IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT IN AND
FOR MARTIN COUNTY, FLORIDA.
APPELLATE DIVISION

Circuit Case No. 16-AP-20
Petition for Writ of Certiorari

RG TOWERS, LLC AND KENAI PROPERTIES, LLC,

Petitioners,

v.

MARTIN COUNTY, LITTLE CLUB CONDOMINIUM ASSOCIATION, INC. AND DYNAMIC TOWERS, INC.,

Respondents.
_____/

Not final until time expires for filing motion for rehearing, and if filed, disposed of.

Decision filed August 8, 2018.

Petition for Writ of Certiorari to the Board of County Commissioners.

Brian Seymour and Christopher Benvenuto, Gunster, Yoakley & Stewart, P.A., West Palm Beach, for petitioners.

Garrick Harding, Wright, Ponsoldt & Lozeau, Trial Attorneys, L.L.P., Stuart, Ruth Holmes, Senior County Attorney, Stuart, Amy Petrick, Lewis Longman & Walker, P.A., West Palm Beach, for respondents.

PER CURIAM.

On August 4, 2015, Little Club Condominium Association, Inc. and Dynamic Towers, Inc. ("the Applicants") filed an application with Martin County for a major master and final site plan to build a 120 foot monopole wireless telecommunications facility ("WTCF"), disguised as a pine tree, on a 2500 square foot portion of a vacant 6.34 acre piece of the Little Club common area property.[1] Under the Martin County Land Development Code Sec. 4.794.D. ("Code"), the Applicants were required to submit a propagation study demonstrating that "the equipment

[1] Little Club owns the land that the WTCF would be built on, and Dynamic Towers owns the option to develop the tower.

planned for a proposed tower cannot be accommodated on an existing or approved and unbuilt structure;" the Applicants' first propagation study is dated March 16, 2016, stating that there is no such tower within three quarters of a mile of the proposed site. On May 31, 2016, the Martin County Board of County Commissioners ("Board") entered a resolution approving the Petitioners'[2] application for a WCTF, to be located 2,350 feet away from the Applicants' proposed site.[3] The Senior Assistant County Attorney informed the Applicants on July 20, 2016 that they needed to submit a new propagation study to demonstrate the infeasibility of using the equipment of the Petitioners' May 31, 2016 approved WCTF.

The Board held a quasi-judicial hearing on July 26, 2016, and the Applicants had not submitted an updated propagation study, which was admitted to by their main witness; he stated that the new study did not exist. Then the Applicants rested their case. The hearing was continued until August 23, 2016 to allow the Petitioners, who are intervenors, adequate time to put on their case in opposition. On August 22, 2016 at 12:08pm, the Applicants emailed a second propagation study to County staff, less than one day before the hearing. The Board determined that a decision on the Applicants' application could not be made at the August 23, 2016 hearing because there was not sufficient time to review the second propagation study; additionally, the radio frequency engineer who produced the study was not in attendance for questioning, so the hearing was once again continued until September 20, 2016. On September 14, 2016, County staff provided a memorandum stating that it retained an independent radio frequency engineer, and even with his help, it could not verify the information in the second propagation study without additional information. At the September 20, 2016 hearing, County staff testified that the Applicants did not comply with Code Sec. 4.794.D. The Petitioners put on their case in opposition to the application, and after minimal deliberation, the Board voted 3-2 to approve the Applicants' application.

The standard of review applied to an administrative decision is whether procedural due process was afforded, whether the essential requirements of the law were observed, and whether the findings and judgment were supported by competent substantial evidence. *Broward County v.*

[2] Like the dynamic between the Applicants, Kenai Properties, LLC owns the property, and RG Towers, LLC has a ground lease to develop the tower.

[3] Little Club, Dynamic Towers, and another homeowner's association not a party to this case filed a petition for writ of certiorari to this court (16-AP-9). On January 23, 2018, this court entered an order denying the petition without opinion, and on February 8, 2018, the clerk issued the mandate.

G.B.V. Intern., Ltd., 787 So. 2d 838, 843 (Fla. 2001) (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982)).

Issue 1—Procedural Due Process

The Petitioners argue that they were not afforded procedural due process because the Applicants' expert who prepared the second propagation study never appeared at the August 23, 2016 or September 20, 2016 hearings to provide testimony or make himself available for cross examination. In *Taxi USA of Palm Beach, LLC v. City of Boca Raton, Florida*, the Fourth District discussed procedural due process in quasi-judicial proceedings:

> A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. In quasi-judicial... proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.

162 So. 3d 119, 124 (Fla. 4th DCA 2014) (quoting *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991) (citing *Coral Reef Nurseries, Inc. v. Babcock Co.,* 410 So.2d 648, 652 (Fla. 3d DCA 1982)); *accord Bush v. City of Mexico Beach,* 71 So.3d 147, 150 (Fla. 1st DCA 2011). In *Seminole Entertainment, Inc. v. City of Casselberry*, the petitioner d/b/a Rachel's, an adult entertainment establishment, participated in a license revocation review hearing conducted by the mayor and prosecuted by the city manager when the city of Casselberry revoked their license. 811 So. 2d 693, 695 (Fla. 5th DCA 2001). The principal witness for the City refused to answer questions on cross examination about accused illegal activity, and the mayor improperly sustained the City's objections. *Id*. The Fifth District held that Rachel's was denied due process when it was not allowed to cross examine the principal witness that testified against it. *Id*. at 696-7. The Petitioners argue that the instant case is analogous because the Applicants had the benefit of submitting the second propagation study without the burden of producing the radio frequency engineer who wrote it. Therefore, the Petitioners did not have the ability to cross examine him, which violated their due process.

The Respondents collectively argue that the Petitioners lack standing to challenge the Board's decision because 1) they are business competitors whose sole interest in this case is one of economic competition and 2) they are not "parties" to this case but are merely "participants." First, the Respondents raised neither of these points at any of the three Board hearings; at all times, they proceeded as though the Petitioners were parties to the case, even specifically postponing the

July 26, 2016 hearing until August 23, 2016 to allow the Petitioners time to put on their case. Second, the Respondents cite *Save Homosassa River Alliance, Inc. v. Citrus County, Fla.*, which proves the exact opposite point. 2 So. 3d 329 (Fla. 5th DCA 2008). In *Homosassa*, the Fifth District discussed the interplay between the Legislature's intent to liberalize the standing requirements for third parties to intervene on development orders and the prior common law standard. 2 So. 3d at 336. In 1985, the Legislature enacted the Growth Management Act, which liberalized standing in local government development cases. *Id.*; *City of Coconut Creek v. City of Deerfield Beach*, 840 So. 2d 389, 392 (Fla. 4th DCA 2003). Prior to the adoption of the Act, the common law standard required "a party had to possess a legally recognized right that would be adversely affected by the decision or suffer special damages different in kind from that suffered by the community as a whole." *Id*. (citing *Putnam County Envtl. Council, Inc. v. Bd. of County Comm'rs,* 757 So.2d 590, 592–93 (Fla. 5th DCA 2000); *Citizens Growth Mgmt. Coal., Inc. v. City of W. Palm Beach,* 450 So.2d 204, 206 (Fla. 1984). *Homossasa* further cited §163.3215, which stated in relevant part:

> (2) **As used in this section, the term "aggrieved or adversely affected party" means any person[4] or local government that will suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan, including interests related to health and safety, police and fire protection service systems, densities or intensities of development, transportation facilities, health care facilities, equipment or services, and environmental or natural resources. The alleged adverse interest may be shared in common with other members of the community at large but must exceed in degree the general interest in community good shared by all persons.** The term includes the owner, developer, or applicant for a development order.

(Emphasis added). The Respondents make an assertion that "generally" business competitors do not have standing to challenge a land use decision. However, under *Homosassa* and §163.3215(2), as neighboring landowners who will suffer an adverse effect with the intensity of development, the Petitioners have standing.

Third, the Respondents allege for the first time in their response that the Petitioners are mere participants to the case, not parties, and they cite *Carillon Community Residential v. Seminole County*, 45 So. 3d 7 (Fla. 5th DCA 2010). In *Carillon,* the Fifth District stated that participants in

[4] A "person" is defined as "an individual, corporation, governmental agency, business trust, estate, trust, partnership, association, two or more persons having a joint or common interest, or any other legal entity" in §163.3164(35), Fla. Stat. (2016), which is the Community Planning Act.

a case do not enjoy the same right to cross examine witnesses as parties do. *Id*. at 10-11. However, the Respondents miss two important distinctions between *Carillon* and the instant case. The first is that in *Carillon*, witnesses appeared at the board hearing; so, when the petitioner, a neighboring landowner, could not cross examine the witnesses, as it wished to do, a party to the case still had the right to do so because the witnesses were present at the hearing, which was not true in the instant case. Second, *Carillon* states "due process is a flexible concept and requires only that the proceeding be 'essentially fair'." *Id*. at 9; (citing *Gilbert v. Homar,* 520 U.S. 924 (1997)). Surely, the Respondents realize that it is not "essentially fair" or a proper reading of *Carillon* to treat the Petitioners as parties throughout three hearings before the Board by allowing them to put on a case, cross examine all witnesses present, enter exhibits, and consider their calendar for scheduling purposes until it suits the Respondents to claim that the Petitioners are merely participants during certiorari review. The Petitioners have enjoyed the procedural due process rights of parties since they filed their request to intervene in July 2016; therefore, this court will continue to afford them the procedural due process rights of parties under the "essentially fair" principle of *Carillon*.

Issue 2—Competent Substantial Evidence

The Petitioners also argue that the Board's decision is not supported by competent substantial evidence that the Applicants met their burden to prove the infeasibility of co-location under Code Sec. 4.794.D, which states:

> *Documentation of the infeasibility of tower co-location.* An application for a tower shall contain adequate documentation that co-location on an existing approved tower, of any type, or on an existing building or structure, has been attempted and is not feasible. Such documentation shall include:
>
> 1. **The results of a propagation study demonstrating to the satisfaction of the County** that the equipment planned for a proposed tower cannot be accommodated on an existing or approved and unbuilt structure.
>
> 2. A propagation study analysis shall be based upon a search radius of three-quarters of a mile minimum distance from the proposed location of the intended tower, including areas lying outside of the unincorporated area of Martin County. At the discretion of the County, based on the County's knowledge of existing co-location opportunities, the County may allow an applicant to provide an affidavit from a professional radio frequency engineer which establishes the search area diameter for the proposed WTCF

location and identifies all other alternatives in such search area. Even if the latter methodology is utilized, further information may be required by the County on the ability of the WTCF to be accommodated on specific sites within three-quarters of a mile of the proposed WTCF.

3. **When co-location is determined by staff to be infeasible, the determination shall be based upon the results of the propagation study and other evidence provided by the applicant documenting one or more of the following reasons:**

a. *Structural limitation.* The proposed equipment would exceed the structural capacity of the existing or approved structure, as documented by a qualified and licensed professional engineer, and the existing or approved structure cannot be reinforced, modified, or replaced to accommodate the planned or equivalent equipment at a reasonable cost.

b. *Interference.* The proposed equipment would cause interference or obstruction materially impacting the usability of other existing or planned equipment at the tower or building as **documented by a qualified professional** and the interference or obstruction cannot be prevented at a reasonable cost.

c. *Insufficient height.* Existing or approved towers and buildings within the search radius cannot accommodate the planned equipment at a height necessary to function reasonably **as documented by a qualified and licensed, if applicable, professional.**

d. *Lack of space.* Evidence from the applicant, verified by a licensed professional, of the lack of space on existing towers or other structures within the search radius to accommodate the proposed facility.

e. *Other factors.* Other reasons that make it unfeasible to locate the planned equipment upon an existing or approved tower or building as documented by a qualified and licensed, if applicable, professional.

(Emphasis added). County staff testified twice that the second propagation study did not comply with the Code. In the Board's written resolution, it states "based on the application, testimony and other materials considered at the meetings, the Board finds that adequate documentation was provided to demonstrate that co-location was not feasible." This finding is extremely problematic in light of the language in the Code. First, after the second propagation study was submitted on August 22, 2016, the County staff did not ever find that co-location was infeasible. Second, even if it had, the Code states that the determination shall be based on the propagation study AND other

evidence provided by the Applicants documenting structural limitation, interference, insufficient height, lack of space, and other factors. The closest the Applicants came to addressing interference or insufficient height of the May 31, 2016 approved WTCF was through the testimony of their witness, Kevin Aycock, who stated that the WTCF would be too short and cause propagation to be straight through the tree line. Unfortunately for the Applicants, his resume is not present in any of the appendices for this court's review. In his testimony, he states that he is a state certified general contractor and "also a tower developer working with RF and real estate guys in doing wireless networks." However, the Code requires a qualified professional to speak on the factors of interference and insufficient height, but the transcript only reflects Aycock saying a few quick comments.

The Respondents correctly assert that this court cannot reweigh or reevaluate evidence. *See Dusseau v. Metropolitan Dade County Board of County Commissioners,* 794 So.2d 1270, 1275–76 (Fla.2001). The standard of review requires this court to determine whether the Board's decision is supported by competent substantial evidence, opposing evidence notwithstanding. *Id*. at 1275. The Court offers clear guidance to circuit courts:

> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. The court's task vis-a-vis the third prong of *Vaillant* is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence. While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Id. at 1276. In *DeGroot v. Sheffield*, the Court defined competent substantial evidence:

> 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 in 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 finding 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.'

95 So. 2d 912, 916 (Fla. 1957); *Becker v. Merrill*, 20 So. 2d 912 (Fla. 1945); *Laney v. Board of Public Instruction*, 15 So. 2d 748 (Fla. 1943); *Jenkins v. Curry*, 18 So. 2d 521 (Fla. 1944); *United States Casualty Company v. Maryland Casualty Company*, 55 So. 2d 741 (Fla. 1951); *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197 (1938).

In the response, the Respondents point this court to "1) Applicants' WTCF application which include (sic) a propagation study evidencing the infeasibility of co-location; 2) the County's Staff Report; 3) a supplemental report which further evidenced the infeasibility of co-location; and 4) the testimony of witnesses for Applicants, Martin County, and Petitioners" as competent substantial evidence supporting the Board's decision. The problem with propagation study included in the Applicants' WTCF application is it predates the Board's approval of the May 31, 2016 WTCF tower and second propagation study, so it is of no application here. Next, the County Staff Report is dated July 13, 2016, so it also predates the second propagation study. When it discusses the applicable Code section, it clearly references the old propagation study, as the new one had not yet been made available to County staff and would not be for over another month, so this report is not competent substantial evidence. The "supplemental report further evidencing the infeasibility of co-location" is an uncited document by the Respondents and is possibly the second propagation study; however, as discussed above, the radio frequency engineer who created it never appeared at any hearing to explain it to the Board, and the County staff's independently hired radio frequency engineer could not reach a conclusion on it. Therefore, it is not competent substantial evidence. Finally, the Respondents rely on testimony. However, the testimony they cite in their response is from the May 31, 2016 hearing, which is not properly part of this case[5]. "[T]he well [-]established rule applicable to ... certiorari proceedings[s][is] that the reviewing court's consideration shall be confined strictly and solely to the record of proceedings by the agency or board on which the questioned order is based." *City of Ft. Myers v. Splitt*, 988. So. 2d 28, 32 (Fla. 2d DCA 2008) (quoting *Dade County v. Marca, S.A.,* 326 So.2d 183, 184 (Fla. 1976). This court is then left with Aycock's testimony, as discussed above. Aycock, a contractor, briefly and basically stated that co-location was infeasible with no detailed analysis. Quick comments, such

[5] A review of the exhibit list found in the July 26, 2016 transcript does not show that the May 31, 2016 transcript was entered before the Board. Therefore, this court cannot consider it.

as "an 85 foot tower is useless," without more, cannot be considered competent substantial evidence.

Since the Board did not afford the Petitioners procedural due process and their decision is not supported by competent substantial evidence, the petition for writ of certiorari is granted, and the Board's resolution approving the Applicants' application for a WTCF is quashed.

KANAREK, GRIFFIN, JJ., and WILD, Acting Circuit Judge, concur.

Copies of above decision
were furnished to the attorneys/parties
of record on the same date
the decision was filed.