

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA KEYS MEDIA, LLC,

Appellant,

vs.

Case No. 16-0277

MONROE COUNTY PLANNING
COMMISSION,

Appellee,

and

UPPER SUGARLOAF RESIDENTS
ASSOCIATION, INC.,

Intervenor.

_____ /

FINAL ORDER

In this administrative appeal to the Division of Administrative Hearings (DOAH), Appellant, Florida Keys Media, LLC (Florida Media or Appellant), seeks review of Resolution No. P36-15 (Resolution) rendered by the Monroe County Planning Commission (Commission) on November 20, 2015. The Resolution denied an application for a Major Conditional Use by Florida Media to erect a 199-foot monopole communication tower to serve as a wireless Site Transmitter Link (STL) on a 1.01-acre parcel located on Upper Sugarloaf Key in the Lower Keys portion of Monroe County (County).

After a five-volume Record of the underlying proceeding was filed by the Commission Clerk, the Upper Sugarloaf Residents Association, Inc., intervened in support of Appellee. Briefs were filed by all parties. Oral argument was heard by teleconference at sites in Marathon and Tallahassee on May 16, 2016.

ISSUES

Appellant raises three issues on appeal: (1) whether there is competent substantial evidence to support the Resolution; (2) whether the Commission departed from the essential requirements of the law by incorrectly applying and interpreting the law governing the application; and (3) whether the Commission denied Appellant due process by concluding that the application lacked sufficient detail necessary for a complete review. The parties agree, however, that the due process argument need not be addressed in this Final Order.

BACKGROUND

Appellant owns seven Florida Keys FM radio stations and operates an AM station. The property in question is located on Upper Sugarloaf Key, between Mile Marker 18 and 19 on the Florida Bay side of U.S. Highway 1, at 830 Crane Boulevard, almost one mile north of U.S. Highway 1. Appellant purchased the property in March 2014 for the purpose of consolidating five

FM Lower/Middle Keys radio stations into one building and housing a microwave STL link for four towers located in Ramrod Key, Grassy Key, Sugarloaf Key, and Cudjoe Key. The site was purchased before Appellant received final approval for construction of the tower.

There is an elevated one-story (two stories high) office building, with additional outside storage, on the site, constructed around 2003. An existing concrete pad lies behind the office building. If the application is approved, Appellant intends to construct on the pad a 199-foot monopole (non-guyed) tower, place an associated generator on an adjacent elevated platform, and install an access/utility easement at the location. In addition to a short weekly maintenance run, the propane generator will operate during any power failure. The tower will carry STL systems for five FM and one AM broadcast stations, stretching from Stock Island to Grassy Key, and a future collocation for a minimum of three Personal Communications Service (PCS) wireless carriers. The proposed site is centrally located to serve all six stations, which lie within a radius of 20 to 25 miles.

The property is zoned Suburban Commercial (SC), which allows light industrial uses subject to approval of a conditional use and other limitations. A communications tower

is an allowed major conditional use within the SC district. See § 130-93(c)(8), M.C.C. Appellant's lot, and two others, on Crane Boulevard form a small SC island in a sea of residential zoning districts. One of the three SC lots is occupied by affordable housing units.

Except for the lot immediately to the west of Appellant's parcel, the area to the west is characterized by very low density residential properties, primarily an acre in size with single-family homes. There is a great deal of native natural habitat in that area. The lot abutting to the east is occupied by two residential buildings, each containing two residential dwelling units. To the east of that lies a Suburban Residential district containing two subdivisions. One of them, Indian Mound Estates, consists of 153 homes, with its closest boundary line only 253 feet from Appellant's property. To the north of Appellant's lot is a third subdivision. To the southeast is the Sugarloaf Sports and Leisure Club, a commercial establishment. Immediately to the south is a single-family residence separated from the site by a native vegetation buffer. Overall, the immediate vicinity of the structure can be characterized as low density residential, low intensity commercial, and native areas. Most of the population of Upper Sugarloaf Key is concentrated in that part of the island where Appellant's property is located.

In all, there are approximately 250 homes, and an estimated 1,000 residents, located within one-half mile of the proposed tower. A public school, Sugarloaf Middle School, is located south of the parcel and close to U.S. Highway 1, but it is not in the immediate vicinity of Appellant's property.

There are three other radio towers on Sugarloaf Key, all illuminated and taller than the one proposed, but they are located within a few hundred feet of the heavily-trafficked U.S. Highway 1 in mangrove areas away from residential areas and not in the immediate vicinity of the proposed new tower. Two other towers are located on Cudjoe Key, the next island around two miles to the east. The record shows that there are at least 19 other wireless towers in Florida Media's Key West to Marathon service area.

On April 27, 2015, Florida Media applied to the Planning Department for a Major Conditional Use. A major conditional use requires that the activity comply with nine standards set forth in the Code. See § 110-67, M.C.C. Relevant here are standards 2 and 4, which require that the Commission consider whether the use is consistent with the community character of the immediate vicinity and whether the use will have an adverse effect on the value of the surrounding properties. Development standards

applicable to wireless communications facilities must also be met. See § 146-5, M.C.C.

The application went before the Development Review Committee (DRC) on July 28, 2015. Review by the DRC is a required step in the approval process before the matter is considered by the Commission. Finding that all standards for a major conditional use and wireless communications facility were satisfied, on October 22, 2015, the DRC recommended approval of the application, with minor conditions. One condition required that additional trees and landscaping elements be introduced to minimize the adverse effects of the tower. Of import here, the staff concluded the proposed use would not be inconsistent with the community character of the immediate vicinity due to the existing development in the area and "the built environment on Upper Sugarloaf Key [that] includes three existing towers and numerous utility poles." The report also found that there was no evidence, one way or the other, that a tower would have "an adverse impact on the value of surrounding properties."

After receipt of the staff recommendation, the Commission conducted a hearing on November 18, 2015. At the hearing, besides considering advice by its own counsel, argument by counsel for Appellant and Intervenor, and testimony by members of the staff, the Commission heard testimony in support of the

application by Florida Media's principal; a planning consultant; the president of the Florida Association of Broadcasters; two members of the Monroe County Sheriff's Office; an agent/consultant who prepared the application; and a Florida Media news broadcaster. Testimony in opposition to the application was presented by a former county attorney; a certified residential appraiser; 17 members of the public, most of whom reside in close proximity (in some cases less than 100 feet) to the proposed tower; and one resident from Key West. In addition, the Commission considered a number of documents submitted by all parties and accepted into the record. In all, the record consists of almost 1,000 pages.

According to James Holladay, Florida Media's principal, after a diligent search that consumed nine months, he concluded that the proposed site is the only location in the Lower Keys with appropriate zoning, an existing office building built to withstand a significant storm that could safely house a staffed studio, and a central location for a STL facility to serve five transmission towers located within a 25-mile radius. While other methods of supplying a reliable STL were studied, including internet, telephone lines, and fiber, Mr. Holladay explained that none of these were viable options when the site was purchased. There are five other towers within a two-mile

area, but Mr. Holladay testified that based on responses from the owners of three towers, and his investigation of the other two, they are not equipped to handle the load requirements for a STL collation due to design limitations or being located in wetlands that prevent further modification. He admitted that another tower could handle the backup for four of the FM stations in case they failed at the primary site, but only a new tower can withstand a higher wind speed without coming down. Mr. Holladay further testified that the tower will serve as a reliable wireless replacement to the various forms of wired telecommunications in remote sites (where the radio stations are located) that Florida Media is currently using to communicate from its staffed studios to the off-site radio transmitters. Mr. Holladay also testified that he intends to combine two studios and six radio stations and relocate them into the existing building on the site, which he described as a "hurricane-proof" facility. An integral part of the facility is the tower, which will use the STL to relay the signal from the radio stations to the main antenna and then to the listeners so that they can still access emergency information by radio if telephone and internet services go down in a storm. Each studio will have a small antenna on the tower that transmits its

distinct audio and data from the new studio on Crane Boulevard to wherever the tower for that station is located.

Florida Media placed into the record two site specific property appraisals for communication towers sited near residential properties in two other areas of the Lower Keys, a new tower on Stock Island a few miles east of Key West, and an older one on Big Coppitt Key, constructed in 2003, which lies just east of Stock Island and the Key West Naval Air Station. These studies were prepared by a non-testifying certified appraiser and concluded that existing cellular phone and wireless towers in those locations did not have any measurable impact on the value of adjacent residential properties.

Other testimony revealed that the FAA, FCC, and County Mosquito Control District do not require lights on the tower; there will be no environmental impacts; and the tower will not impact mosquito control operations on the island. From a safety perspective, if it fails, the tower is designed to collapse within the parcel, and not on adjacent properties. Finally, Appellant presented testimony that two radio stations are the primary Lower Keys stations in the County Emergency Alert System, and the STL tower will serve as a more reliable form of wireless communication to the remote sites than the existing wired network in the event a major storm strikes the area.

Twenty persons testified in opposition to the application on the basis of aesthetics, property value concerns, and some impermissible considerations, such as health and safety issues.

A former county attorney, who assisted in drafting the language for the SC zoning district, testified that the facility is inconsistent with the Code because it is a regional facility serving a 25-mile area and is not designed to meet the needs of the immediate vicinity, as required by the Code. He also disputed the assertion by Appellant that another tower, located on Ramrod Key to the east of Cudjoe Key, is sited in the middle of a swamp, making access impossible and limiting the ability to modify its load capacity.

A certified residential appraiser, Lucy Paige, disagreed with Appellant's appraisals, which concluded a tower has no effect on the value of adjacent residential properties. Ms. Paige testified that the appraisals are not comparable to Upper Sugarloaf Key, as the neighborhoods selected by Appellant's appraiser do not have the rural, residential character of Upper Sugarloaf Key. She explained that the selected areas are located on highway frontage parcels near U.S. Highway 1, they sit in the midst of large concrete poles, service stations, an aqueduct substation, or near a military airfield, and they are surrounded by commercial properties. In

her opinion, a tower on Crane Boulevard would negatively impact nearby residential property values. This was confirmed in written comments by three other non-testifying licensed realtors, who concluded that a home near the proposed tower will have to be "deeply discounted" in order to be sold, the tower will have "an adverse effect on the value of those neighboring properties," and the tower "would definitely impact the marketability of homes in the area."

The record shows that four apartments abut Appellant's property to the east. Also, Mira Negrón's homestead on Mad Bob Road is immediately adjacent to the parcel; the home of another resident, Zappone Beneway, is 82 feet from the property line; and the Richardson family home is directly across the street with the front porch facing the tower. Ms. Negrón, whose home is only 92 feet from the tower and 60 feet from the platform, testified that the tower and generator will be "right in my face towering over my front yard," and aside from the negative impact on aesthetics and natural beauty, she will be subjected to loud noise every time the generator runs. Vera Vasek, who lives less than a quarter-mile from the tower, will have an unobstructed view of the tower from her home. Like other homes in the area, Ms. Vasek's home had to be constructed at least 12 feet above Base Flood Elevation (BFE), or well above street level. She

added that the tree line on the island rises only to 30 feet at the tallest point and will not shield the view of the 199-foot tower. This was confirmed by Elaine Davia, a nearby resident who testified that due to BFE requirements, "[n]obody lives on ground level," and this will cause the residents to be "more impacted by that tower." Another resident on Crane Boulevard, Claudia Richards, testified that every time she and her husband sit on the front porch, they will have an unobstructed view of the tower. She was told by realtors that if they sell their home, they will lose around \$100,000.00 in its value. A number of other property owners testified that if a tower is built, they will experience adverse visual and noise impacts and a possible reduction in property values. They uniformly expressed the view that "a huge tower" is out of character for the residential neighborhood. Finally, representatives of two homeowners' associations were unanimous in their view that the tower was incompatible with the residential character of that part of the island and would impair the natural beauty of the area.

At the conclusion of the hearing, the Commission voted 3-1, with one Commissioner absent, to deny the application. This decision was memorialized by Resolution P36-15 issued on November 20, 2015. In short, the Resolution denied the

application because (a) the proposed use was incompatible with the community character of the immediate vicinity and did not meet the standard in section 110-67(2), and (b) the tower would have an adverse effect on the value of surrounding properties and did not meet the standard in section 110-67(4). It also concluded that Appellant failed to comply with section 146-5(1)a.6.(ii)(DD) by failing to demonstrate that there were other limiting factors that would render existing wireless communications facilities unsuitable. The rather lengthy Resolution made the following findings of fact:

1. The subject property is located in a Suburban Commercial (SC) Land Use (Zoning) District; and
2. The subject property has a Future Land Use Map (FLUM) designation of Mixed Use/Commercial (MC); and
3. The subject property has a tier designation of Tier I; and
4. In 2002, a minor conditional use permit was approved to allow the redevelopment of the property with a 3,375 SF office building, 2,850 SF storage area beneath the office building, a 2,540 SF outdoor storage area adjacent to the office building, and four employee housing units in two residential duplex buildings. The approval is memorialized in Development Order # 14-01; and
5. On July 16, 2014, the Planning & Environmental Resources Department issued a Letter of Understanding concerning the

development of a proposed antenna supporting structure on the subject property; and

6. On July 28, 2015, the application was reviewed by the Development Review Committee. At the meeting, staff requested that applicant revise the site and landscape plans and provide additional supporting information. In addition, staff requested that certain conditions be applied to any approval; and

7. Pursuant to § 130-93 of the Monroe County Code, in the Suburban Commercial (SC) district, new antenna-supporting structures, pursuant to section 146-5(1) may be permitted with a major conditional use permit; and

8. Monroe County Code § 110-67 provides the standards which are applicable to all conditional uses. When considering applications for a conditional use permit, the Planning Commission shall consider the extent to which:

1) The conditional use is consistent with the purposes, goals, objectives, and standards of the Monroe County Year 2010 Comprehensive Plan and Monroe County Code;

2) The conditional use is consistent with the community character of the immediate vicinity of the parcel proposed for development;

3) The design of the proposed development minimizes adverse effects, including visual impacts, or the proposed use on adjacent properties;

4) The proposed use will have an adverse effect on the value of surrounding properties;

- 5) The adequacy of public facilities and services, including but not limited to roadways, park facilities, police and fire protection, hospital and Medicare services, disaster preparedness program, drainage systems, refuse disposal, water and sewers, judged according to standards from and specifically modified by the public facilities capital improvements adopted in the annual report required by this chapter;
- 6) The applicant for conditional use approval has the financial and technical capacity to complete the development as proposed and has made adequate legal provision to guarantee the provision and development of any open space and other improvements associated with the proposed development;
- 7) The development will adversely affect a known archaeological, historical or cultural resource;
- 8) Public access to public beaches and other waterfront areas is preserved as a part of the proposed development; and
- 9) The proposed use complies with all additional standards imposed on it by the particular provision of this chapter authorizing such use and by all other applicable requirements of this code; and
9. Monroe County Code §146-5 provides the development standards applicable to wireless communications facilities; and
10. Development shall not be inconsistent with the Monroe County Code; and
11. Development shall not be inconsistent with the Monroe County Comprehensive Plan; and

12. Development on Sugarloaf Key shall not be inconsistent with the Lower Keys Livable CommuniKeys Plan; and

13. Development shall not be inconsistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern[.]

The Resolution makes two Conclusions of Law, which state the bases for denying the application:

1. After consideration of the application, the Planning Commission based on written evidence (Attachments A and C) and oral testimony, determined that the new antenna-supporting structure would be inconsistent with the community character of the immediate vicinity of the parcel proposed for development and that the proposed use will have an adverse effect of [sic] the value of surrounding properties, and therefore did not meet standards 2 and 4 of Monroe County Code §110-67. The geographic nature of the archipelago that is the Florida Keys provides for the existence of individual island communities. Each of these islands has their own distinct character, and it is difficult to evaluate and quantify this character without the assistance from those who are permanent members of these communities. Numerous residents of Sugarloaf Key assisted the Planning Commission in understanding the island's community and its character. This information was used in making the determination that the new antenna-supporting structure would be inconsistent; and

2. The Planning Commission based on written evidence (Attachments B and C) and oral testimony also found that the applicant did not demonstrate that there are other limiting factors that render existing

wireless communications facilities unsuitable, as required by Monroe County Code § 146-5(1)a.6.(ii). The applicant, during the time of the application process and public hearing, demonstrated that its existing facilities were providing similar radio service to the public as they would provide in the future with the proposed new antenna-supporting structure. The evidence supporting this is the radio stations were using existing broadcasting equipment and existing towers to broadcast at the time of the public hearing. Furthermore, the applicant testified that other than a new FM transmitter for emergency backup situations the proposed tower would not provide expanded radio service to the public.

On December 14, 2015, Florida Keys timely appealed that decision, and the matter was referred to DOAH for briefing and oral argument.

LEGAL ANALYSIS

Pursuant to a contract, DOAH has jurisdiction to consider this appeal under section 102-213, M.C.C. The hearing officer "may affirm, reverse or modify the order of the planning commission." § 102-218(b), M.C.C. The hearing officer's order is subject to the following limitations:

The hearing officer's order may reject or modify any conclusion of law or interpretation of the 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 the law.

Id. Thus, the undersigned must determine whether the findings in the Resolution are based on competent substantial evidence, and whether the proceeding on which the findings were based complied with the essential requirements of the law. Unlike the three-tier judicial review of final administrative action by a circuit court, procedural or due process violations may not be considered. See, e.g., Osborn v. Monroe Cnty. Planning Comm'n, Case No. 03-4720 (Fla. DOAH Nov. 1, 2004) ("the review criteria are limited and do not include consideration of whether procedural due process was afforded by the Commission"). Therefore, an argument by Appellant that it was denied due process is not within the scope of this appeal. See Appellant's Brief, pp. 40-42.

The issue of whether the Commission complied with the essential requirements of the law is synonymous with whether the Commission "applied the correct law." Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 530 (Fla. 1995).

When used as an appellate standard of review, competent evidence has been construed to be "legally sufficient evidence"

or evidence that is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred. Id. Lay opinion testimony can establish competent substantial evidence, so long as it is fact based. Miami-Dade Cnty. v. Walberg, 739 So. 2d 115, 117 (Fla. 3d DCA 1999). Lay individuals have been found to be just as competent as expert witnesses to proffer views on aesthetics. Bd. of Cnty. Comm'rs of Pinellas Cnty. v. City of Clearwater, 440 So. 2d 497, 499 (Fla. 2d DCA 1983) ("The local, lay individuals with first-hand knowledge of the vicinity who were heard in opposition at the two public hearings were as qualified as 'expert witnesses' to offer views on the ethereal, factual matter of whether the City's proposed dock would materially impair the natural beauty and recreational advantages of the area."). On the other hand, "mere generalized statements of opposition are to be disregarded, but fact-based testimony is not." Walberg, 739 So. 2d at 117. So long as there is competent substantial evidence supporting the findings, both implicit and explicit, made by the Commission in reaching its decision, they will be sustained. See, e.g., Fla. Power & Light Co. v. City of Dania,

761 So. 2d 1089, 1093 (Fla. 2000); Collier Med. Ctr., Inc. v. Dep't of Health & Rehab. Servs., 462 So. 2d 83, 85 (Fla. 1st DCA 1985). In determining whether the Commission's decision is supported by competent substantial evidence, the hearing officer cannot second-guess the wisdom of the decision, reweigh conflicting testimony presented to the Commission, or substitute his judgment for that of the Commission as to the credibility of witnesses. Haines City, 658 So. 2d at 530. And the issue is not whether the Commission's decision is the best decision or the right decision or even a wise decision. "These are technical and policy-based determinations properly within the purview of the [Commission]." Town of Manalapan v. Gyongyosi, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002). In sum, the undersigned's function here is to determine whether the Commission had before it any competent substantial evidence supporting the findings in the Resolution, not whether there is competent substantial evidence to support a contrary position. Fla. Power & Light Co., 761 So. 2d at 1093; Educ. Dev. Ctr., Inc. v. City of West Palm Bch. Zoning Bd. of App., 541 So. 2d 106, 108 (Fla. 1989). These concepts are particularly relevant here because there are conflicts in the evidence and the Commission resolved the conflicts contrary to Florida Media's position.

A. Point I - Competent Substantial Evidence

Appellant contends three findings in the Resolution are not supported by competent substantial evidence: the Commission's determination that (a) the proposed tower is incompatible with the community character of the immediate area; (b) the tower will adversely affect the value of the surrounding properties; and (c) Appellant did not demonstrate that there are other limiting factors that render existing wireless communication facilities unsuitable.

i. Compatibility with Surrounding Area

The Code expressly recognizes that compatibility is to be taken into account in determining whether to grant a major conditional use. See 110-67(2), M.C.C. Florida law permits an incompatibility finding to be based on aesthetics. See Bd. of Cnty. Comm'rs of Pinellas Cnty., 440 So. 2d at 499 (court upheld denial of dock application on sole ground a proposed use would materially impair the natural beauty and recreational advantages of area).

Recognizing that each island in the Keys has its own distinct character, the Commission relied upon the testimony of numerous residents to assist it in understanding Upper Sugarloaf Key's community and character. A number of residents who reside in the immediate area of the project expressed their opposition

to the proposed facility on the basis of aesthetics. The residents had first-hand knowledge of the vicinity and were as qualified as expert witnesses to offer views on aesthetic incompatibility of the proposed monopole with the surrounding residential area. Id. Their testimony noted that the character of the neighborhood was predominately residential and natural. They pointed out that the tower will be significantly taller than existing utility poles in the immediate area, all homes in the area are above BFE, and the tree canopy is no more than 30 feet at its tallest point and will not shield the tower's view from the elevated homes. Also, a large, backup generator for the studio/tower will be placed on a platform as close as 60 feet to existing homes and, besides the effect on aesthetics, nearby homes will endure loud noise each time it is running. In addition to these concerns, the witnesses expressed concerns that the tower would adversely affect the value of their property, in one case by \$100,000.00. These observations were relevant, material, and fact-based and were not "generalized statements of opposition." Having this testimony before it, the Commission reviewed the residential character of the neighborhood, the size of the structure and its proximity to single-family residences, and made a determination that the use was not compatible with surrounding uses. This testimony

provided evidence sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion that the proposed tower would be incompatible with the surrounding residential area. DeGroot, 95 So. 2d at 916. In sum, the Commission's finding that the applicant did not satisfy the standard in section 110-67(2) is supported by competent substantial evidence and will not be disturbed.

ii. Impact on Value of Surrounding Properties

The Commission may also deny a major conditional use on the ground the proposed use will adversely impact the value of surrounding properties. See § 110-67(4), M.C.C. While Appellant presented a written appraisal report stating that cell phone and communication towers did not measurably affect the value of adjacent residential properties in two other areas in the Lower Keys, the Commission had testimony by a certified residential appraiser, and reports by three local realtors, which concluded that the facility would adversely affect surrounding property values. It also had testimony that Appellant's appraisal was in areas that were not comparable to the rural residential character of Upper Sugarloaf Key. The fact that these professionals did not submit their own countervailing charts or statistical studies did not diminish the sufficiency of their testimony/reports. The Commission's

finding that the applicant failed to satisfy the standard in section 110-67(4) is supported by competent substantial evidence and will not be disturbed.

iii. Appellant's Failure to Demonstrate that There Were Other Limiting Factors that Render Existing Wireless Communications Facilities Unsuitable

The Commission also concluded that Appellant did not demonstrate that there are other limiting factors that render existing wireless communications facilities unsuitable, as required by section 146(1)a.6.(ii)(DD). It based this conclusion on evidence that at the time of the hearing, Appellant's radio stations were capable of operating using existing equipment and towers, and the new tower would not provide expanded radio service to the public.

Section 146-5(1)a.6. requires an applicant to demonstrate that no existing wireless communications facility can accommodate the proposed tower through either collocation or a combined antenna. This standard can be met in one of four ways. See § 146-5.(1)a.6.(ii)(AA)-(DD), M.C.C. To demonstrate compliance, Appellant relied on subparagraph (CC), which requires an applicant to show that existing wireless communications facilities do not have sufficient structural strength to support the applicant's proposed facility and

equipment. Appellant presented written and testimonial evidence relating to the insufficient structural strength of the immediate five towers (three on Upper Sugarloaf Key and two on Cudjoe Key) to support collocation on those towers. Further, Appellant presented evidence that the primary need for the tower was to serve as a wireless link, and not to provide expanded radio service or backup for the existing wire service. This evidence was not refuted. Perhaps out of confusion, which is apparent in their deliberations, the Commission erroneously assumed that Appellant was relying on subparagraph (DD), and not (CC), to comply with the standard. Because there is unrefuted competent substantial evidence to support a finding of compliance with the standard in section 146-5.(1)a.6., the Resolution's finding that Appellant failed to meet the standard must be rejected.

B. Point II -Departure from the Essential Requirements of the Law

An argument that the Commission incorrectly interpreted section 365.172(13)(b)1., Florida Statutes, was withdrawn at oral argument. Appellant still maintains, however, that the Commission departed from the essential requirements of the law by incorrectly interpreting section 146-5 in three respects. Except for Appellant's contention that the Commission

incorrectly interpreted the term "immediate vicinity," as used in sections 110-67(2) and 146-5(1)a.14., the County and Intervenor do not seriously dispute Appellant's assertions. They contend that even if the Commission incorrectly interpreted section 146-5(1)a.6. in two respects, the Commission's findings that Appellant failed to satisfy the standards in section 110-67(2) and (4) are not affected, and sufficient grounds still exist to deny the application. The undersigned agrees with this analysis.

i. The Community Character of the Immediate Vicinity

The term "immediate vicinity" is not defined in the Code or Plan. In construing the term for purposes of determining whether the tower would have an adverse effect on adjacent properties and the community character, the Commission used a radius of less than a mile, and more than likely one-half mile, around the site. Appellant contends the Commission departed from the essential requirements of the law by failing to use the three-mile radius required under section 146-5(1)a.14.(ii). That section imposes the following standard that must be satisfied by applicants for a wireless communications facility:

14. Adverse effects on adjacent properties and compatibility with community character:

i) New antenna supporting structure shall be configured and located in a manner that is consistent with the community character

of the immediate vicinity, and shall minimize adverse effects including visual impacts on adjacent properties pursuant to section 110-67(2) and (3).

(ii) The following attributes shall be considered from vantage points within three miles of the base of the proposed antenna-supporting structure:

- (AA) Height;
- (BB) Mass and scale;
- (CC) Materials and color;
- (DD) Illumination.

Appellant contends the requirements in subparagraphs (i) and (ii) must be read together, as it would be unfair to require an applicant to justify the attributes of the tower, including its height, mass and scale, materials and color, and illumination, from "vantage points within three miles of the [tower]," but then allow the Commission to use a much smaller radius to determine the tower's impact on adjacent properties and community character. In short, it argues that the geographic boundary of the tower's immediate vicinity is three miles.

The County and Intervenor respond that subparagraphs (i) and (ii) are two distinct provisions. They assert that if the County had intended to fix the boundary of a community or immediate vicinity as a circle with a fixed, three-mile radius, it would have done so in the applicable Definitions sections of the Plan and Code, and not by strained implication. Or, it

would have added a new section (EE) to draw the immediate vicinity or community character from subparagraph (i).

If Appellant's analysis of the Code is correct, the "immediate vicinity" would encompass not only all of Upper Sugarloaf Key north of U.S. Highway 1, but virtually the entire key south of the highway, most of Cudjoe Key to the east, and any land areas that lie within three miles to the west across the bay. This interpretation would produce an absurd result and require the Commission to consider the impacts on areas far beyond the area or region that surround the site and that could potentially impact the community character of the area's secluded subdivisions. While the rationale for drafting the Code in this manner is not of record, the undersigned is persuaded that the Commission's interpretation of the Code is a reasonable one and should be affirmed.

Finally, Appellant's Motion to Strike Attachment C, added to the record after the Resolution was issued, is granted. Appellant's Motion to Strike two portions of Intervenor's Answer Brief is denied as being moot.

DECISION

Based on the foregoing, the Commission's findings that the application fails to meet standards 2 and 4 in section 110-67 and its interpretation of "immediate vicinity" are affirmed.

The remaining grounds for denying the application are reversed.
The denial of the application is approved.

DONE AND ORDERED this 1st day of June, 2016, in
Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
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(eServed)

NOTICE OF RIGHTS

Pursuant to article VI, section 102-218(c), M.C.C., this Final Order is "the final administrative action of the county." It is subject to judicial review by common law petition for writ of certiorari to the circuit court in the appropriate judicial circuit.