultant. I will say, however, that during our meeting
8 on April 9, 2019, we were told that JEA had just completed a Rate Study and that, while JEA
9 did not at that time have an action plan to implement the Study's recommendations, capacity
10 fees would likely be increased from the traditional \$3,300. At the meeting, JEA
11 representatives were unable to say how much those fees would increase nor when the increase
12 would be implemented. They did, however, state that the capacity fees for the proposal
13 requiring an offsite wastewater plant and the dedication of an onsite water plant would be
14 \$13,000. Consequently, relying on their current rates does not seem reasonable.

15 We have been informed that by financing the facilities with tax exempt utility revenue bonds
16 we can structure the financing at an interest rate and under such terms as would permit a
17 reduction in the proposed rates by approximately 25 percent.

18 **Q. We have been told by JEA in their pleadings, by Mr. Zammataro, and others that JEA**
19 **has exclusive franchise agreements with the City of Jacksonville and Nassau County.**
20 **First, do you agree with that assessment, and second, how do these franchise agreements**
21 **influence the current proceedings?**

22 A. I don't know if the JEA has exclusive franchise agreements with the City of Jacksonville
23 ("City") and Nassau County ("County"). I know that JEA has a contractual agreement with
24 the County to provide services under certain conditions. As a related entity to the City, I do
25 not know whether JEA has a franchise or some other arrangement to provide services within

1 the City. Our proposed development will contain contiguous properties in Duval, Nassau and
2 Baker Counties. It is my understanding that under Florida law, because the proposed service
3 territory will include areas in the three Counties, the Florida Public Service Commission
4 (“Commission”) has exclusive jurisdiction over our Certificate Application. Consequently,
5 JEA’s agreements with the County and the City might be relevant to these proceedings to
6 extent that the JEA can and will provide service to all of our properties in a timely and
7 economically feasible manner, which they cannot. JEA has no service agreement with Baker
8 County so it cannot serve that property. In fact, we believe that Baker County supports our
9 provision of service to the northeastern portion of its territory. With regard to Duval and
10 Nassau Counties, as noted earlier JEA has no facilities in the area, is prohibited from investing
11 in facilities in such area, and it cannot provide services to these areas in a timely fashion.

12 **Q. You say that JEA cannot provide services to the proposed territory in a timely fashion.**
13 **What do you mean by that?**

14 A. As we have noted in the Application and various interrogatories, we have substantial
15 entitlements to develop the proposed territory. We have also been approached by significant
16 homebuilders with interest to purchase the lots and build homes in phase one of the project.
17 However, homebuilders will not act on this interest until there is certainty that utility services
18 will be available when the homes are built. This can be accomplished if we can deliver the
19 utility services in 30 months. If we inform them that it will be five or more years before
20 utility services may be available, they will go elsewhere.

21 **Q. Do you have any additional thoughts that you wish to offer concerning JEA’s “Comp**
22 **Plan” argument?**

23 A. Yes, I do. JEA is prohibited under the Comp Plan from investing in facilities in rural areas.
24 The proposed territory is in the far western rural area of Duval and Nassau Counties. See the
25 two maps attached hereto as RK-2, which graphically depict this fact and the distances to

1 proposed JEA facilities. JEA has no facilities within miles of the proposed territory. Rather
2 than have the Comp Plan amended, JEA in one of its proposals is attempting to have the
3 Partners make the investment and then turn over the facilities to JEA. JEA's management
4 and leadership disarray could very well limit its ability to serve the subject property and
5 maintain the facilities, even if the initial phase of the facilities is financed and built by the
6 Partners.

7 JEA's earlier demands to relocate the proposed First Coast wastewater facilities off-site and
8 turn over ownership to the JEA are in contravention of the Ordinance. JEA is attempting to
9 override the Ordinance through their Objection to the Application. This seems at best to be
10 improper.

11 JEA is unconstitutionally exacting property (the water and wastewater plants) from the
12 Partners by building and paying for plants that the JEA could not finance and construct on its
13 own. Also, aside from our development, Mr. Orfano has testified that there is insufficient
14 current demand in the area to justify JEA building a regional plant, and this creates a windfall
15 to the JEA to the extent that it receives a wastewater plant at no cost and connection fees from
16 third-party customers who would not otherwise have service but for the forced exaction from
17 the Partners.

18 **Q. In your direct testimony, you outlined your educational experiences and training, and**
19 **the fact that you are a lawyer. Do you have any thoughts that you wish to offer on the**
20 **“dedication” comments made by the JEA’s witnesses in their direct testimony?**

21 A. Yes, I do. First, however, I want to point out that I am only licensed to practice law in
22 Georgia. I am not acting as an attorney in Florida.

23 JEA's proposal to serve the applied for service area presumes that First Coast must give up
24 property rights that it has no duty to do so. That would be a taking, in the constitutional sense.
25 It is a fundamental principle of property rights law that one cannot be forced to give up one

1 constitutional right in order to enjoy another. The line of cases including *Nollan v. California*
2 *Coastal Commission* and *Dolan v. the City of Tigard*, both stand for the proposition that when
3 government demands something that it is not otherwise entitled to as a condition of doing
4 business or going forward with an endeavor, a “forced exaction” can occur. Here, the City
5 of Jacksonville has told the Partners that they can develop their land but now an entity of the
6 City of Jacksonville, the JEA, is conditioning the development of that land upon the Partners
7 building utility facilities which the JEA will eventually utilize to serve others without fully
8 compensating the Partners for that construction. There is no doubt but that the FPSC can
9 grant to the Partners’ utility, First Coast, territorial service rights within its property to build
10 its own utility to serve itself. Duval County granted to the FPSC jurisdiction over the
11 privately-owned utilities in the county long ago, and, although few are left, Jacksonville is
12 saying with one hand “here is a mechanism by which you can own and operate private utilities
13 in Duval County” and yet on the other, its wholly-owned entity, the JEA, is saying “not so
14 much”.

15 Our predecessors agreed to give the JEA first rights of operation and maintenance or contract
16 operations. No more, no less. The Ordinance 2010-874-E directs the Partners to build on-
17 site water and wastewater facilities. The Ordinance also provides that the Partners must
18 designate JEA as the operator of the facilities. JEA, on the other hand, seeks to have the
19 Partners build the water and wastewater facilities and then turn over ownership to JEA. JEA
20 is, therefore, attempting to rewrite the Ordinance through their objection to the Application.
21 Under the “Bert J. Harris, Jr. Private Property Protection Act” (Section 70.001, *et. seq.*,
22 Florida Statutes), the burden placed on property owners by government actions or inactions
23 must be roughly proportionate to the benefit conferred. Stated otherwise, there must be a
24 rationale nexus between the benefit and the burden. The Comp Plan provides that the JEA
25 shall not invest in building utility facilities in the area of the Partners’ property. JEA’s

1 response to that prohibition, in part, is to require the Partners to build wastewater facilities in
2 the area *where they (JEA) are prohibited from doing so*, turn those facilities over to the JEA
3 for ownership and operation, and thus create an expanded utility service area for the JEA, at
4 the cost of the Partners. Under the case law and the Bert Harris Act, we would argue that this
5 is a “taking”.

6 **Q. Can JEA provide the service more economically than First Coast?**

7 A. No. All of JEA’s options are more expensive, require crossing environmentally sensitive
8 lands, and take much longer to complete than our own onsite facilities, unless we do it for
9 them and donate them to JEA, which we cannot do.

10 **Q. Do you have any further thoughts on the JEA’s position to share with the Commission?**

11 A. Yes, I do. JEA’s witnesses briefly acknowledge the idea of providing operation and
12 maintenance services but even a surface level examination of that testimony makes it clear
13 that their view of the matter is much broader than that. At best, JEA can operate our plants,
14 pumps, tanks, and appurtenances on a contract basis. Nowhere are we obligated to, and
15 certainly we would never allow, JEA to provide billing, collection, engineering, planning,
16 new construction contracts, or any of those services to our developers and future customers.
17 JEA will not be involved in our financing activities, our short or long range planning, our
18 selection and hiring of contractors, engineers, consultants, and so on and so forth. JEA has
19 stretched the definition of “contract operations” to mean something that we are not obligated
20 to, nor would we ever, agree to.

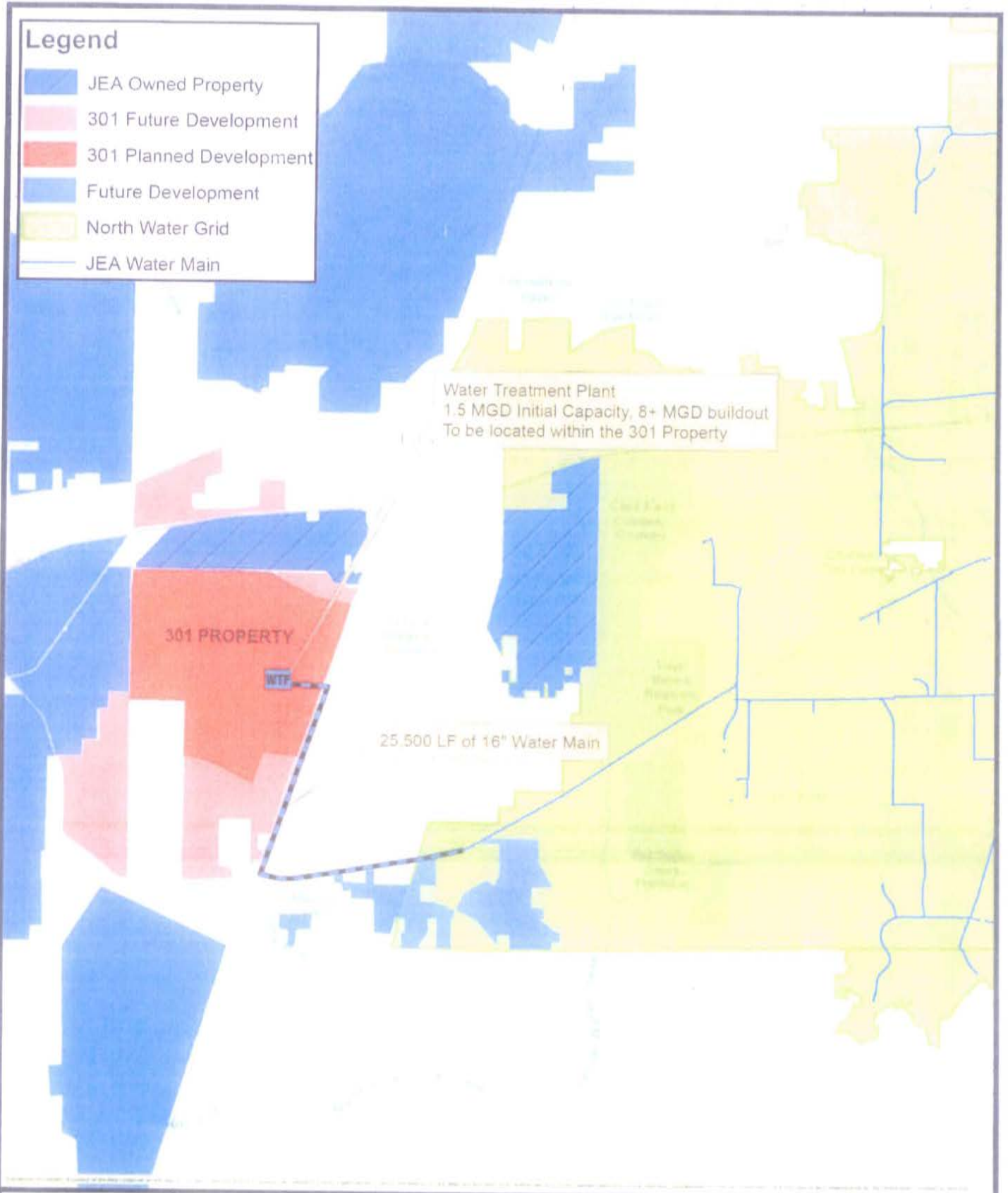
21 **Q. Does that conclude your rebuttal testimony?**

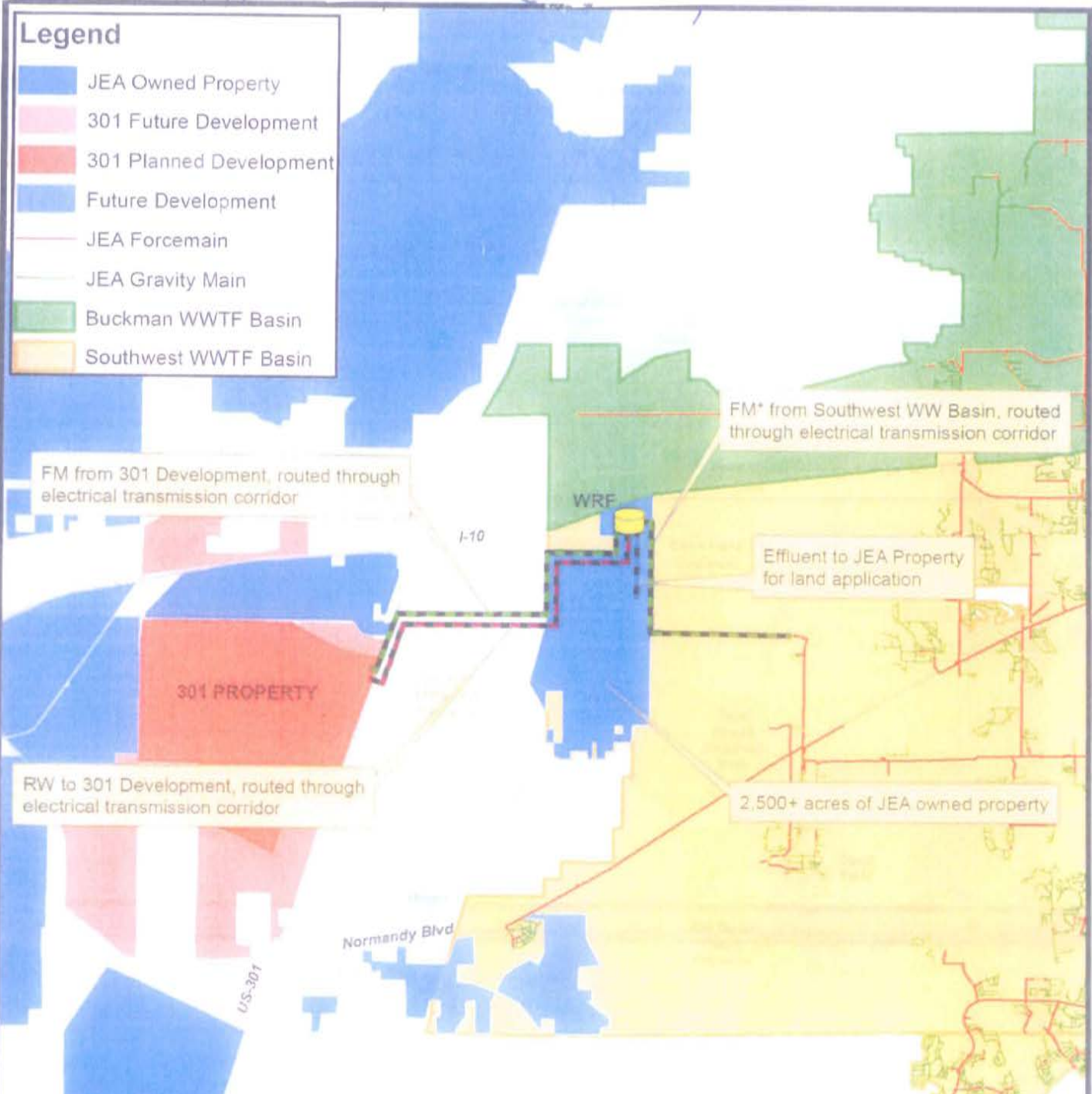
22 A. Yes, it does.

23

24

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- NOTES**
- o A package Water Reclamation Facility (WRF) would initially be needed, but low flow would be an issue for the first year as homes are established; this could be solved with a baseline* wastewater flow from the Southwest Wastewater (WW) Basin into the package WRF
 - o Reclaimed water demands will require supplemental water; wastewater* from the Southwest WW Basin could be used as a supplementation option to produce sufficient reclaimed water to meet demands.
 - o This location will require piping to and from US-301, the preferred route would be the electrical easement.
 - o Wet weather discharge and/or unused reclaimed water could be sent south and land applied on the same JEA owned property. Other discharge options will later be evaluated.
 - o A solar farm is planned for 500 acres of the JEA property east of US-301 in the next five years.
 - o This is a preliminary evaluation, subject to verification, some options could change as a result of a more thorough investigation.