

**CITY OF ORLANDO
QUASI-JUDICIAL PROCEEDINGS**

IN RE: Quasi-Judicial Hearing

Petitioner: Dr. Wanda Jones

Applicant/Owner: Carl Tuter, Oates Creek LLC

Property Address: SW of W. Princeton St. & N. John Young Pkwy

Case No.: QJ 2015-006 (ZON2015-00028)

RECOMMENDED ORDER DENYING PETITION

The final quasi-judicial hearing on this matter was on January 20, 2016. Based upon a complete review of the record, the parties' testimony, the witnesses' testimony, the exhibits and all of the other evidence presented at the hearing, I recommend the Orlando City Council deny the Petitioner's Petition.

Property Description

The property at issue is located in unincorporated Orange County, Florida south of W. New Hampshire Street, east of Parks Oaks Avenue, and west of N. John Young Parkway, at 3604 W. New Hampshire Street. It is one (1) legal parcel approximately 9.6 acres in size identified as Parcel Identification Number 21-22-29-5844-00-090. Pursuant to Section 2.208 of the Orlando City Code, it is legally described as: **Lots 9 and 10, WILLIS R. MUNGERS LAND SUB, according to the Plat thereof, as recorded in Plat Book E, Page 3, Public Records of Orange County, Florida; less and except the North 15.00 feet for road right-of-way (hereinafter the "Property").**

Statement of Case

Carl Tutera on behalf of Oates Creek, LLC ("Owner") filed three (3) applications with the City to ultimately develop the Property with two communication towers:

1. Case No. ANX2015-00015, seeking annexation of the Property into the City,
2. Case No. GMP2015-00031, seeking a future land use map designation of "Industrial" in the City's Growth Management Plan for the Property,
3. Case No. ZON2015-00028, seeking an initial zoning designation of "I-P/W" to permit two communication towers in the City pursuant to Orlando City Codes rather than a residential subdivision in the County pursuant the County's Comprehensive Plan Future Land Use Map Medium Density Residential (MDR) designation and R-1A zoning.

On October 20, 2015, the MPB voted unanimously to recommend approval of the three (3) applications with the City Staff's recommended conditions and additional conditions requested by the MPB. The Owner agreed to all the conditions which include: (i) limited clearing of the site to preserve most of the trees and vegetation on the Property, (ii) imposing the City's Planned Development district designation limiting the entire 9.6 acre site to two towers with small accessory buildings, (iii) subjecting the Property to significant buffering requirements, (iv) requiring compliance with all applicable codes, ordinances, and laws, and (v) requiring permits from all applicable local, state and federal authorities prior to any construction.

On November 16, 2015, Petitioner, Dr. Wanda Jones ("Dr. Jones"), filed her "Pre-hearing Petition in Opposition" challenging the recommended approvals in Case No. ANX2015-00015, Case No. GMP2015-00031, and Case No. ZON2015-00028. Dr. Jones's grounds are essentially (1) cell towers, through radio frequency emissions,

harm people, animals, habitat and interfere with people's cell phones and electronic devices and (2) the towers are not compatible with the surrounding properties and will harm wildlife and the natural environment.

At the hearing, the parties submitted the following numbered exhibits in evidence:

1. The Resume of Wanda Jones,
2. Health, Safety and Medicine Article dated January 20, 2016,
3. LexisNexis Restrictive Covenants Research,
4. RF Safety FAQ dated January 20, 2016,
5. Electromagnetic Radiation Article dated January 20, 2016,
6. Orange County, Florida, Code Sec. 38.1382,
7. Little Wekiva River Article not dated,
8. OCPA Map not dated,
9. St. Johns River Water Management District Article dated January 20,
2016,
10. Recognizing Wetlands Article not dated,
11. Bio-Tech Consulting, Inc.'s Environmental Assessment dated June 10,
2005,
12. Florida Fish and Wildlife Conservation Commission Article dated January
19, 2016,
13. The Impact of Cell Phone Towers on House Prices in Residential
Neighborhoods Article dated Summer 2005,

14. Composite Exhibit including the Resumes of experts Lou Mueller and Mark Ausley, and

15. Composite Exhibit including all legal documents establishing the Project's existing entitlements, which are attached as Exhibits "A" – "E" to Respondent's Response to Pre-Hearing Petition of Opposition filed by and through his counsel in this matter: Staff Report to the MPB dated October 20, 2015 (Exhibit "A"), as amended; MPB October 20, 2015, Meeting Minutes (Exhibit "B"); Federal Communications Commission Office of Engineering & Technology Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields (Exhibit "C"); Viewshed Analysis of Proposed Tower Site at 3604 New Hampshire Street (Exhibit "D"); and Preliminary Environmental Assessment, prepared by Bio-Tech Consulting, Inc., dated December 14, 2015 (Exhibit "E").

Evidence also included the testimony of Dr. Jones, a Ph.D. in Biology from the University of Florida, property owner and resident Marchelle Robinson, Mr. Tutera, the Owner, expert Louis Mueller, an engineer with over 50 years experience in communication towers, expert Mark A. Ausley, a Certified Wildlife Biologist with 18 years experience in Environmental Site Assessments, and City of Orlando Planner Katy Magruder who the City tendered as an expert in planning without objection. After the conclusion of the evidence, certain members of the public opined on a variety of topics.

Findings of Fact

A. The Parties

Petitioner, Dr. Wanda Jones, resides at 3620 Lake Lawne Avenue, Orlando, Florida 32808, approximately half a mile from the Property. Respondent Oates Creek, LLC., owns the Property. Carl Tuteria owns Oates Creek, LLC. Respondent, City of Orlando, is a Florida municipal corporation.

B. The Property and Current Development Rights

The Property consists of approximately 9.6 acres of undeveloped land in unincorporated Orange County, Florida. It has an Orange County Comprehensive Plan Future Land Use Map Medium Density Residential (MDR) designation and R-1A zoning which theoretically allows for the construction of over 100 residential units on the Property.

The future land use designations for the properties surrounding the Property are:

- a. Property to the North – Conservation and Industrial.
- b. Property to the East – Industrial and Residential.
- c. Property to the South — Residential Low Intensity.
- d. Property to the West — Conservation.

The zoning for the properties surrounding the Property are:

- a. Property to the North — H/W and I-P/W.
- b. Property to the East — IP/RP/W.
- c. Property to the South — PD/W.

d. Property to the West — H/W.

The Property is in the Wekiva Overlay District and the Wekiva Study Area and can only be developed in accordance with regulatory open space requirements to protect effective recharge areas as set forth the City's Comprehensive Plan adopted pursuant to Section 369.321, Chapter 369, Part III, Wekiva Parkway and Protection Act, Florida Statutes.

Although not required until site plan submittal, the Owner obtained and submitted an Environmental Assessment conducted by Bio-Tech Consulting, Inc. (Exhibit 11). According to the Environmental Assessment, no protected wildlife species preventing rezoning were observed or documented on the Property.

Conclusion of Law

Article XXXII of the City of Orlando Code sets forth the procedures for quasi-judicial hearings before a hearing officer. Quasi-judicial hearings before a hearing officer are de novo. Pursuant to §2.207(5) Article XXXII of the City of Orlando Code, "The party filing the hearing request shall have the burden of coming forward with the evidence and the burden of proof. The Hearing Officer's decision shall be based on competent substantial evidence after applying the criteria set forth in the Orlando City Code and any applicable administrative, federal and state case law in effect at the time the hearing was filed." Dr. Jones has the burden of proof to show by competent substantial evidence the Owner's request should be denied.

On February 8, 1996, President William J. Clinton signed the Telecommunications Act of 1996 amending the Communications Act of 1934. Section 704 (a) of the Telecommunications Act of 1996, codified in part at 47 U.S.C. Section 3332(c)(7)(B)(iv), prohibits states, counties and cities from regulating towers "on the basis of environmental effects of radio frequency emissions . . ." 47 U.S.C. 3332(c)(7)(B)(iv). The federal government first controlled our nation's airwaves with the Radio Act of 1927. See Radio Act of 1927, Pub. L. No. 69-632, 44 Stat. 1162. Congress expressed and continues to express its clear intention to preempt this issue and thus, the City cannot consider the potential effects of the tower emissions. See Louisiana Public Service Comm'n v. FCC, 476 U.S. 355, 368 (1986)(Preemption under the Supremacy Clause of the United States Constitution occurs when Congress expresses a clear intent to preempt state and local laws).

Regardless of any legitimate concerns or scientific uncertainty concerning the long-term effects of tower emissions, Federal law requires local governments accept compliance with prescribed FCC emission limits as the final determination on environmental safety. See *Id.* See also 47 CFR Sections 1.1307(b), 2.1091 and 2.1093; Exhibit C, FCC Supp. A to OET Bulletin 65. The City properly conditioned approval of the towers on compliance with federal law and obtaining all applicable permits. The proposed towers will comply with prescribed FCC emission limits. Accordingly, Dr. Jones's arguments, testimony and evidence regarding the deleterious effects of tower emissions cannot be considered and are rejected.

Dr. Jones's final argument is the towers are not compatible with the surrounding properties and the building of the towers will harm wildlife and the natural environment. These arguments are proper under 47 U.S.C. Section 3332(c)(7). Although she was not formally tendered as an expert, Dr. Jones offered expert opinion without objection and the formal rules of evidence do not apply to this proceeding. See Sec. 2.207 (6), Art. XXXII Orlando City Code. Furthermore, Dr. Jones earned the highest degree attainable in biology from our state's flagship university. She is an expert and her testimony is weighed as expert testimony.

Dr. Jones presented a thoughtful well-prepared case. However, Dr. Jones did not meet her burden of proof. Uncontroverted evidence and expert testimony showed the Owner's proposed plan results in substantially less intense development under the City's Planned Development District Designation than currently allowed. The restricted development proposal limits development to two towers and small accessory buildings. Orange County's MDR designation and R-1A zoning allow over 100 residential units on the Property. The proposed City Planned Development Designation on the Property complies with (i) the State of Florida Comprehensive Plan (Chapter 187, Florida Statutes), (ii) the East Central Florida Strategic Policy Plan, (iii) County and Municipal Planning Land Development Regulation (Chapter 163 Florida Statutes, Part II), (iv) the City's Growth Management Plan, (v) the City's Comprehensive Plan, and (vi) all other applicable codes, ordinances and laws.

The restricted development proposal for the towers requires most of the Property remain as impervious open space allowing significant recharge areas to remain and

most of the natural habitat preserved. Consistent with Objective 1.7 and Policy 1.7.8 of the City's Growth Management Plan, Conservation Element, the restricted development proposal promotes a pattern of development that preserves open space and protects recharge areas while recognizing existing vested property development rights. There will be less traffic, less development, fewer demands on public facilities and more open space under the proposed plan than the current vested development entitlements under Orange County's MDR Future Land Use Map designation and R-1A zoning.

Competent substantial evidence provided by City Planner Katy Magruder also showed the Planned Development District Designation is compatible with surrounding uses, which are, in part, also industrial. City Planner Ms. Magruder testified the residential homes in the area are not adjacent to the Property and far from the proposed towers. In addition to the distance between the towers and the few existing homes in the immediate vicinity, the Property will have "significant buffering" as part of any future site plan approval and, according to the consulting engineering report, will not be visible by Dr. Jones from her 3620 Lake Lawne Ave. home. See Exhibit 15-D. See also *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc.*, 857 So.2d 202, 205 (3rd DCA 2003)(City staff opinions are competent and substantial evidence).

Recommendation

Based on the Findings of Fact and Conclusions of Law, I recommend the City of Orlando Council:

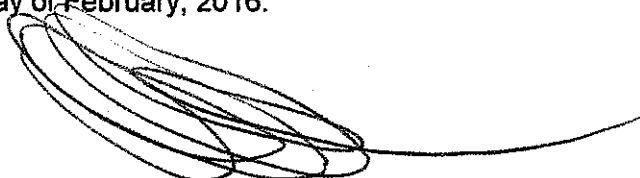
A. DENY Petitioner's petition and APPROVE the Owner's Application for rezoning in Case ZON2015-000028 with all staff recommended conditions and MPB

recommended conditions including zoning the Property City Planned Development District within the Wekiva Overlay District,

B. Adopt and approve this Recommend Order after annexing the Property and assigning the Industrial Future Land Use Map designation in the City's Growth Management Plan, and

C. To the extent the Owner's applications filed in Case No. ANX2015-00015 and Case No. GMP2015-00031 are quasi-judicial under *Debes v. City of Key West*, 690 So.2d 700 (3rd DCA 1997) and subject to appeal under Art. XXXII of the Orlando City Code, DENY Petitioner's petition and APPROVE the Owner's applications filed in Case No. ANX2015-00015 and Case No. GMP2015-00031 with all conditions recommended by City staff.

RESPECTFULLY SUBMITTED this 15th day of February, 2016.



DEREK A. SCHROTH, ESQ.
Hearing Officer
Florida Bar No. 0352070
Board Certified Expert in City, County and
Local Government Law and Business Litigation

Pursuant to Section 2.208 of the Orlando City Code, the parties have ten (10) working days from the date of receipt of this Recommended Order in which to submit to the Clerk written exceptions for presentation to the Orlando City Council in its consideration of this Recommended Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY on February 15, 2016, I furnished via email, and to those who requested

by mail by mail, a true and accurate copy of this Recommended Order to:

Jason Searl, Esq.
Applicant/Owner's Attorney
jason.searl@gray-robinson.com

Kyle Shephard, Esq.
Respondent/City's Attorney
kyle.shephard@cityoforlando.net

Dr. Wanda Jones
Petitioner
3620 Lake Lawne Avenue
Orlando, FL 32808
cosasmia@yahoo.com

Katy Magruder
katy.magruder@cityoforlando.net

Mark Cechman
marl.cechman@cityoforlando.net

A handwritten signature in black ink, appearing to be 'Cynthia Sanford', written over a horizontal line.

Cynthia Sanford
Hearing Administrator