

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UPPER KEYS CITIZENS ASSOCIATION)
and FLORIDA KEYS CHAPTER IZAAK)
WALTON LEAGUE OF AMERICA,)
)
Appellants,)
)
vs.) Case No. 01-3914
)
MONROE COUNTY and FLORIDA KEYS)
ELECTRIC COOPERATIVE)
ASSOCIATION, INC.,)
)
Appellees.)
_____)

FINAL ORDER

Appellants, Upper Keys Citizens Association and Florida Keys Chapter Izaak Walton League of America (Appellants), seek review of Monroe County Planning Commission (Commission) Resolution No. P52-01, approving, with conditions, a request by Appellee, Florida Keys Electric Cooperative Association, Inc. (FKECA), for a minor conditional use for an unmanned electrical substation on property adjacent to State Road 905, approximately 2.5 miles south of the Ocean Reef Club gatehouse, North Key Largo, Monroe County, Florida. Resolution No. P52-01 is dated August 8, 2001, and this appeal was timely filed. The Division of Administrative Hearings, by contract, and pursuant to Article XIV, Section 9.5-535, Monroe County Code (M.C.C.), has jurisdiction to consider this appeal.

I. Issues

Appellants raise two issues on appeal: (1) whether they were denied procedural due process of law when Commissioner Jerry Coleman declined to recuse himself from consideration of the request for a minor conditional use, after Appellants requested his recusal; and (2) whether the Commission's decision to approve the minor conditional use is consistent with the Monroe County 2010 Comprehensive Plan (Plan), and in particular Policy 103.2.4. Stated otherwise, the second issue includes consideration of whether there is competent substantial evidence to support the Commission's findings and ultimate decision to approve, with conditions, the minor conditional use.

After approval of several, unopposed extensions of time for all of the parties in this appeal, Appellants filed an Initial Brief and a Reply Brief, and Monroe County and FKECA filed separate Answer Briefs. Oral argument was heard on February 7, 2003.

II. Background

On or about September 9, 1998, FKECA applied for a minor conditional use for the purpose of establishing an unmanned electrical substation to be located on a 2.02-acre portion of a former Florida Department of Transportation (FDOT) right-of-way, known as Old Card Sound Road, in North Key Largo, Monroe County, Florida. This parcel was acquired by FKECA from FDOT (by quit

claim deeds) in 1997 and 1998. FKECA exchanged a three-acre parcel for this 2.02-acre site (which is the site approved by the Commission), when FKECA determined that the former site could not be used for the substation because of "environmental sensitivity." Numerous documents were submitted with the application.

On April 11, 2001, Martin Schultz, Senior Planner, and Ralph Goulidy, Senior Administrator-Environmental Resources, provided the Development Review Committee (DRC) with a Memorandum which provided a review of the application.

Staff reviewed the application for consistency with provisions of Monroe County Land Development Regulations (LDR) and the Plan, and the application was found to be in compliance with several criteria and not in compliance with others. Staff stated that compliance had not been determined with respect to other regulations. The application was also reviewed for and found in compliance with several provisions of the Plan, including but not limited to Policy 103.2.4, see page 8, infra. (Record, pages 415-416). Staff recommended approval of the minor conditional use with conditions.

On June 4, 2001, the DRC unanimously recommended that the Commission approve the minor conditional use, with conditions, and entered Resolution No. D16-01. The DRC adopted the "Findings of Fact and Conclusions of Law" proposed in the

Memorandum. Unlike the staff's analyses of compliance issues, the DRC's Resolution does not directly discuss Policy 103.2.4. See Endnote 7, infra.

On or about June 18, 2001, Appellants requested the recusal of Commissioner David Ritz based on a conflict of interest. Commissioner Ritz recused himself and did not participate in consideration of the matter.

By separate letter of June 18, 2001, Appellants also requested the recusal of Commissioner Coleman based on allegations of bias in light of the alleged "antagonistic nature of" the relationship between Appellants' counsel (Lee R. Rohe, Esquire) and Commissioner Coleman arising out of independent litigation between Commissioner Coleman and Appellants' counsel's clients/parties opposing Commissioner Coleman's interests. Appellants also provided an affidavit of Joan Mowery, a member of Appellants' organizations, who expressed "a present and real fear that the organizations represented by Mr. Rohe will not receive a fair and impartial hearing on July 25, 2001. . . ."

By letter dated July 23, 2001, Commissioner Coleman advised Mr. Rohe that he would not recuse himself and stated the reasons for his decision. Commissioner Coleman participated in, made the motion to approve the staff recommendation, and voted in favor of approving the minor conditional use.

On June 6, 2001, staff (Mr. Schultz and Mr. Goulby) prepared a Memorandum, analyzing the application. This Memorandum is similar to the Memorandum staff prepared and submitted to the DRC on April 11, 2001. (A copy of the June 6, 2001, Memorandum was not included in the Record. By Order of February 25, 2003, Monroe County, after consultation with the parties, was ordered to file a copy of this Memorandum because it was referred to and incorporated by reference as part of the record by the Commission in Resolution No. P52-01. This Memorandum is made a part of the Record.)

With respect to Policy 103.2.4, staff stated: "The applicant's submittals concerning land availability, State and Federal use restrictions on public lands, constraints regarding transmission distances, and required environmental disturbances relative to alternate sites closer to Ocean Reef suggest that the proposed site results in the least environmental impacts while meeting the engineering constraints faced by the utility. Staff recognizes that efficient, reliable, and adequate electrical service protects the public health, safety, and welfare."

After discussing the compliance issues, the staff's June 6, 2001, Memorandum (in the "Staff Analysis" section IV.) provided:

Due to the environmental sensitivity of North Key Largo, the FKEC substation must be designed to minimize environmental degradation. Since

much of the area is under conservation within the Crocodile Lakes National Wildlife Refuge and the Key Largo State Botanical Site, available disturbed sites are limited. Additional limitations on site selection result from engineering constraints related to energy line losses associated with transmission of electricity over distance. Placing the facility on identified sites north of the intersection of S-905 and Card Sound Road will require hammock clearing for the substation and as well as for a significant number of additional high voltage transmission towers.

Much of the proposed site is disturbed with secondary regrowth of native vegetation and exotics, and the presence of numerous fill and debris piles. It is Staff's opinion that minimizing encroachment into the site, removal of debris, fill, and exotic vegetation, along with an approved restoration of the remaining disturbed area and continuing management of exotic vegetation and fire ant infestation, will result in less cumulative environmental impacts than would occur with alternative sites to the north.

On July 25, 2001, the Commission held a public hearing to consider FKECA's application. John Burch, P.E., Mickey Harrelson, P.E., Charles Russell, CEO of FKECA, Robert Smith, Thomas Edward Lodge, Ph.D., and Donald L. Craig, A.I.C.P., testified for FKECA. Joan Mowery, Michael F. Chenoweth, Esquire, and several members of the public, including but not limited to Steve Klett, the refuge manager at Crocodile Lake National Wildlife Refuge, testified in opposition to the application.

After hearing the evidence and argument of counsel, the Commission voted three to one to approve the minor conditional use, with conditions. The Commission's decision was reduced to Resolution No. P52-01 and entered August 8, 2001.

III. Facts

The following facts are gathered from the evidence presented to the Commission, which is contained in the Record of this appeal.¹

The proposed substation is to be located on a 2.02-acre parcel (project or proposed site), adjacent to State Road 905, approximately 2.5 miles south of the Ocean Reef Club gatehouse, in North Key Largo, Florida. The proposed structure is shown to be approximately 1,924 square feet with equipment and wires also on the site extending to power poles adjacent to State Road 905. The proposed substation is designed to serve the Ocean Reef Community.

The proposed site is zoned Native Area (NA) under Monroe County's Land Development Regulations (LDR) as a land use district.²

The proposed site is an abandoned roadway adjacent to a former radar base, which is currently part of the Dagny Johnson Key Largo Hammock Botanical State Park (Park)³ on the Atlantic Ocean, or eastern side of the site. The majority of the other lands in the area are reserved for conservation with the Park,

and the Crocodile Lake National Wildlife Refuge (Refuge) on Biscayne Bay, or western side of the site. The landowners adjacent to the proposed site are the Board of Trustees of the Internal Improvement Trust Fund, as owner of State of Florida lands, the FDOT, and the United States of America.

As part of the application, FKECA submitted a "Key Largo Substation Needs Analysis" dated August 2000. The purpose of this needs analysis was to demonstrate that the proposed site was appropriate as a substation and consistent with applicable provisions of the Monroe County Code LDRs and the Monroe County Comprehensive Plan, and in particular, Policy 103.2.4 which provides: "Monroe County shall require that public facilities be developed on the least environmentally sensitive lands and shall prohibit the location of public facilities on North Key Largo, unless no feasible alternative exists and such facilities are required to protect the public health, safety, or welfare."⁴

FKECA indicated in its Needs Analysis that its "long-range facilities plan" identified the North Key Largo distribution system as requiring improvement by the addition of a proposed substation. FKECA noted that

the thirteen (13) mile long feeder system, adjacent to State Road 905, serving the North Key Largo area, including the Ocean Reef Club, is experiencing substantial line loss and diminished reliability due to the lack of adequate voltage stabilization. In layman's terms this situation means that the present

electric distribution system is inefficient, loses voltage along the length of the distribution system, and often results in brown-outs or voltage spikes in the Ocean Reef community.

Because of the proposed project site's size and location within the native land use district, FKECA was required to obtain a minor conditional use permit.

To support its application, FKECA provided, in part, an assessment of alternative sites for the proposed substation. Before discussing the evidence pertaining to this analysis, a brief discussion of the evidence as to how electricity is provided by FKECA is appropriate.

John Burch is a licensed professional engineer in the State of Florida. He has worked for FKECA for over nine years and is currently the Director of Engineering for FKECA. He has experience in electrical system planning and design, construction, and operations.

FKECA buys almost 100 percent of their power from Florida Power & Light (FPL). The electricity travels from FPL's system to FKECA's system by a transmission system, "like a super highway." The electricity travels from Florida City south down Card Sound Road (SR 905). In order to serve the public, the electricity must pass through an interchange. It becomes usable through a transformer and a substation. The closest substation

in the North Key Largo area is the Oz Moody station at Mile Marker 106.

According to Mr. Burch, the load has "dramatically increased" over the past 12 years and the system is not designed to carry the required load. FKECA has experienced a line loss which has resulted in an "extremely large amount of power loss because of the large amount of power that must flow for" an extra 20 miles. FKECA estimates approximately \$329,700 a year in lost resources because of the need to transport power an additional 20 miles.

Location of the substation at the proposed site would allow FKECA "to meet the national standards for voltage drop. If [FKECA moves] any farther south from that location then the voltage drop is going to increase dramatically and [FKECA will not] be able to meet the voltage drop standards."

The proposed substation is approximately 40 percent smaller than a normal substation. No additional transmission or distribution lines will be required. The substation allows FKECA to tap into the existing transmission line system.

There are no transmission lines from the proposed site to Ocean Reef; only a distribution line. If an Ocean Reef site were chosen, transmission lines would need to be built.

If the substation is built on the proposed site, FKECA's line losses would be reduced from \$329,000 a year to \$68,000 a

year, the voltage would be within the national standards, and reliability would be increased.

Mickey Harrelson, a registered professional engineer in the State of Florida, also testified in favor the application. He described the function of the existing system as "totally inadequate." Mr. Harrelson confirmed Mr. Burch's testimony regarding the benefits of using the proposed site from an engineering perspective.

Charles Russell, CEO of FKECA, testified in support of the application. His testimony supported Mr. Burch's testimony. He reiterated that placing a substation inside Ocean Reef would cause environmental damage by the necessity of building "two or three miles" of transmission lines.

Eleven sites, plus the site ultimately approved by the Commission and owned by FKECA, were examined pursuant to the following criteria: project electrical suitability; environmental criteria; land ownership criteria; land use and zoning designations; comprehensive plan policy criteria; principles for guiding development; and surrounding lands. A map attached to the Needs Analysis identifies the corridors along State Roads 905 and 905A in which an electrical substation could be placed according to FKECA. As noted by FKECA:

The selection of these corridors was based upon the absolute criteria that the substation be placed within an area adjacent to the existing

distribution lines from the mainland and along State Route [sic] 905. Within these corridors, sites were chosen based upon the availability of disturbed upland areas close to Road 905 or Road 905A. Once the sites were chosen, electrical suitability criteria are applied to each of the sites. The electrical suitability criteria are driven by the behavior of electricity transmitted over land by means of wire, and the cost attendant with providing such lines and ancillary equipment. The effect of electrical transmission of the type available to the cooperative results in geographic limitations on where a substation to boost or maintain voltage may be placed.

Pertinent here, environmental impacts were considered.

Robert Smith of the Robert Smith Company, and Dr. Thomas Edward Lodge completed an environmental analysis of each potential site. Mr. Smith has a bachelor's degree in mathematics and biology. He also has a master's degree in organismal ecology and biochemistry.

The record contains "alternate site biological reports" and "habitat evaluation indices for project site and alternate sites marginally feasible with disturbed areas."

Mr. Smith explained that the Plan establishes a habitat evaluation procedure called an "HEI or habitat analysis" which "is a compilation of various environmental parameters that are reviewed and combined into an overall picture of the relative degree of pristineness of one parcel or another parcel as it relates to either plant communities or animal communities in a particular area or the actual physical ground that the community

is located within. That's codified within Comprehensive Plan as well as the Monroe County Code."

In assessing proposed sites, Mr. Smith and Donald Craig, A.I.C.P., reviewed existing aerial and zoning maps of Monroe County, and looked at potential areas large enough to accommodate the substation and connecting to State Road 905.

During the hearing before the Commission, Mr. Smith provided a summary of his findings with respect to each site which amplified the written documentation in the record. (There is a map in the record (Record, page 273) prepared by Dr. Lodge, which shows the location of the 12 sites.)

Relevant here, alternate site number 11 was analyzed. (Only sites 9 and 10 are south of site 11.) Alternate site number 11 measures approximately 3.1 acres, and was owned by FKECA, and was proposed originally for the electrical substation until it was determined to be unsuitable because of the environmentally sensitive nature of the site. As noted above, this site was traded to the FDOT for the current proposed site.

Mr. Smith concluded (in a January 10, 2000, written report) that site 11 "was analyzed and found to be a high quality tropical hardwood hammock. The open space ratio would be 0.80. The hammock of which the subject parcel is a part has significant wildlife value for endangered species." On the "normative suitability scale" provided with the needs analysis,

alternate site number 11 received a score of 10, whereas the FKECA proposed site received a score of 32, with a higher score being more suitable than a lesser score, based on the "alternate site selection criteria" mentioned above. See page 11, supra. The proposed site received the highest score (of the alternative sites reviewed) for suitability.

Mr. Smith also provided a mixed habitat analysis for the proposed site. The site was described and habitat types evaluated. The hammock areas located on the property are described in some detail. Mr. Smith also observed that a majority of the site "would be classified as disturbed lands." His conclusions are:

IV. Conclusion, Open Space, Buildable Area and Clustering:

A. Low Hammock: The low hammock was evaluated and found to be a moderate quality hammock. The environmental open space would be .60 which would allow for 40 % buildable area. Since the zoning is native hammock (NaH), the open space would be .80 and only 20 % could be used for buildable purposes. This would equate to ± 1,484 sq.ft. of buildable area.

B. High Hammock: The high hammock was evaluated and found to be a moderate quality hammock. The environmental open space would be .60 which would allow for 40 % buildable area. Since the zoning is native hammock (NaH), the open space would be .80 and only 20 % could be used for buildable purposes. This would equate to ± 4,836 sq.ft. of buildable area.

C. Disturbed Lands: The disturbed lands measured 53,420 sq.ft. (1.23 acres). The

environmental open space ratio of .20 which would allow for 80% to be built upon. Since the zoning is native disturbed (NaD), the open space would be .60 and only 40 % could be used for buildable purposes. This would equate to ± 21,368 sq.ft.

D. Fringing Mangroves: The fringing mangroves portion of the parcel measured ± 3,600 sq.ft. The environmental and zoning open space is 100 % and as such no buildable area is present.

Total Buildable Area: 27,688 sq.ft. The Monroe County Code requires that clustering of buildable area be within the environmentally least sensitive area of the parcel when more than [sic] one habitat category is present on site. The environmentally least sensitive area of the parcel would be the disturbed lands portion.

Alternate site 1 was evaluated on June 29, 1999.

(Alternate site number 1 is the northernmost site.) This site is "part of the utility area of Ocean Reef Club, North Key Largo, Monroe County, Florida." It is zoned "Sparsely Settled (SS)." Mr. Smith provided the following written "summary statement": "The subject parcel is located within the Ocean Reef Club within North Key Largo. The parcel is a portion of the utility grounds area of the Club. The parcel was contained within a development agreement (D.A.) with Monroe County. The use proposed within the development agreement was for a driving range. The parcel abuts the airport and is within the geometric dome of interaction with the flight path glide zone, a.k.a.

clear zone. There are no environmental features on site." It is a "scarified" site. This site received a rating of "15."

Alternate site number 2 (south of site 1) was also evaluated by Mr. Smith on June 28, 1999, and January 15, 2000. This site is located at "Old Card Sound Roadway and adjacent lands adjacent to the Ocean Reef Club, North Key Largo, Monroe County, Florida." Alternate site number 2 received a rating of "8" on the suitability scale. Mr. Smith's conclusions in the January 15, 2000 report are:

III. Conclusion, Open space and Buildable Area:

A. Tropical Hardwood Hammock: The hammock was evaluated and found to be a high quality hammock. The open space ratio would be 0.80 which would allow for 20 % of the hammock to be cleared and built upon[.] However all clearing in excess of 10 % would require that any tree larger than 4 inches in diameter at breast height be relocated. The hammock would need to be cleared for a length of 178 L.F. and a width of 59 L.F. (10,502 sq. ft.) in order to accommodate the proposed facility. Since the open space ratio is 0.80 then the minimum area of 52,510 sq.ft. (1.205 acres)[.] [T]ropical hardwood hammock would need to be annexed onto the roadway such as to conform with the Monroe County Code.

B. Roadway: The disturbed portion of the roadway right of way located adjacent to the Ocean Reef Club (north) could not be used as it is within the required setbacks associated with the native landuse [sic] district. The roadbed is ± 25 feet wide with a shoulder area of ± 10 feet. The facility is 94 feet wide and 178 feet long (16,732 sq.ft.). This area would accommodate 178 L.F. X 35 L.F. = 6,230 sq. ft. The remainder of the facility would be in the

tropical hardwood hammock areas. In order to conform with the open space requirement of 0.60 (native disturbed or scarified) the length of the roadway and adjacent shoulder area would need to be 297 linear feet. This would be in addition to any driveway or roadway needed to access and setback the facility from the paved roadway (S-905).

During the hearing, Mr. Smith further amplified on his conclusions that the proposed sites (1 and 2) in or around Ocean Reef were not as feasible as the site chosen. With respect to the Ocean Reef site, Mr. Smith considered Mr. Burch's assessment of the need to construct transmission lines to the Ocean Reef site and opined:

I went and looked at the locations on both sides of the road, seeing where you would put a transmission line and I have been informed that if a transmission line would be constructed it would be on the west side of 905. So I went through, walked the whole distance there and did a habitat analysis of the west side of the road. And effectively it would result in clearing of approximately four acres of either tropical hardwood hammock or mangrove wetlands. It probably would be impossible to obtain permits to do that type of clearing.

Mr. Smith also discussed the appropriateness of the proposed site during the final hearing, and testified in part:

The proposed site is or was an abandoned roadway which at one time was 905 before it was abandoned. It currently was a roadway, physically has a roadway in the center of it and part of that has been filled, other parts have not been filled, didn't need to. It's [sic] elevational change for the Keys is relatively significant because it goes from a wetland elevation on one corner to an elevation

of around eight or nine or even ten feet at the highest point which is relatively quick gradation for the Keys. Along the roadway -- at one time the entire roadway was cleared except for some portions of the northernmost corner of the parcel. . . .

. . . The northernmost portion of the parcel was not cleared and it's about, approximately 20 to 22 feet wide from the edge of the cleared area to the edge of the surveyed parcel and that's part of mature tropical hardwood hammock. The rest of the parcel is considered to be disturbed and portions of it are recovering with native species and other portions are growing with exotic pest plants. The rear of the parcel, the eastern most third approximately, would be characterized as disturbed with exotic pest plants. It's heavy [sic] trashed. There is a fair amount of dumping and debris that's there and a significant number of, a significant number of old pieces of metal that have been thrown there, boats, washing machines, that type of stuff and roofing material.

The one corner of the property which would be the western most corner abuts on to a mangrove area and has some mangrove wetlands. We are not proposing to be in that area. We are proposing to use the existing roadway. And when we first designed the site plan it was located in the rear of the western most sector of the parcel because of the amount of exotics that were there. After meeting with the county biologist, spoke with Niko Reisinger and also with Ralph Gouddy they suggested maybe we should consider moving it closer to the highway.[⁵]

Our objective originally was to try to situate in the rear where there were more exotics, and as well you wouldn't be able to see the facility the further back that it is. I just thought from design perspective it is probably a better idea to be closer to the road because there is less wires and everything that

need to be put in. However the county decided and we had gone along with it obviously, that we move the facility closer to the road, to 905.

One of the benefits associated with that or I leave [sic] the logic pattern that the county biological staff used, and they can correct me if I'm wrong, is that a portion of any development order issued by Monroe County requires that if you have any area that has exotic pest plants that all the exotic pest plants need to be removed from there and the area restored. So our intent was to situate the facility closer to 905 which allowed us a much larger area in the rear of the parcel to recreate and reforest, hence recreating the wildlife corridor that would extend from the forest on the north side to the reforesting areas to the south of the parcel hence it's a bigger area to restore.

Mr. Smith advised that the proposed site consists of approximately two acres and FKECA will be using approximately one-third of the site. According to Mr. Smith, the net result would be to end up with more tropical hardwood hammock than currently exists due to restoration that would be required of FKECA. Mr. Smith was satisfied that the design and the location of the substation on the proposed site minimizes environmental impacts.

With respect to the potential building of the facility in Ocean Reef, Mr. Smith advised that a secondary impact of using this site would require the removal of approximately four acres of either tropical hardwood hammock or mangrove wetlands. Overall, he opined that the "impact upon placement of the

facility there [Ocean Reef] would be many times greater than where [FKECA proposed] it to be." On the other hand, Mr. Smith agreed that the Ocean Reef "site [number 1] had no environmental features." "It's scarified." But, he reiterated on cross-examination that he was concerned with the placement of required transmission lines which was problematic.

Dr. Lodge, an environmental scientist and primarily an ecologist, also testified in favor of the application. Dr. Lodge has a Bachelor of Arts degree with a major in zoology from Ohio Wesleyan University, and a Ph.D. in biology from the University of Miami in 1974. He is the author of the Everglades handbook subtitled Understanding the Ecosystem, which contains chapters on mangrove, tropical hardwood hammock, and Florida Bay. He has had considerable experience in evaluating impacts of construction in environmentally sensitive areas.

Dr. Lodge visited all of the proposed sites, and some of them several times. He focused on the environmental aspects of each site.

Dr. Lodge opined that the proposed alternative of constructing transmission lines into Ocean Reef was not appropriate. He was concerned with the fragmentation which would result from construction of the transmission lines in this area. He was also concerned with the "edge effect" which can result in an ecological problem involving invasive species. He

opined that there was a "much larger environmental impact" to run transmission lines rather than use the proposed site.

As part of the application, FKECA submitted a memorandum letter from Mr. Craig dated June 14, 2001, evaluating the expected impacts from an alternative location of the proposed substation somewhere within the Ocean Reef Club. Mr. Craig summarized the results of the consultant team's analysis that an Ocean Reef Club substation be rejected. The conclusions are as follows:

1. A substation at ORC would require the construction of a new double circuit transmission line from the three-way stop to ORC.
2. Line losses will still be unacceptable with a new transmission line extension to the Ocean Reef Club.
3. The environmental damage associated with construction of a new transmission line would be greater than those associated with the proposed site.
4. The new transmission line would have to carry one-half (1/2) the load of the entire system for the Florida Keys. The alternating current with loads of this size must have a return circuit to Key West.
5. The cost of an alternative involving a complete underground transmission line to the ORC substation site would be excessive and would involve as much, if not more environmental damage as the transmission line alternative.
6. An assumption that new transmission poles would simply be placed in the same location as

the existing distribution poles is incorrect. The Florida Department of Transportation requires that the larger concrete transmission poles be placed far away from the road travel lanes in order to minimize the damage to automobiles and passengers in collisions with large immobile objects.

In addition, the consulting team calculated the location, site and effects of placing a series of transmission line poles to a substation located at the Ocean Reef Club. Numerous calculations are included in Mr. Craig's letter. Part of the analysis contained in Mr. Craig's letter referenced clearing impacts associated with the construction of the transmission line on which distribution lines would be supported.

During the hearing, Mr. Craig summarized his previous findings with respect to the construction and maintenance impacts which will likely result if a transmission line or a sub-service line were to be placed inside the Ocean Reef Club. He, in concert with other experts including Mr. Burch and Mr. Russell, concluded that it would take approximately 38 new poles to take the transmission line into the gate of Ocean Reef Club, an alternative site favored by Appellants. He stated that the clearing of existing hammock for new transmission lines on the Ocean Reef site was worse than installation of the substation. Approximately 3.9, not 10.9 (Record, pages 103 and 257) acres of hammock would be cleared. Mr. Craig also

subtracted the temporary construction clearing from this figure to arrive at the permanently cleared area of 3.47 acres.

Mr. Craig further testified regarding FDOT regulations which require the placement of utility structures at the farthest edge of the right-of-way.

As a professional planner, Mr. Craig opined that the proposed site was the least environmentally sensitive site that has been identified for the placement of the substation and that there are no other considered sites which would be equally or more feasible than the proposed site. (Mr. Craig is not an engineer nor a practicing biologist or economist.)

On cross-examination, Mr. Craig reiterated that in his opinion, the clearing of the hammock for the new transmission line to and from Ocean Reef Club would be worse than the installation of the substation at the proposed site.

During the hearing, Mr. Craig's assessments especially with respect to the location of the poles and the clearing impacts associated with the construction of the transmission line, were criticized by Appellants' witness Mr. Michael F. Chenoweth. Mr. Chenoweth suggested that perhaps FDOT would grant a waiver from siting requirements in order to avoid the loss of the approximately four acres of hammock due to the construction of the transmission lines.

Mr. Chenoweth believes that there is room for the substation inside the Ocean Reef Club, outside the gate of the Ocean Reef Club, and inside the entrance to the Angler's Club. He stated that there are alternative and feasible sites between alternate sites 1 and 2.

Mr. Chenoweth also disagrees with the staff analysis that the proposed site will result in less cumulative environmental impacts than would occur with alternative sites to the north, i.e., the Ocean Reef area. Mr. Chenoweth states that FKECA should have pursued a waiver from the FDOT from the setback requirements and, second, alternate site number 1 is the best site because it has no environmental features that will be impacted by construction of the substation. He also favors alternate site number 2. Mr. Chenoweth states that North Key Largo had "the largest contiguous hardwood hammocks . . . in the United States" and that the "[P]ark has the highest CARL priority when it was being acquired."

Prior to the hearing, Mr. Chenoweth submitted a letter offering a lengthy critique of the application.

Mr. Chenoweth has a degree in environmental engineering technology from Florida International University and a law degree. He spent 31 years as a reserve officer in the Army Corps of Engineers. He does not have training in the siting of

structures for FDOT right-of-way projects. Rather, his testimony is based on his personal observations.

His belief that a waiver is possible is based on his experience with the Governor and Cabinet of the State of Florida. He has never sought a waiver from the FDOT.

On rebuttal, Mr. Burch disagreed with Mr. Chenoweth regarding whether the FDOT would grant a waiver.

There were several persons from the public who opposed the application. They spoke, in part, about the importance of the Park, e.g., being a "fragile ecological treasure" and "home to many endangered and threatened plants and animal species." (Record, page 160). Steve Klett, the refuge manager at the Crocodile Lake National Wildlife Refuge, also spoke in opposition to the application. He is a biologist who lives approximately one mile from the proposed site. Mr. Klett opined that "[t]he project would result in a loss and fragmentation of habitat important to these species and would attract black rats, fire ants and invasive exotic plants which are all detrimental to the endangered species in North Key Largo. A case in point is the endangered Key Largo woodrat and Key Largo cotton mouse. Both species have shown a rather dramatic decline in their population over the last 20 years." He believes that the Ocean Reef site "would have far less impact to the endangered species of North Key Largo."

The Record contains a May 31, 2001, letter from David E. Dismutes, Ph.D., a "consulting economist." Dr. Dismukes was critical of, in part, FKECA's Needs Analysis, including the information on alternative sites, and growth forecasts.

After closing arguments, Edward Koconis, A.I.C.P, Island Planning Team Director, and DRC Chair, favored the application, although he said "it wasn't the easiest thing in the world." Nevertheless, he recommended that the Commission adopt an additional finding of fact which appears in Resolution No. P52-01 as follows:

6. Based on the application, we find that the proposed project is consistent with Florida Statute 380.0552(7), balanced between 380.0552(7)(h)8. which states that one of the principles for guiding development in the Florida Keys Area, regarding the protection and designation as an area of critical concern, is to protect the value, efficiency, cost-effectiveness, and amortized life of existing and proposed major public investments, including City Electric Service and the Florida Keys Co-op, and Section 380.0552(7)(i) which states that adverse impacts of public investments on the environmental resources of the Florida Keys be limited, and all other factors of Section 380.0552(7).

Mr. Koconis stated that these statutory provisions should be considered, especially regarding an interpretation of "feasibility" which appears in Plan Policy 103.2.4. See page 8, supra.

After deliberating, Commissioner Coleman moved to approve the staff recommendation (approval of the application).

Commissioners Coleman and Hill, and Chairman Mapes voted in favor of the motion. Commissioner Werling voted against. The Commission adopted the additional language offered by Mr. Koconis (paragraph 6) and "all other enumerated factors."

Except for paragraph 6, the Commission's Resolution is quite similar to the DRC's Resolution with respect to findings of fact and conclusions of law, and without specific findings of fact regarding Policy 103.2.4. See Endnote 7, infra.

Commissioner Coleman moved to approve the staff recommendation which necessarily included the analyses performed by staff in the June 6, 2001, Memorandum, and which included a discussion of the facts in light of Plan Policies and LDR's, and specifically Plan Policy 103.2.4.

The Commission's Resolution requires three conditions: that Monroe County approve a transplantation plan; that the County engineer approve the surface water management plan; and that prior to the issuance of a building permit, a Habitat Conservation Plan containing a restoration plan must be prepared and an 'incidental take' permit be obtained from the United State Fish & Wildlife Service (USFWS). (This latter condition is in response to a May 5, 1999, letter from the USFWS stating that the implementation of the project "will result in take of

listed species protected under the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.)(ESA))."

IV. Legal Discussion

The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Article XIV, Section 9.5-535, M.C.C. The hearing officer "may affirm, reverse or modify the order of the planning commission." Article XIV, Section 9.5-540(b), M.C.C. The scope of the hearing officer's review under Article XIV is:

The hearing officer's order may reject or modify any conclusion of law or interpretation of the Monroe County land development regulations or comprehensive plan in the planning commission's order, whether stated in the order or necessarily implicit in the planning commission's determination, but he may not reject or modify any findings of fact unless he first determines from a review of the complete record, and states with particularity in his order, that the findings of fact were not based upon competent substantial evidence or that the proceeding before the planning commission on which the findings were based did not comply with the essential requirements of law.

Id. "The hearing officer's final order shall be the final administrative action of Monroe County." Article XIV, Section 9.5-540(c), M.C.C.

In DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957), the court discussed the meaning of "competent substantial evidence" and stated:

We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. . . . In employing the adjective "competent" to modify the word "substantial" we are aware of the familiar rule that in administrative proceedings the formalities and the introduction of testimony common to the courts of justice are not strictly employed. . . . We are of the view, however, that the evidence relied upon to sustain the ultimate findings should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent, the "substantial" evidence should also be "competent."

Id. at 916 (citations omitted.)

A hearing officer (administrative law judge) acting in his or her appellate review capacity is without authority to reweigh conflicting testimony presented to the Commission or to substitute his or her judgment for that of the Commission on the issue of the credibility of witnesses. See Haines City Community Development v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

The question before the undersigned is not whether the record contains competent substantial evidence supporting the view of Appellants; rather, the question is whether competent substantial evidence supports the findings made by the

Commission. Collier Medical Center, Inc. v. State, Department of Health and Rehabilitative Services, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

The issue of whether the Commission "complied with the essential requirements of law" is synonymous with whether the Commission "applied the correct law." Haines City Community Development, 658 So. 2d at 530.

Appellants contend that, in light of the request for disqualification made by Appellants, Commissioner Coleman should have disqualified himself from consideration of the requested minor conditional use.

In the Initial Brief, Appellants recite several statutory provisions which, according to Appellants, required disqualification under the circumstances. Appellants also contend that they were deprived of procedural due process because Commissioner Coleman did not disqualify himself. In their Reply Brief, Appellants rely almost exclusively on their procedural due process claim.

During oral argument, Appellants' counsel stated that the Commission was not subject to Chapter 120, Florida Statutes, and necessarily Section 120.665, Florida Statutes, and that various other cited provisions, such as the Code of Judicial Conduct, were guidelines to be considered, but were not binding on Commissioner Coleman.⁶ In other words, the central issue

presented in this appeal is whether Appellants were denied procedural due process.

Under the Monroe County Code, the review criteria are limited and do not include consideration of whether procedural due process was afforded by the Commission. See page 28, supra. Because the decision to grant or deny a permit under the Monroe County Code is a quasi-judicial action, Appellants may, if they wish, seek review of this final order by filing a petition for a writ of certiorari with the appropriate circuit court. Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469 (Fla. 1993). See also Park of Commerce Associates v. City of Delray Beach, 636 So. 2d 12, 15 (Fla. 1994). When the circuit court reviews a decision of an administrative agency under Florida Rule of Appellate Procedure 9.030(c)(3), there are three discrete components of its certiorari review, including whether the administrative proceeding has been conducted in accordance with the constitutional requirements of procedural due process. See City of Deerfield v. Valiant, 419 So. 2d 624, 626 (Fla. 1982). See also Robert Stoky and Ruth Stoky v. Monroe County, Florida, Case No. 00-0377DRI (DOAH Oct. 12, 2001) at pages 23-24. Accordingly, Appellants' procedural due process claim is not considered.

Appellants also contend that the Commission's decision to approve the minor conditional use for the location of the

electrical substation on the proposed site is inconsistent with the Plan.

In the Initial Brief, Appellants cite to several provisions of the Plan and the LDR's. Appellants' main claim throughout this proceeding (before the Commission and in this review proceeding) has been that FKECA's application is inconsistent with Policy 103.2.4, when strictly construed, and, implicitly that the Commission's findings (and ultimate findings of fact and decision) are not supported by competent substantial evidence.⁷

"After a comprehensive plan . . . has been adopted in conformity with this act, all development undertaken by, and all actions taken in regard to development orders by, governmental agencies in regard to land covered by such plan or element shall be consistent with such plan or element as adopted." Section 163.3194(1)(a), Florida Statutes. Local government development orders are subject to strict scrutiny in order to assure compliance with the duty imposed by Section 163.3194. See, e.g., Pinecrest Lakes, Inc. v. Shidel, 795 So. 2d 191 (Fla. 4th DCA 2001) (standard applied in the context of a circuit court de novo proceeding pursuant to Section 163.3215, Florida Statutes), cert. denied, 821 So. 2d 300 (Fla. 2002). (The Record contains a Verified Complaint submitted on behalf of

Upper Keys pursuant to, in part, Section 163.3215. The status of this matter is unknown. (Record, Pages 209-220)).

In this appellate review proceeding, which is not a de novo proceeding, whether the Commission's determination, and necessarily FKECA's application, is consistent with the Plan, and specifically Policy 103.2.4, is to be determined in light of the standard of review provided in the Monroe County Code and in light of the evidence, which is not viewed in the light most favorable to Appellants. See Collier, supra.

It is beyond the purview of this review proceeding for the undersigned to judge the credibility of the witnesses (including expert witnesses) and to re-weigh the evidence. This is precisely what Appellants request.

Based on a review of the entire Record, it is concluded that there was competent substantial evidence to support the Commission's findings (see Endnote 7) and ultimate decision to approve the application based on the Commission's implicit finding that the proposed project is consistent with Policy 103.2.4. There was expert testimony supported by other competent substantial evidence in the Record to sustain the Commission's decision.

DECISION

Based upon the foregoing, the Commission's decision to approve the minor conditional use, with conditions, is AFFIRMED.

DONE AND ORDERED this 5th day of March, 2003, in
Tallahassee, Leon County, Florida.

CHARLES A. STAMPELOS
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of March, 2003.

ENDNOTES

^{1/} See Article XIV, Section 9.5-538, M.C.C., for the contents of the Record, which includes "[a]ll applications, memoranda, or data submitted to the [C]ommission" and "[e]vidence received or considered by the" Commission.

^{2/} Pursuant to Article VII, Section 9.5-210, M.C.C., the purpose of this district "is to establish areas that are undisturbed with the exception of existing solid waste facilities, and because of their sensitive environmental character should be preserved in their natural state."

^{3/} The Park was purchased by the State of Florida with the purpose of maintaining the area as a wildlife preserve. It is estimated that the State of Florida has spent more than \$155 million under several land acquisition programs to acquire a number of parcels to protect and preserve significant tropical hammocks and pinelands in the Keys and protect one of the world's most significant coral reef ecosystems. According to Mr. Robert J. Lovern, Assistant Division Director, Division of State Lands, of the Department of Environment Protection (Department), the placement of an electric substation on lands acquired by the state for conservation purposes is an "incompatible use." Mr. Lovern suggests that "[i]n choosing

such a substation site, consideration should be given to ecological, historical and recreational values, as appropriate." (Record, page 247). These comments were made in a letter dated June 20, 2001, at a time when FKECA requested permission from the Department to locate a substation on state-owned property on North Key Largo in exchange for the site owned by FKECA in the same vicinity.

^{4/} Appellants do not oppose per se the construction of an electrical substation in North Key Largo. Appellants contend that the chosen site is not the least environmentally sensitive land available and that other feasible alternatives exist, e.g., on Ocean Reef Club property and land adjacent thereto. (Record, page 95).

^{5/} The County biologist recommended relocation of the facility as close as possible to State Road 905 while maintaining wetland setbacks and open space ratios within the hammock areas.

^{6/} Appellees contend that recusal of a commissioner, as a public officer, is confined to an examination of the requirements of Section 112.3143(3)(a), Florida Statutes, providing the circumstances when a voting conflict may arise involving a public officer. Appellants do not argue that this section applies. Consistent with the disposition of Appellants' procedural due process claim, no decision is reached on whether Section 112.3143(3)(a), Florida Statutes, applies in this case.

^{7/} Article III, Section 9.5-47, M.C.C., requires the Commission to provide, in a resolution, "[a] clear statement of specific findings of fact and a statement of the basis upon which such facts were determined, with specific reference to the relevant standards set forth in this chapter, including but not limited to the standards in section 9.5-65." Appellants do not challenge the legal sufficiency of the Resolution in light of Section 9.5-47. The Commission's Resolution contains findings of fact and conclusions of law. The transcript of the hearing before the Commission indicates that the motion was to approve the staff recommendation on the application and to include paragraph 6 recited herein at page 26 and "all other enumerated factors." (Record, pages 200-201). The motion seems to have necessarily included staff's analyses of the Plan and LDR's, including Policy 103.2.4, in light of the facts presented to staff at the time the June 6, 2001, Memorandum was prepared. (The Commission also had the benefit of considering the evidence adduced during the public hearing.) It is concluded that the

June 6, 2001, Staff Memorandum, including the portion which discusses Policy 103.2.4., which includes the Staff Analysis-section IV., to the extent it is incorporated by the Commission as findings of fact, is supported by competent substantial evidence.

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NOTICE OF RIGHTS

Pursuant to Article XIV, Section 9.5-540(c), M.C.C., this Final Order is "the final administrative action of Monroe County." It is subject to judicial review by common law petition for writ of certiorari to the circuit court in the appropriate judicial circuit.