STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN INFOAGE, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-0999
	)	
CITY OF CLEARWATER,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Administrative Law Judge ("ALJ") Daniel Manry conducted the administrative hearing in this case on June 29, 2000, in Clearwater, Florida.

APPEARANCES

For Petitioner: Darryl R. Richards, Esquire
Johnson, Blakely, Pope, Bokor,
Ruppel and Burns, P.A.
Post Office Box 1100
Tampa, Florida 33601

For Respondent: Leslie K. Dougall-Sides, Esquire
Assistant City Attorney
Post Office Drawer 4748
Clearwater, Florida 33758

STATEMENT OF THE ISSUE

The issue in this case is whether the decision of the City of Clearwater Community Development Board (the "Board") to deny the application of Petitioner for flexible development approval to erect a telecommunications tower should be upheld pursuant to the City of Clearwater Land Development Code (the "Code"). (All section references are to the Code adopted on January 21, 1999, unless otherwise stated).

PRELIMINARY STATEMENT

On January 25, 2000, the Board voted to deny Petitioner's application to erect a telecommunications tower and entered a written order on February 29, 2000. On February 8, 2000, Petitioner timely filed a Notice of Appeal. On March 1, 2000, Respondent referred the appeal to the Division of Administrative Hearings ("DOAH") to conduct an administrative hearing.

At the hearing, the parties agreed to the admission of Joint Exhibit One. Joint Exhibit One includes the audio tapes, minutes, exhibits, and transcripts from the proceeding before the Board.

Petitioner presented the testimony of two witnesses, including one by deposition, and submitted 27 exhibits for admission in evidence. Respondent presented the testimony of two witnesses and submitted three exhibits for admission in evidence.

The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the Transcript of the hearing filed on July 14, 2000. Petitioner timely filed its Proposed Final Order ("PFO") on July 25, 2000. Respondent timely filed its PFO on July 24, 2000. Respondent's objection to the admissibility of the deposition testimony of Mr. Joseph Feraca is sustained for the reasons stated in Respondent's written objection.

FINDINGS OF FACT

1. Petitioner is a Florida corporation engaged in the business of building telecommunication towers for co-location of

antennae to send and receive cellular telephone signals. Proper location of telecommunication towers is essential to efficient and effective cellular telephone communications. There must be an available tower to pick up the signal as a user moves from a distant tower to the available tower. Without an available tower, the user would lose signal.

2. It is undisputed that three telephone carriers, identified in the record as GTE, Nextel, and PrimeCo, need an available tower in the vicinity of Clearwater High School (the "high school"). Another telephone carrier, identified in the record as AT&T, shares an existing tower at the high school with the Pinellas County School Board (the "school board").

3. No reasonable use can be made by GTE, Nextel, or PrimeCo of the existing tower at the high school without modification to the tower. The existing tower is not adequate in height and structural capacity to meet the requirements of GTE, Nextel, and PrimeCo.

4. The school board and AT&T repeatedly rejected efforts by GTE, Nextel, and Petitioner to discuss the possibilities of modification of the existing tower to accommodate co-location. In 1996, AT&T advised GTE that the school board was not interested in co-location activity. The school board repeated that position in a separate meeting with GTE.

5. GTE and PrimeCo searched for over two years for an alternative structure, tower, or location that would provide reasonable use for their technical requirements. In 1997, GTE

requested a permit from Respondent to build a new tower approximately two blocks from the existing tower at the high school. Respondent contacted the superintendent of the school board to encourage co-location. Respondent did not issue a permit to GTE for a new tower.

6. Early in 1998, GTE and PrimeCo approached Petitioner to locate a site for construction of a new tower in the vicinity of the high school. Over the next eight months, Petitioner searched for a suitable site for building a new tower. Petitioner found a site surrounded by commercial property and bordered by mature trees which are 20 to 40 feet tall. On October 13, 1998, Petitioner optioned the portion of the property on which Petitioner intended to build the tower, and Petitioner now owns the property.

7. On May 17, 1999, Petitioner filed its application for site plan approval. The application proposed the construction of a 160-foot wireless communications tower for co-location by GTE, Nextel, and PrimeCo (the "proposed tower"). Petitioner sent a notice of the proposed tower to Mr. Kevin Becker at AT&T.

8. The staff for the Board conducted a technical review of the application. The staff recommended approval of the application subject to certain conditions. Petitioner complied with each of those conditions.

9. The staff also recommended approval by the Development Review Committee (the "DRC"). The DRC must review each application before it is submitted to the Board. The staff

report to the DRC stated that the existing tower at the high school was the only other tower in the area and was in poor condition. The report found that the tower cannot structurally hold more weight and cannot accept more antennae.

10. Before the Board reviewed the application, Nextel again contacted Mr. Becker at AT&T to discuss modification of the existing tower for co-location of Nextel's antenna. Mr. Becker responded for AT&T with a terse e-mail that stated, "This is the THIRD TIME I have told Nextel that . . . tower is not available for anyone."

11. The Board conducted five hearings to review the application by Petitioner. The hearings spanned six months. The Board conducted the first hearing on July 20, 1999, a second hearing on October 5, 1999, a third hearing on November 16, 1999, a fourth hearing on December 14, 1999, and the last hearing on January 25, 2000.

12. The Board did not follow the staff recommendation at the first hearing. After hearing testimony and receiving other evidence, the Board continued the first hearing, in relevant part, to "allow the City to do whatever it may want to do in terms of addressing that issue." The Board directed Petitioner to contact the school board concerning the condition of the tower and directed the City Planning Director to also contact the school board.

13. After the July hearing, Petitioner contacted the school board concerning the existing tower. Neither the school board

nor AT&T had any plans for modification of the existing tower at the high school. The City Planner conducted an independent inquiry and determined that there is not much of a desire on the part of the school board or AT&T to "create other opportunities at this time."

14. Petitioner and the City Planner reported their findings to the Board at the second hearing conducted on October 5, 1999. No one from the school board or AT&T appeared at the hearing.

15. Petitioner presented an engineering study concerning the inadequacy of the existing tower at the high school. One Board member asked whether a new tower could be constructed at the high school to replace the existing tower. Petitioner and the Board's attorney stated that the Code encourages the use of existing towers rather than new towers. The Board continued the hearing over objection from Petitioner so that City representatives could contact school board representatives at a higher level and also allow consideration of a new tower at the high school.

16. After the October hearing, the City Manager contacted the superintendent of schools to discuss the tower at the high school. On November 10, 1999, the superintendent stated that he would meet with city representatives only if AT&T representatives were also present. The superintendent eventually met with the City Manager without the presence of an AT&T representative. The superintendent indicated a willingness to consider modification of the existing tower but no agreement was reached due to the

absence of AT&T participation. Another Board member prevailed on the superintendent four times to make a decision without success.

17. The Board conducted the third hearing on November 16, 1999. Representatives from GTE, Nextel, and PrimeCo testified at the hearing. Modification to the existing tower at the high school would accommodate one of the three companies but not the other two. The proposed tower is the only tower that would accommodate all three companies. The proposed tower is necessary to provide effective and efficient service to the customers of GTE, Nextel, and PrimeCo. GTE has been at a competitive disadvantage since 1996. The Board voted to approve Petitioner's application.

18. The Board conducted a fourth hearing on December 14, 1999. At that hearing, the Board voted to reconsider Petitioner's application on the ground that the Board had received timely requests for reconsideration from an interested party. The Board determined that Petitioner had misrepresented the position of the school board and AT&T concerning their willingness to modify the existing tower at the high school.

19. The catalyst for the Board's reconsideration was a letter from Mr. Becker, dated September 16, 1999, stating that AT&T was willing to consider co-location. Mr. Becker sent a copy of the letter to the Board the day after the Board approved Petitioner's application. The letter stated that AT&T was very interested in considering co-location with other carriers but that the existing tower at the high school was inadequate for the

purpose. The letter represented that AT&T would be willing to discuss replacement of the tower with other carriers. Petitioner had never seen the letter prior to the Board's approval and had no knowledge of the change in position by AT&T.

20. The Board conducted a final hearing of Petitioner's application on January 25, 2000. The Board considered the letter from Mr. Becker and a letter from legal counsel for AT&T. Both letters stated that the existing tower does not have the structural capacity to add additional wireless antennae. A staff member for the Board again concluded that the term "existing" meant a tower in existence at that time. Respondent's expert confirmed that the existing tower, without reconstruction, was not a reasonable alternative to the tower proposed by Petitioner. Mr. Becker testified that AT&T was not proposing to modify the existing tower to accommodate the proposed antennae needed by GTE, Nextel, and PrimeCo and that the existing tower was beyond reinforcement to accommodate additional loading.

21. The Board denied Petitioner's application. The Board found that the existing tower "can be modified to accommodate carriers and thus reasonable use may be made of the existing tower."

22. The evidence does not support a finding that the existing tower can be modified to accommodate GTE, Nextel, and PrimeCo. To do so, the existing tower would need to be replaced rather than modified. Reasonable use of the existing tower cannot be accomplished by modification.

23. Replacement of the existing tower with a new tower would not provide reasonable use of the "existing" tower. As a threshold matter, an interference study would be necessary before a determination could be made that the replacement tower would accommodate all of the carriers. PrimeCo cannot commit to the replacement tower until the interference study is completed. In addition, there are other problems.

24. AT&T proposes to place seven carriers on the replacement tower. That configuration would not provide adequate coverage to each carrier. A second tower would be required in the "short term."

25. AT&T's proposed location of each antenna on the replacement tower would reduce the amount of coverage that is available to each carrier on the tower proposed by Petitioner. Petitioner's proposal locates GTE at 155 feet to accommodate GTE's technical needs. AT&T would locate GTE no higher than 120 feet thereby substantially reducing the area served by GTE. If GTE is located at 120 feet, GTE would need to construct another tower a mile away in order to obtain the coverage achieved at 155 feet in Petitioner's proposal.

26. The replacement tower proposed by AT&T imposes additional limitations on AT&T's competitors. It requires GTE to reduce the size of its antenna to four feet from the eight-foot antenna in Petitioner's application. AT&T imposes a similar reduction on Nextel and requires Nextel to agree to a "compromising antenna" to co-locate on the replacement tower.

27. The continuances ordered by the Board delayed construction of the tower proposed by Petitioner. If Petitioner had received approval of the application in July 1999, Petitioner could have had its proposed tower in service by January 2000. The delay has placed GTE, Nextel, and PrimeCo at a competitive disadvantage.

28. As of the date of the administrative hearing, AT&T had not begun construction of the replacement tower. The school board has the right to approve any co-location agreements for the replacement tower proposed by AT&T. AT&T has not submitted any co-location agreements for school board approval.

29. Board policy considers the timeliness of a replacement tower as one factor in determining whether the replacement tower is "feasible" or a "reasonable alternative" within the meaning of Section 3-2.001D.1. A replacement tower that would require more than one year to construct is neither feasible nor a reasonable alternative.

30. Neither the Board nor its staff enunciates any intelligible standards for adopting a one-year time limit or for applying a one-year time limit, including any standard for identifying the starting point of the one-year limit. For example, Petitioner first applied for approval on May 17, 1999. The Board began the one-year period for determining feasibility of the AT&T replacement tower on September 10, 1999. Respondent failed to explicate why it started the one-year period on September 10, 1999, rather than the date of application.

31. The limitations imposed by AT&T for co-location on the replacement tower and the continuances imposed by the Board, individually and severally, comprise a "legitimate limiting factor" within the meaning of Section 3-2001D.1.g. The limitations and continuances have the effect of placing GTE, Nextel, and PrimeCo at a competitive disadvantage and also have the effect of discriminating against the three companies in violation of Section 3-2001A.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 4-505. The parties were duly noticed for the hearing.

33. The burden of proof is on Petitioner. Section 4-505, in relevant part, provides:

> C. The burden shall be upon the appellant to show that the decision of the community development board cannot be sustained by the evidence before the board and before the hearing officer, or that the decision of the board departs from the essential requirements of law. (emphasis supplied)

34. Section 4-505C authorizes reversal of the decision of the Board if Petitioner shows either that the decision cannot be sustained by the evidence or that the decision departs from the essential requirements of law. Section 4-505 does not prescribe the evidentiary standard by which Petitioner must satisfy its burden of proof.

35. Petitioner satisfied both disjunctive requirements of the burden of proof prescribed in Section 4-505. Petitioner

showed by clear and convincing evidence that the decision of the Board cannot be sustained by the evidence and that the decision departs from the essential requirements of law.

36. Section 3-2001, in relevant part, provides:

> D. Telecommunications towers.
>
> 1. . . . Joint use of existing telecommunications towers . . . is required as an alternative to new tower construction whenever feasible. Therefore, anyone considering new tower construction, must first explore other options. Prior to the issuance of any building permit for a new tower, a determination must be made that no existing tower or other structure is available as a reasonable alternative. An applicant requesting a permit for a new tower shall submit evidence to the city that supports a conclusion that no reasonable use can be made of any existing tower or structure. The evidence shall clearly establish one or more of the following conditions: (emphasis supplied)
>
> a. No existing tower or structure is located within the geographic area required to meet the applicant's coverage requirements.
>
> b. Existing towers or structures are not of sufficient height to meet the applicant's engineering requirements.
>
> c. Existing towers or structures do not have sufficient structural strength to support the applicant's proposed antenna and related equipment.
>
> d. The applicant's proposed antenna would cause electromagnetic interference with or would be interfered with by other antennas if place on any existing tower or structure.
>
> e. The fees, costs or contractual provisions required by the owner in order to share an existing tower or structure for a time period of 25 years, [sic] exceed the cost of developing a new tower.

> f. It is not financially feasible to modify or replace an existing tower to accommodate the proposed antenna.
>
> g. The applicant demonstrates that there are other legitimate limiting factors that render existing towers and structures unsuitable.

37. The evidence clearly established the presence of one or more of the conditions that must be present for the approval of an application to construct a new tower. It is uncontroverted that the existing tower at the high school is not of sufficient height or structural strength, within the meaning of Section 3-2001D.1.b and c., to accommodate co-location of an additional antenna. Petitioner showed by clear and convincing evidence that the replacement tower proposed by AT&T would not provide sufficient height location for the GTE, Nextel, and PrimeCo antennae within the meaning of Section 3-2001D.1.b.

38. The evidence clearly established that there are other legitimate limiting factors that render the replacement tower proposed by AT&T unsuitable within the meaning of Section 3-2001D.1.g. The seven antennae proposed by AT&T would not provide adequate coverage to each carrier and would necessitate at least one additional tower. The absence of an interference study prevents PrimeCo from committing to a replacement tower and may require PrimeCo to build another tower. AT&T's location of GTE no higher than 120 feet on the replacement tower and reduction of antenna size from eight to four feet would substantially reduce the area served by GTE and would require GTE to build a second tower within one mile of the replacement tower. Similar

reductions to the antenna of Nextel would enhance Nextel's need for an additional tower.

39. Petitioner showed by clear and convincing evidence that the decision of the Board departed from the essential requirements of law within the meaning of Section 4-505C. Section 3-2001, in relevant part, provides:

> A. Purpose and goals. The purpose of this division is to establish general standards for the siting of telecommunications towers and antennas. The goals are to encourage the use of existing structures as an alternative to new tower construction, to encourage the joint use of new towers, to encourage the design and construction of towers and antennas which minimize the adverse visual impacts, and to enhance the ability of providers of telecommunications services to furnish such services with the city quickly, effectively and efficiently. It is not the intent of the city to discriminate among providers of functionally equivalent services, or to prohibit or have the effect of prohibiting the provision of personal wireless services.

40. The evidence clearly established that the replacement tower proposed by AT&T would not enhance the ability of GTE, Nextel, and PrimeCo to furnish services within the city quickly, effectively, and efficiently within the meaning of Section 3-2.001A. Conversely, the evidence clearly established that the tower proposed by Petitioner would enhance the ability of those providers to furnish such services.

41. For reasons stated in paragraph 38, the evidence clearly established that the replacement tower proposed by AT&T would encourage the construction of additional towers by GTE, Nextel, and PrimeCo in violation of the goals prescribed in

Section 3-2001A. Conversely, the evidence clearly established that the tower proposed by Petitioner would encourage the use of the proposed tower by reducing the need of GTE, Nextel, and PrimeCo for additional towers.

42. The evidence clearly established that the continuances ordered by the Board did not enhance the ability of GTE, Nextel, and PrimeCo to furnish services within the city quickly, effectively, and efficiently. The continuances delayed construction of the tower proposed by Petitioner. If Petitioner had received approval of the application in July 1999, Petitioner could have had its proposed tower in service by January 2000. The continuances ordered by the Board and the significant limitations imposed by AT&T for the replacement tower had the effect of placing GTE, Nextel, and PrimeCo at a competitive disadvantage and also had the effect of discriminating among providers within the meaning of Section 3-2001A. The competitive disadvantage is underscored by the failure of the Board to explicate any intelligible standard for application of the one-year time limit for availability of the replacement tower.

43. The Code does not define the term "existing." The Code provides in Section 8-101N that words not defined in the Code "shall have the meaning indicated by common dictionary definition." The replacement tower is not an existing tower because it does not have "actual or real being" and is not "present . . . in a certain place." The American Heritage Dictionary, Second College Edition, 475 (Houghton Mufflin Company

1982). The Board is bound by the express terms of its own ordinance. Carroll v. City of Miami Beach, 198 So. 2d 643, 645 (Fla. 3d DCA 1967), rev. denied, 545 So. 2d 1366 (1989).

44. The Board's determination that a replacement tower is an "existing" tower departs from the essential requirements of law. When the Board defined an "existing" tower to mean a replacement tower, the Board construed the term "existing" in a manner other than its common ordinary meaning; inserted additional terms not found in the express terms of the ordinance; and thereby departed from the essential requirements of law. Mandalstam v. City Commission of the City of South Miami, 539 So. 2d 1139, 1140 (Fla. 3d DCA 1988). Zoning laws are in derogation of the common law and must be strictly construed in favor of a property owner such as Petitioner. Id.

45. The decision of the Board departed from the essential requirements of law by engaging in ex parte communications in violation of Section 4-206D.3. Section 4-206D.3. provides:

> . . . Except as provided in this subsection, no member of the . . . board . . . shall engage in any ex parte communications with any person in regard to the substance of a quasi-judicial matter which is to be considered by the board. . . . (emphasis supplied)
>
> a. Members of the . . . board may conduct personal investigations and site visits regard [sic] to a quasi-judicial pending [sic] before them provided that the existence of such investigation is disclosed at a public hearing and made a part of the record before final action on the matter.

46. The Board went far beyond the personal investigation and site visit authorized in Section 4-206D.3.a. Board members engaged in ex parte communications with the superintendent of schools without allowing Petitioner to be present to cross-examine the evidence obtained by the Board. Such ex parte communications violated Section 4-206D.3., as well as fundamental notions of the due process right to cross-examine evidence that the trier of fact will consider in determining the substantial interests of Petitioner.

FINAL ORDER

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

ORDERED that the decision of the Board is reversed, and the application of Petitioner is approved.

DONE AND ORDERED this 30th day of August, 2000, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of August, 2000.

COPIES FURNISHED:

Darryl R. Richards, Esquire
Johnson, Blakely, Pope, Bokor,
Ruppel and Burns, P.A.
Post Office Box 1100
Tampa, Florida 33601

Leslie K. Dougall-Sides, Esquire
Assistant City Attorney
Post Office Drawer 4748
Clearwater, Florida 33758

Cynthia Goudeau, City Clerk
City of Clearwater
Post Office Box 4748
Clearwater, Florida 34618

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the Agency Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.