STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING
FINANCE CORPORATION

DOCKSIDE AT SUGARLOAF KEY, LLC

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

APPLICATION NO. 2019-008CS/2021-291CS
FHFC Case # 2022-005VW

PETITION FOR WAIVER OF RULE 67-48.0072(21)(B) AND FOR WAIVER OF THE QUALIFIED ALLOCATION PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS AND RULE 67-48.002(96)

Petitioner, Dockside at Sugarloaf Key, LLC, a Florida limited liability company (the "Petitioner") submits its petition to Respondent, Florida Housing Finance Corporation (the "Corporation"), for a waiver of Rule 67-48.0072(21)(b), F.A.C. in effect at the time Petitioner submitted its application in response to the Corporation's Request for Applications 2018-115 (the "RFA"), to allow Petitioner to extend the Firm Loan Commitment deadline for the State Apartment Incentive Loan ("SAIL") funding allocated to Petitioner pursuant to the RFA. In addition, Petitioner submits its Petition for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2021 Housing Credit Allocation prior to the fourth quarter of 2023. The return of the Housing Credits is required before the Corporation may reserve an allocation of Housing Credits that Petitioner requests be immediately allocated. See Rule 67-48.002(96), Florida Administrative Code (2018) and 2018 Qualified Allocation Plan Section II.K. In support of this petition (the "Petition"), Petitioner states as follows:

A. Petitioner and the Development.

1. The name, address, telephone, and facsimile numbers for Petitioner and its qualified representative are:

Dockside at Sugarloaf Key, LLC
c/o Rural Neighborhoods, Inc.
19308 SW 380th Street
Florida City, FL 33034
(305) 242-2142
SteveKirk@ruralneighborhoods.org

The name, address, telephone, and facsimile numbers of Petitioner's attorneys are:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, FL 33131
Telephone: (305) 347-7308
Facsimile: (305) 347-7808
Email: gcohen@shutts.com

2. Pursuant to the RFA, Petitioner timely submitted its application for low-income housing tax credits ("Credits") and SAIL funding. See Application Number 2019-008CS. Petitioner was preliminarily awarded $1,366,400.00 in SAIL funding under the RFA (the "SAIL Award"). The SAIL Award Firm Loan Commitment issuance deadline was originally January 2, 2020, which was twelve (12) months from the invitation to enter credit underwriting, which date was extended at a December 2019 meeting of the Board of Directors of the Corporation ("Board") to July 1, 2020, and extended at a July 2020 Board meeting until January 31, 2021, and extended at a January 2021 Board meeting until January 31, 2022.

3. Under Rule 67-48.028(1), if an applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, such applicant must enter into a "Carryover Allocation Agreement" with the Corporation by December 31 of the year in which the preliminary allocation is issued. The carryover allocation (under Section 42 of

the Internal Revenue Code) may allow the applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service. At its January 2021 Board meeting, the Corporation approved the return by Petitioner of its 2019 credit allocation in exchange for an allocation of 2021 housing credits, and the Corporation mandated in the replacement Carryover Allocation Agreement that the development be placed in service by December 31, 2023. The replacement Carryover Allocation Agreement provides for the "10% test" to be met by August 31, 2021, which date has been extended by Petitioner to February 12, 2022.

4. The SAIL Award is a critical part of the financing for the new construction of 28 units of affordable family/workforce housing to be known as Dockside at Sugarloaf Key, serving income qualifying persons (the "Development"). The development is located in Monroe County.

5. For the reasons explained more fully below, the SAIL Award Firm Loan Commitment will not be issued by the January 31, 2022 deadline and the requirement under the Carryover Allocation Agreement that the 10% test be met by February 12, 2022 cannot be met. Due to (a) substantial opposition received from neighboring landowners in Monroe County to Petitioner's major conditional use application, and (b) the impact of the Covid-19 pandemic, Petitioner is requesting (i) to return its 2021 Housing Credit allocation and obtain from the Corporation an immediate allocation of 2022 Housing Credits, and (ii) an extension of the firm loan commitment issuance deadline until January 31, 2023.

B. Rules from Which the Waiver is Sought.

6. The relevant portion of the Rules in effect at the time the SAIL funds were awarded for which this waiver is sought, provides as follows:

> "(21) Information required by the Credit Underwriter shall be provided as follows:

***

(b) For SAIL, EHCL, and HOME, unless stated otherwise in a competitive solicitation, the firm loan commitment must be issued within twelve (12) months of the Applicant's acceptance to enter credit underwriting. Unless an extension is approved by the Corporation in writing, failure to achieve credit underwriting report approval and issuance of a firm loan commitment by the specified deadline shall result in withdrawal of the preliminary commitment. Applicants may request one (1) extension of up to six (6) months to secure a firm loan commitment. All extension requests must be submitted in writing to the program administrator and contain the specific reasons for requesting the extension and shall detail the time frame to achieve a firm loan commitment. In determining whether to grant an extension, the Corporation shall consider the facts and circumstances of the Applicant's request, inclusive of the responsiveness of the Development team and its ability to deliver the Development timely. The Corporation shall charge a non-refundable extension fee of one (1) percent of each loan amount if the request to extend the credit underwriting and firm loan commitment process beyond the initial twelve (12) month deadline is approved. If, by the end of the extension period, the Applicant has not received a firm loan commitment, then the preliminary commitment shall be withdrawn." Rule 67-48.0072(21)(b), F.A.C. (2018).

7. The Corporation's Qualified Allocation Plan (Section II.K) provides that Housing Credits may be returned **only** after the second quarter of the year in which a development is required to be placed in service:

> … where a Development has not been placed in service by the date required pursuant to Section 42 of the IRC, or it is apparent that a Development will not be placed in service by the date required pursuant to Section 42 of the IRC, and such failure is due to circumstances beyond the applicant's control, and the Applicant **has returned its Housing Credit allocation in the last calendar quarter of the year** in which it was otherwise required to be placed in service pursuant to Section 42 of the IRC, the Corporation may reserve allocation in an amount not to exceed the amount of Housing Credits returned, and may issue a Carryover Allocation Agreement allocating such housing credits to the Applicant for either the current year or the year after the year in which the Development was otherwise required to be placed in service…"

2018 QAP at Section II.K (emphasis added).

C. Statute Implemented.

8. The Rules for which a waiver is requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute that created the SAIL program and provides for the allocation of Housing Credits. See §§ 420.5087 and §§ 420.5099(2), Florida Statutes (2021).

9. Pursuant to Chapter 120.542(1), Florida Statutes, "[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation." Therefore, under Section 120.542(1), Florida Statutes and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its requirements when strict application of these requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

> "Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule." Section 120.542(2), Florida Statutes.

10. In this instance, Petitioner meets the standards for a waiver.

D. Justification for Petitioner's Requested Waiver

11. Petitioner was previously granted multiple extensions to secure a firm loan commitment of the SAIL Award, extending such deadline to January 31, 2022. A further extension of the deadline to secure a firm loan commitment may not be granted without a waiver of the Rule.

12. Petitioner is requesting an extension of the deadline to secure a loan commitment from January 31, 2022 to January 31, 2023, to have additional time to complete permitting and credit underwriting for the Development. The reasons for this request are as set forth below.

13. Petitioner is required to meet the 10% test by February 12, 2022 pursuant to the provisions of its Carryover Allocation Agreement. Petitioner is requesting to return its 2021 Housing Credit Allocation now, rather than wait for the fourth calendar quarter of 2023 as required under QAP, and obtain from the Corporation an immediate allocation of new housing credits (2022) with a later required 10% test date, in order to have additional time to complete the permitting and credit underwriting for the Development and close on its financing and commence construction, enabling it to meet the 10% test. Failure to meet the 10% test results in loss of the housing credits. The reasons for this request are as forth below.

14. Petitioner has faced substantial opposition from organized entities and neighboring landowners in Monroe County to its major conditional use application causing the Developer and Applicant to retain planners, traffic engineers, biologists, legal counsel, and other professionals to establish an extensive record and address expressed concerns. These groups have previously appeared before board and staff on several occasion expressing various reasons for their opposition to affordable housing.

15. Petitioner held two large voluntary public meetings of an estimated 100 and 80 attendees on Sugarloaf Key in which it presented conceptual drawings and polled neighborhood reactions to design alternatives. In addition, the Petitioner participated on October 1, 2020 in mandatory community meeting and public participation required by the Monroe County Planning and Environmental Resources Department in accordance with the Monroe County Land Development Code.

16. Petitioner participated in a public Development Review Committee meeting on November 16th, 2020 in which Monroe County presented its staff report recommending approval of requested conditional uses and heard public comment.

17. Petitioner participated in an extensive public meeting of the Monroe County Planning Commission on December 16th, 2020 in which the conditional uses were approved 5-0 after public participation. In addition to supportive presentations, entities in opposition presented consultant experts in their effort to construct an alternate record.

18. Entities opposed to this approved action filed an appeal of the Planning Commission approval to the Florida Division of Administration Hearings ("DOAH") on February 5, 2021. Oral arguments were heard at DOAH on July 13, 2021, and on July 22, 2021 the DOAH Administrative Law Judge affirmed in all respects the issuance of the major conditional use permit for the development. A copy of the DOAH decision is attached as **Exhibit A**.

19. On August 18, 2021, the entities who appealed the Planning Commission's approval to DOAH filed a Petition for Writ of Certiorari in Circuit Court for Monroe County, Florida, seeking to overturn the above-described DOAH order (which order had upheld the decision of the Monroe County Planning Commission to approve a conditional use permit for the development). Petitioner filed its response on September 29, 2021. The opposing parties' reply brief was originally due on October 29, 2021, which date has been extended to February 28, 2022. The reason that the due date for the opposing parties' reply brief has been extended is that the parties have reached tentative agreement on resolution of the litigation, which will permit Petitioner to proceed with the development. However, final settlement between the parties has not yet been reached.

20. The developer (Rural Neighborhoods, Incorporated, a IRS 501(c)(3) tax-exempt corporation; "Developer") has responded to numerous correspondence requests from corporations, limited liability companies and individuals in opposition to the project including requests for its charitable tax returns and audits. In addition, Developer and Applicant has been forced to respond to a series of correspondence addressed to potential Housing Credit investors, the assigned credit underwriting firm and FHFC from entities in opposition to the project. This interference with financial sources and credit underwriting has caused significant delay and financial harm including legal costs to be borne by the Developer and Applicant.

21. In addition to the slow-downs caused by organized opposition as described above, the project has been hindered by public health orders and pandemic-related delays, particularly in Monroe County, FL. Given these issues and that interruptions in predevelopment services remain ongoing due to the above-referenced litigation, Petitioner believes the length of its extension request is justified.

22. The requested waiver will not adversely affect Petitioner, the Development, any other party that applied to receive SAIL funding or Housing Credits in the RFA or the Corporation. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner, as it has incurred substantial costs to date toward ensuring that the Development proceeds to completion; (b) deprive Monroe County of the provision of much needed affordable workforce housing; and (c) violate principles of fairness. §120.542(2), F.S.

23. As discussed above, the delays have been caused by circumstances outside Petitioner's control. As a result, the delay makes it impossible to meet the January 31, 2022 deadline for issuance of a firm loan commitment and the February 12, 2022 10% test deadline.

24. The requested waiver will ensure the availability of SAIL and Housing Credit equity funding which will otherwise be lost as a consequence of the development delays described herein.

E. Conclusion

25. The facts set forth in Sections 14 through 24 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for a Rule waiver; that is, the delay in permitting and securing of necessary development approvals for the new construction of the Development caused by neighborhood opposition and COVID-19 and the loss of a substantial sum of money should the transaction not go forward.

26. As demonstrated above, the requested waiver serves the purposes of Sections 420.5087 and 420.5089, Florida Statutes, and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe, and sanitary housing in the State of Florida to low income persons and households. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable rental housing.

27. The waiver being sought is permanent in nature. Should the Corporation require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

WHEREFORE, Petitioner respectfully requests that the Corporation:

A. Grant this Petition and all the relief requested therein;

B. Grant a waiver of the Rule to extend the deadline to secure a firm loan commitment from January 31, 2022 to January 31, 2023, and not require that an additional extension fee be imposed;

C. Waive the Qualified Allocation Plan's Prohibition for returning Housing Credit Allocations prior to the fourth quarter of 2023;

D. Allow the immediate return of Petitioner's 2021 Housing Credit Allocation;

E. Immediately allocate new 2022 Housing Credits to Petitioner with a later placed service date, in an amount equal to the amount of its 2021 Housing Credit Allocation with no further fees imposed (other than the Corporation fee for exchanging Credits); and

F. Award such further relief as may be deemed appropriate.

Respectfully submitted,

Gary J. Cohen, Esq.
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CERTIFICATE OF SERVICE

The original Petition is being served by overnight delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by overnight delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 5th day of January, 2022.

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LOWER DENSITY FOR LOWER SUGARLOAF, LLC, SUGARLOAF SHORES PROPERTY OWNERS ASSOCIATION, INC., SOUTH POINT HOMEOWNERS, LLC; STUART SCHAFFER; JACK MARCHANT; JOHN COLEY AND WILLIAM L. WALDROP FAMILY TRUST 12/13/11,

Appellants,

vs. Case No. 21-0494

MONROE COUNTY PLANNING COMMISSION AND LOWER KEYS COMMUNITY CENTER CORPORATION,

Appellees.
_____/

FINAL ORDER

Pursuant to section 102-185(f), Monroe County Code (MCC),[1] Appellants, Lower Density For Lower Sugarloaf, LLC; Sugarloaf Shores Property Owners Association, Inc.; South Point Homeowners, LLC; Stuart Schaffer; Jack Marchant; John Coley; and the William L. Waldrop Family Trust 12/13/11 (Appellants), seek review of Monroe County Planning Commission (Commission) Resolution No. P35-20 (Resolution).

The Resolution approved a development application requesting issuance of a major conditional use permit by Lower Keys Community Center Corporation (LKCCC) for the proposed development of 88 multifamily deed-restricted affordable employee housing dwelling units at the intersection of Overseas Highway/U.S. Highway 1 and South Point Drive on Sugarloaf Key, near approximate mile marker 16.7, oceanside (Application).

[1] Part II of the Monroe County Code is often referred to as the Land Development Code (LDC). For purposes of this Final Order, relevant provisions will be referred to as being part of the MCC.

On December 16, 2020, the Commission held a duly noticed public meeting (Public Meeting) to hear and consider the Application. Based on its consideration of the record developed at the Public Meeting, the Commission passed and adopted the Resolution, and approved the Application, on December 16, 2020. The Resolution was rendered on January 8, 2021. The "Appeal to Hearing Officer (State of Florida Division of Administrative Hearings - DOAH)" (Appeal) was filed by Appellants with the Monroe County Planning and Environmental Resources Department (MCPERD) on February 5, 2021. The Appeal was referred to the Division of Administrative Hearings (DOAH) on February 11, 2021. The ten-volume Record of the underlying proceeding, consisting of pages 1 through 1287, was thereafter electronically filed on the docket and transmitted on a CD-R to DOAH on February 12, 2021.

On February 16, 2021, a scheduling order was entered that established the briefing schedule for the appeal pursuant to section 102-217, MCC. Appellants filed an Unopposed Motion for an Extension of Time to File the Initial Brief, which was granted. The date for filing the initial brief was set for May 13, 2021.

On March 15, 2021, LKCCC, the owner of the property and applicant for the major conditional use permit, moved to intervene in this proceeding. The motion was granted, and LKCCC was accepted with full party rights as an Appellee.

On April 6, 2021, Appellants filed a Motion to Stay, requesting that this proceeding be stayed to allow a related Commission resolution, Resolution P36-20, which approved an affordable housing project of "greater than 20 units" for the same project and property, to be resolved contemporaneous with this case.

On April 20, 2021, a telephonic hearing was held on the Motion to Stay at which all parties were represented. Due to the unavailability of the then-presiding Administrative Law Judge (ALJ), Suzanne Van Wyk, the motion was heard by the undersigned. At the commencement of the motion hearing, the undersigned advised the parties of a possible conflict created with the intervention of LKCCC, whose counsel is a member of the law firm that served as ALJ Van Wyk's ethics counsel in

her election campaign for judicial office in 2018. Appellants thereafter filed a Motion to Recuse ALJ Van Wyk, and this case was transferred to the undersigned.

After consideration of the motion, responses, and argument, the Motion to Stay was denied.

On May 10, 2021, Appellants filed a motion to extend the deadline to file the Initial Brief by seven days, until May 20, 2021. The Motion was granted.

On May 14, 2021, Appellants, without filing a motion for leave to do so, filed a Supplement to Record. Appellants did not file a memorandum of the authority under which the supplement was filed. On May 20, 2021, LKCCC filed a Motion to Strike Appellants' "Supplement to Record." On June 8, 2021, the Motion to Strike was granted, and the Supplement to Record has been given no consideration in the development of this Final Order.

The Initial Brief was timely filed on May 20, 2021. Appellees' Answer Briefs were timely filed on June 22, 2021. On June 24, 2021, Appellant filed a Motion for a 5-Day Extension of Time to File the Reply Brief, and on that same day the undersigned entered an Order to Show Cause directing Appellees to explain the basis for any objection to the Motion. Upon review of the response to the Order to Show Cause, the Motion for a 5-Day Extension of Time was granted, and the Reply Brief submission date was extended to July 6, 2021. Appellants' 22-page Reply Brief was thereafter timely filed on that date, accompanied by a Motion to Exceed Page Limit.

On July 12, 2021, Stuart Schaffer, a party to this proceeding, filed a Motion to Appear Pro Se and Participate in the Oral Argument. Also, on July 12, 2021, Appellants filed a Notice of Supplemental Authority of the Final Order in *Florida Keys Media, LLC v. Monroe County Planning Commission*, Case No. 16-0277 (Fla. DOAH June 1, 2016).

Oral argument was heard by Zoom teleconference on July 13, 2021, at which Appellants' Motion to Exceed Page Limit and Mr. Schaffer's Motion to Appear Pro Se and Participate in the Oral Argument were granted. Appellees were also granted

leave to file a two-page response to the *Florida Keys Media* Final Order, which was filed on July 19, 2021.

ISSUES

Appellants raise five issues on appeal: (1) that the Commission erred in approving the Application despite there being no competent substantial evidence of LKCCC's financial capacity to develop the property; (2) that the Commission erred in approving the Application despite there being no competent substantial evidence that the project will meet the "local needs" requirement of the MCC; (3) that the Commission's Public Meeting denied Appellants due process, and was fundamentally unfair; (4) that the Commission erred in approving the Application despite the failure of the project to comply with the "phasing and aggregation" requirements of the MCC for reserved outparcels; and (5) that the Commission erred in approving the Application despite the failure of the project to comply with, and the project's inconsistency with, the Lower Keys Livable CommuniKeys Plan ("CommuniKeys Plan").

BACKGROUND

LKCCC proposes the development of 88 multifamily deed-restricted affordable employee housing dwelling units at the intersection of Overseas Highway/U.S. Highway 1 and South Point Drive on Sugarloaf Key, near approximate mile marker 16.7, oceanside (the Project). The general description of the Project is as follows:

> Dockside consists of 28 units [in one building with three connected sections] on a parcel of 1.95 acres on the west side of S. Point Drive, with the Landings [60 units in seven structures] on a parcel of 3.34 acres on the east of South Point Drive, adjacent to a parcel which is not part of this project. Also on the western side of the Dockside parcel, there is another parcel, also not a part of the project.

The Project is proposed with a new entrance to U.S. Highway 1 ("U.S. 1") at the Landings side that will serve as the primary and only entrance to the Landings.

The new entrance is designed with right turn in and right turn out lanes, and a separate left turn lane for south-bound traffic.

The existing South Point Drive entrance from U.S. 1 is designed to add a right turn in deceleration lane, a right turn out acceleration lane, and a left turn queuing lane. A new roundabout is proposed for South Point Drive, designed to slow traffic along South Point Drive and direct traffic into Dockside.

A new bus stop is proposed for South Point Drive to serve public transit and school busses.

Evidence in the Record of the Commission Public Meeting

The Application was filed on August 14, 2020, by Donald Leland Craig, AICP, and Erica Sterling of Spottswood, Spottswood, Spottswood & Sterling, PLLC, seeking issuance of a major conditional use permit pursuant to section 110-70, MCC.

A major conditional use permit is necessary pursuant to section 130-93(c)(9), MCC, which requires dwelling units involving more than 18 units, designated as employee housing, be approved by the Commission as a major conditional use permit.

On October 1, 2020, a public community meeting was held in accordance with section 110-70(c), MCC.

On or about December 7, 2020, the staff of MCPERD filed a supplemental Staff Report in the Commission's record of this proceeding, containing a review of pertinent Monroe County Comprehensive Plan and MCC provisions, and recommending approval of the Application, subject to recommended conditions of approval.

The Public Meeting was properly noticed and set for December 16, 2020. On that date, the Commission conducted a quasi-judicial hearing on the Application.

At the Public Meeting, the Commission was represented by John J. Wolfe, Esquire. Brad Stein, the Planning Development Review Manager, who was accepted as an expert in planning, presented the supplemental Staff Report to the

Commission. Testifying at the Public Meeting were the following representatives and professional consultants of LKCCC: Donald Craig, AICP; Steven Kirk, President of the managing member of LKCCC; Karl Peterson, P.E., LKCCC's traffic engineer; and Harry Delashmutt, LKCCC's environmental and biological resources expert. Offering testimony on behalf of Monroe County was Emily Schemper, Senior Director of Planning and Environmental Resources, who was accepted as an expert in planning; Michael Roberts, Assistant Director of Environmental Resources, who was accepted as an expert in biology and environmental resources; and Mr. Stein.

Testimony was taken from 24 members of the public, mostly nearby residents, with five in favor, and 19 in opposition to the Application.

Andrew Tobin, Esquire, appeared on behalf of Appellants, and provided oral legal argument. Also appearing on behalf of Appellants was Stuart Schaffer, President of the Sugarloaf Shores Property Owners Association; Jack Marchant, representing South Point Homeowners, LLC; John Coley, a party; Bill Waldrop, a party representative; and expert witnesses Juan Calderon, P.E., a professional traffic operational engineer; Max Forgee, a planner; Phil Frank, an environmental consultant; and James Carras, a financial consultant. Several of Appellants' speakers submitted written reports that were in the record before the Commission.

The Resolution identified the following evidence as having been presented at the Public Meeting, which was incorporated and transmitted as part of the record:

> 1. Major conditional use permit development application received by the [MCPERD] on August 14th, 2020;
>
> 2. Site plan ("Site Plan") prepared by PQH Group Design Inc., signed-and-sealed by Aldo Minozzi, AIA, dated/on October 19th, 2020;
>
> 3. Building elevations ("Building Elevations") prepared by PQH Group Design Inc., signed-and-sealed by Aldo Minozzi R.A., dated/on October 19th, 2020;
>
> 4. Building floor plans ("Building Floor Plans") prepared by PQH Group Design Inc., signed-and-sealed by Aldo Minozzi R.A., dated/on July 31, 2020;

5. Drainage plan ("Drainage Plan") prepared by GRAEF (GRAEF USA), signed-and-sealed by Nelson H. Ortiz, P.E., dated/on October 21, 2020;

6. Photometric plan ("Photometric Plan") prepared by PQH Group Design Inc., signed-and-sealed by Thomas C. Nielsen, P.E., dated/on October 19th, 2020;

7. Landscape plan ("Landscape Plan") signed-and-sealed by Brown & Crebbin Design Studio Inc., by/via Richard Brown, FRLA, dated/on October 22nd, 2020;

8. Existing conditions report ("Existing Conditions Report" or "ECR") prepared by Biosurveys, Inc., signed by Harry DeLashmutt, March 16th, 2020;

9. Boundary survey ("Boundary Survey") by Florida Keys Land Surveying, LLC, signed-and sealed by Eric A. Isaacs, P.S.M., dated/on a revised date of July 29th, 2020;

10. Traffic study ("Traffic Study") by KBP Consulting, Inc., signed-and-sealed by Karl B. Peterson, P.E., dated December 2019, and furthermore updated dated July 2020 and December 2020;

11. Sworn testimony of representatives of the property owner and the property owner's professional consultants, including but not limited to Donald Craig, AICP, Harry Delashmutt, Karl Peterson, P.E., Steven Kirk, and Nelson Ortiz, P.E.;

12. Sworn testimony of MCPERD professional staff, including but not limited to the sworn testimony of the Department's Senior Director Emily Schemper, the sworn testimony of the Assistant Director of the Department's Environmental Resources Office Michael Roberts, and sworn testimony of the Department's Development Review Manager Bradley Stein;

13. Written protest request forms from members of the public, more particularly contained in the Department's file maintained for the instant development application/request for hearing and consideration of the

subject major conditional use permit application received from the property owner;

14. Written public comment from members of the public, more particularly contained in the Department's file maintained for the instant development application/request for hearing and consideration of the subject major conditional use permit development application received from the property owner;

15. Sworn testimony of various members of the public speaking in support of and speaking in opposition to the property owner's development application;

16. A two-page (2-page) letter from counsel for certain members of the public, submitted by Andrew Tobin, Esq., dated December 11th, 2020, and oral legal argument of Mr. Tobin;

17. Additional miscellaneous documents contained in the Department's file maintained for the instant development application/request for hearing and consideration of the subject major conditional use permit development application received from the property owner;

18. Advice and counsel of John J. Wolfe, Esq., counsel to the [ ] Commission.

At the conclusion of the Public Meeting, the Commission voted unanimously to approve the Application. That decision is memorialized in the Resolution, rendered on January 8, 2021. The Resolution made the following "initial" findings of fact:

1. The subject property is located in the Suburban Commercial ("SC") Land Use ("Zoning") District; and

2. The subject property is located the Mixed Use/Commercial ("MC") Future Land Use Map ("FLUM") category; and

3. The subject property is located within an area designed Tier III ("Infill Area"); and

4. Pursuant to [MCC] Section 130-93(c)(9), the proposed development shall require a major conditional use permit; and

5. [MCC] Section 110-67 furnishes the standards which are applicable to all conditional uses. When considering applications for a conditional use permit, this tribunal shall consider the extent to which:

(a) The conditional use is consistent with the purposes, goals, objectives and policies of the Comprehensive Plan and this [MCC];

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

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

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

(e) The adequacy of public facilities and services;

(f) 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 improvements associated with the proposed development;

(g) The development will adversely affect a known archaeological, historical or cultural resource;

(h) Public access to public beaches and other waterfront areas is preserved as a part of the proposed development; and

(i) The proposed use complies with all additional standards imposed on it by the particular provision of the [MCC] authorizing such use and by all other applicable requirements; and

6. Development shall be consistent with the [MCC]; and

7. Development shall be consistent with the Monroe County Comprehensive Plan; and

8. Development shall be consistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern.

The Resolution then made the following "further initial" findings of fact and conclusions of law:

1. The property owner's development application is consistent with the provisions and intent of the Monroe County Year 2030 Comprehensive Plan, specifically:

A. The development is consistent with the purpose of the Mixed Use/Commercial ("MC") future land use map category, as set forth in Policy 101.5.6; and

B. The development is consistent with the future land use densities and intensities, as set forth in Comprehensive Plan Policy 101.5.25.

2. The property owner's development application is consistent with the provisions and intent of the [MCC], specifically:

A. With execution of attached conditions, the development is consistent with the purpose of the Suburban Commercial ("SC") Land Use ("Zoning") District, as set forth in [MCC] Section 130-46; and

B. With execution of attached conditions, the land uses of the development are permitted within the Suburban Commercial ("SC") Land Use ("Zoning") District, as set forth in [MCC] Section 130-93; and

C. With execution of attached conditions, the development meets all of the standards for a conditional use permit as set forth in [MCC] Section 110-67; and

> 3. The property owner's development application is consistent with the Principles for Guiding Development in the Florida Keys Area of Critical State Concern.

The Resolution concluded by expressing the Commission's concurrence with the advice and counsel of its legal counsel; the documentary and testimonial contentions of LKCCC in support of the Application; and the recommendations, findings, and conclusions of the MCPERD's professional staff, and resolved that:

> Following considered review of the full record before it, based upon competent substantial evidence in the record, more particularly referenced above in the foregoing prefatory and operative recitals, prefatory and operative findings of fact, and prefatory and operative conclusions of law, all detailing said evidence, and detailing the [ ] Commission's concurrence with particular oral assertions of law and contentions or determinations of fact and law in the record, the [ ] Commission hereby approves the property owner's development application requesting approval of issuance of a major conditional use permit.

The Application approval was made subject to the following conditions:

> 1. The proposed development is currently in compliance with Monroe County Comprehensive Plan Policies 301.1.1, 301.2.1, 301.2.2, 301.2.3 and 301.2.4, as well as [MCC] Sections 114-2(a)(l)(a.), (b.) and (c.). There is currently adequate roadway capacity available at this time, but this shall not guarantee the adequacy or availability of public facilities at subsequent stages of development review. The applicant/property owner hereby acknowledges and agrees that any traffic level of service conditions in the development order are preliminary, and only represent a conditional concurrency determination. A final concurrency review shall [be] completed during building permit review to ensure adequate roadway capacity is confirmed and the adopted level of service is maintained. In areas of the County that are served by marginal or inadequate facilities, developments may be approved, provided that the development in combination with all other permitted development will not decrease travel speed by more than five percent (5%) below Level-of-Service ("LOS") C, and mitigation is provided. Mitigation may be in the form of specific improvements or

proportioned shared contribution towards improvements and strategies identified by the County, and/or by the Florida Department of Transportation ("FDOT") to address any level of service degradation beyond LOS C and/or deficiencies. The applicant shall submit evidence of an agreement between the applicant and the FDOT for inclusion in any contract or agreement for improvements to U.S. Highway 1. For roadway improvements required, the applicant/property owner may utilize:

a. The necessary facilities and services will be in place at the time a development permit is issued; or

b. The necessary facilities and services are in place at the time a certificate of occupancy, or its functional equivalent is issued. Prior to commencement of construction, the applicant shall enter into a binding and legally enforceable commitment to the County to assure construction or improvement of the facility; or

c. A binding executed contract in place at the time a permit is issued which provides for the commencement of the actual construction of the required facilities or provision of services; or

d. An enforceable development agreement guaranteeing that the necessary facilities and services will be in place with the issuance of a permit. An enforceable development agreement may include, but is not limited to, development agreements pursuant to Section 163.3220, Florida Statutes, or an agreement or development order issued pursuant to Chapter 380, Florida Statutes; or

e. A proportionate share contribution or construction that is sufficient to accomplish one or more mobility improvement(s) that will benefit a regionally significant transportation facility. A proposed proportionate fair-share mitigation shall be reviewed pursuant to Section 126-2, [MCC].

2. Prior to issuance of the building permit, a Notice of Intent from the FDOT for the proposed ingress and egress

directly from U.S. Highway 1 for the Landings portion of the property owner's project must be provided.

3. Prior to issuance of a Certificate of Occupancy for any dwelling units within the Landings portion of the property owner's project, an issued FDOT permit for the proposed ingress and egress directly from U.S. Highway 1 for the Landings portion of the project must be provided.

4. If the FDOT does not approve the proposed new access point on U.S. Highway 1 for the Landings portion of the project, the property owner's project will be required to come before the [ ] Commission as an Amendment to the subject major conditional use permit.

5. Prior to issuance of building permit(s), the applicant/property owner must obtain 88 Rate of Growth Ordinance ("ROGO") allocations, either through a reservation approved by the Monroe County Board of County Commissioners, or through the permit allocation system quarterly application process.

6. Prior to the issuance of a building permit(s) the fencing must comply with [MCC] Section 114-13.

7. Prior to the issuance of a building permit(s) for any signage, all proposed signs must comply with [MCC] Chapter 142.

8. Prior to the issuance of a building permit(s) all standards and requirements of the American with Disabilities Act ("ADA") must be met.

9. The scope of work has not been reviewed for compliance with Florida Building Code prior to the issuance of building permit(s), new development and structures shall be found in compliance by, including but not limited to, the Monroe County Building Department, the Monroe County Floodplain Administrator, and the local Office of the Fire Marshal.

On February 5, 2021, Appellants timely appealed the Commission's decision. On February 11, 2021, the appeal was referred to DOAH for briefing and oral argument.

LEGAL DISCUSSION

Jurisdiction

Pursuant to a contract between DOAH and Monroe County, DOAH has jurisdiction to review by appeal the action of the Commission pursuant to section 102-213, MCC.

Standard of Review

In rendering a final order, the undersigned is subject to the following standard of review:

> Within 45 days of oral argument, the hearing officer shall render an order that may affirm, reverse or modify the order of the planning commission. 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.

§ 102-218(b), MCC.

The standard of review under section 102-218(b), MCC, has been applied to determine whether the Commission "applied the correct law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *see also Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003); *Wolk v. Bd. of Cty.*

Comm'rs, 117 So. 3d 1219, 1223-24 (Fla. 5th DCA 2013). The correct law may derive from the MCC. *Wolk*, 117 So. 3d at 1224.

When used as an appellate standard of review, competent substantial 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); *see also Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002)("The 'competent substantial evidence' standard of review ... 'is tantamount to legally sufficient evidence.'"). So long as there is competent substantial evidence supporting the findings made by the Commission in reaching its decision, those findings 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 HRS*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985). Whether the record also contains competent substantial evidence to support a different result is irrelevant. *Clay Cty. v. Kendale Land Dev., Inc.*, 969 So. 2d 1177, 1181 (Fla. 1st DCA 2007); *Fla. Power & Light Co.*, 761 So. 2d at 1093; *Educ. Dev. Ctr., Inc. v. City of W. Palm Bch. Zoning Bd. of App.*, 541 So. 2d 106, 108 (Fla. 1989). The scope of review regarding the competent substantial evidence standard requires only that the undersigned:

> 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.

Dusseau v. Metro. Dade Cty. Bd. of Cty. Comm'rs, 794 So. 2d 1270, 1276 (Fla. 2001).

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, or substitute his or her judgment for that of

the Commission as to the credibility of witnesses. *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d at 530. Furthermore, the issue is not whether the Commission's decision is the best decision, 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 at 1032. 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.*, 541 So. 2d at 108.

Issues on Appeal

I. Whether the Commission had competent substantial evidence of LKCCC's financial capacity to develop the property.

Section 110-67(f), MCC, provides that:

> When considering applications for a conditional use permit, the Planning Director and the Planning Commission shall consider the extent to which:
>
> * * *
>
> (f) 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 improvements associated with the proposed development[.]

At paragraph 5(f) of the Resolution's initial findings of fact, the Commission determined that:

> 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 improvements associated with the proposed development[.]

Appellants argue that "the County's Staff Report concludes that 'Staff has no evidence to support or disprove the applicant's financial and technical capacity.'" However, the issue is not whether Monroe County staff had competent substantial evidence to support its recommendation, but rather whether the Commission had competent substantial evidence to support its decision.

Here, the Commission's finding that LKCCC has the financial capacity to complete a development as proposed was supported by evidence of property ownership, and by evidence that the project had been approved for funding by the Florida Housing Finance Corporation (FHFC), which performs a financial analysis as a condition of its funding application review. The FHFC acknowledged, in its July 17, 2020, Order Granting Waiver of Rule 67-48.0072(21)(b), that LKCCC "was selected to receive State Apartment Incentive Loan (SAIL) funding and 9% Housing Tax Credits under Request for Applications (RFA) 2018-115, to assist in the construction of a workforce housing Development in Monroe County, Florida." That evidence is sufficient to establish that the Project is financially supported.

James Carras was retained by Appellant, Lower Density for Sugarloaf, LLC, to "conduct the financial feasibility analysis of the Dock Side and Landings projects." Mr. Carras has extensive experience in consulting and teaching community economic development, including affordable housing finance. He has been certified as an economic development finance professional by the National Development Council. He has taught at Harvard University for the last seven years in the area of Urban Development and Financing Affordable Housing, and previously taught similar courses at Tuffs University, University of South Florida, and MIT. His clients have included public agencies, nonprofit development organizations, and private developers, and his work for those clients has included preparing financing applications, including low-income housing tax credits and other financing incentives and options. Mr. Carras was asked to model whether the development proposed by LKCCC, as well as potential alternative developments, were financially feasible. At the Public Meeting, Mr. Carras testified that:

> the project as proposed in terms of the 88 units, despite the higher construction costs in 2020 and lower value of the credits the project is still financially feasible, but also the project is financially feasible at a lower total number of units.

Appellants argue that Mr. Carras was "cut off," and that he may have said something different if given more time. However, his statement was clear, direct, and, by his own testimony, supported by his modeling. Thus, it constitutes competent substantial evidence upon which the Commission was entitled to rely of LKCCC's financial capacity to complete the development as proposed. The Commission's decision did not depart from the essential requirements of the law.

II. Whether the Commission had competent substantial evidence that the Project will meet the "local needs" requirement of the MCC.

At paragraph 1 of the Resolution's initial findings of fact, the Commission determined that "[t]he subject property is located in the Suburban Commercial ('SC') Land Use ('Zoning') District[.]"

Section 130-46, MCC, provides that "[t]he purpose of the [Suburban Commercial] district is to establish areas for commercial uses designed and intended primarily to serve the needs of the immediate planning area in which they are located. This district should be established at locations convenient and accessible to residential areas to reduce trips on U.S. 1."

Section 130-93, MCC, provides, in pertinent part, that:

> (c) The following uses are permitted as major conditional uses in the Suburban Commercial district subject to the standards and procedures set forth in Chapter 110, Article III:
>
> * * *
>
> (3) Institutional residential uses involving 20 or more dwelling units or rooms; provided that:

a. Access to U.S. 1 is by way of:

1. An existing curb cut;
2. A signalized intersection; or
3. A curb cut that is separated from any other curb cut on the same side of U.S. 1 by at least 400 feet[.]

* * *

(9) Attached and detached dwellings involving more than 18 units, designated as employee housing as provided for in section 139-1.

At paragraph 2 of the Resolution, the Commission further determined that:

> The property owner's development application is consistent with the provisions and intent of the [MCC], specifically:
>
> A. With execution of attached conditions, the development is consistent with the purpose of the Suburban Commercial ("SC") Land Use ("Zoning") District, as set forth in [MCC] Section 130-46; and
>
> B. With execution of attached conditions, the land uses of the development are permitted within the Suburban Commercial ("SC") Land Use ("Zoning") District, as set forth in [MCC] Section 130-93; ...

The proposed development site is in an established SC District. Thus, issues of whether the SC District was "established at locations convenient and accessible to residential areas to reduce trips on U.S. 1" were resolved with the adoption of section 130-46, MCC, and are not at issue here.

Brad Stein, Monroe County's Planning Development Review Manager, testified that "the proposed conditional use is consistent with the purposes, goals, objectives, and policies of the comprehensive plan and this land development code, including the density for affordable housing." The staff report referenced by Mr. Stein provides that "[t]he proposed employee housing dwelling units are an allowed use with the SC district, and serve the affordable housing needs of Monroe County, including the Lower Keys area."

The staff report and expert opinion of Mr. Stein constitute competent substantial evidence of the development's service of the needs of the immediate planning area. *See Weyerhaeuser NR v. City of Gainesville*, Case No. 20-0581, FO at 12 (Fla. DOAH May 5, 2021)(staff analysis and expert opinions of record are competent substantial evidence supporting a local government's decision); *PGSP Neighbors United, Inc. v. City of St. Petersburg*, Case No. 20-4083, FO at 19 (Fla. DOAH Mar. 3, 2021; Fla. DEO Apr. 1, 2021)("The City Council properly relied upon the Staff Report in adopting the Ordinance, which further qualifies as competent, substantial evidence.").

Furthermore, as argued by LKCCC, the Monroe County Comprehensive Plan and the CommuniKeys Plan support that the proposed development meets the needs of the immediate planning area. Objective 101.19 of the Monroe County Comprehensive Plan requires a "balancing of local community needs with all Monroe County communities." The CommuniKeys Plan includes a direct planning area that extends from mile marker 14.2 to mile marker 29, and establishes that "the Lower Keys LCP planning area serves primarily as a bedroom community supporting more mature and intensely developed employment centers and commercial areas in Stock Island, Key West, and the Upper Keys." The staff report notes that the SC district and the proposed Project serves the affordable housing needs of the Lower Keys planning area as a whole.

There was competent substantial evidence to support the determination that the immediate planning area to be served by the SC district extended beyond the discrete confines of Sugarloaf Key. The SC district was created "to establish areas for commercial uses designed and intended primarily to serve the needs of the immediate planning area in which they are located." In performing its duty of balancing local community needs, the Commission was obliged to apply and harmonize the relevant standards applicable to its decision. In that regard:

> Rules of statutory construction...apply to municipal ordinances and city charters. ... Appellant argues that this case implicates the rules of construction that specific provisions control over general ones and that one

> provision should not be read in such a way that it renders another provision meaningless. Both rules are well-established. *See Murray v. Mariner Health*, 994 So. 2d 1051, 1061 (Fla. 2008). Another rule of construction relevant to this issue is that all provisions on related subjects be read in pari materia and harmonized so that each is given effect. *Cone v. State, Dep't of Health*, 886 So. 2d 1007, 1010 (Fla. 1st DCA 2004).

Katherine's Bay, LLC v. Fagan, 52 So. 3d 19, 28 (Fla. 1st DCA 2010).

Based on the above, the Commission's approval of affordable workforce housing for persons employed outside of the bounds of Sugarloaf Key was based on its analysis that the immediate planning area to be served by the SC district included more mature and intensely developed employment centers and commercial areas. Its decision was based on competent substantial evidence provided by the documentary submissions, the staff reports, and testimony of its staff and experts. The Commission's decision did not depart from the essential requirements of the law.

III. Whether the Commission's Public Meeting denied Appellants due process and was fundamentally unfair.

Appellants object that, at the December 16, 2020, Public Meeting, they were limited to six minutes for their legal representative, three minutes apiece for members of the public, including residents and other representatives, "and a little longer for experts." Meanwhile, "[t]he Planning Commission allows the 'parties' - the Staff and the Applicant - as much time as they need to present competent substantial evidence in support of or in opposition to an application and allows time for rebuttal; the 'parties' are allowed to call and question witnesses and have the ability to qualify witnesses as experts to bolster their credibility."

Under the MCC, the review criteria are limited and do not include consideration of whether procedural due process was afforded by the Commission. *See* § 102-218(b), MCC; *see also Osborn v. Monroe Cty. Planning Comm'n*, Case No. 03-4720, FO at 33-34 (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"); *Handte v. Monroe Cty. Planning Comm'n*, Case No. 19-5649, FO at 6 (Fla. DOAH Aug. 12, 2020) ("Unlike the three-tier judicial review of final administrative actions by a circuit court, procedural or due process violations may not be considered. ... Therefore, Appellants' argument that procedural due process violations occurred during the appeal hearing in front of the Commission, is not within the scope of this appeal.").

As set forth herein, the Commission allowed the public to participate in the proceeding consistent with its established procedures. It further allowed the Appellants individually, and their counsel and experts, to appear and to submit documentary evidence. Thus, the Commission did not depart from the essential requirements of the law in taking its action.[2] Nonetheless, the specific argument raised by Appellants that they were denied due process is not within the scope of this appeal.

IV. Whether the Project complies with the "phasing and aggregation" requirements of the MCC for Reserved Outparcels.

Appellants argue that the failure of LKCCC to include two reserved outparcels as "proposed phases of development," and to include them in the Project traffic study, violated the "phasing" and "aggregation" provisions of the MCC. LKCCC argues, on the other hand, that the outparcels are not part of the Project, and were not submitted to the Commission for review or approval.

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[2] Appellants' argument appears to have been considered and rejected by the Fifth District Court of Appeal, which has established that, in quasi-judicial hearings, the parties to the proceeding "must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the (government agency) acts." *Carillon Cmty. Residential v. Seminole Cty.*, 45 So. 3d 7, 11 (Fla. 5th DCA 2010). However, the court was clear that adjoining landowners are not parties, and do not have due process rights to cross-examine witnesses. Rather, the court established that the right of participation of adjoining landowners "does not, in any way, recognize a right on behalf of all neighboring property owners to cross-examine any and all individuals who may speak for or against the zoning application. To recognize such a right on behalf of all 'interested persons' would create a cumbersome, unwieldy procedural nightmare for local government bodies." *Id.*

Section 110-70, MCC, provides, in pertinent part, that:

> (a) Applications for major conditional uses. An application for a major conditional use permit shall be submitted to the Planning Director in a form provided by the Planning and Environmental Resources Department. The application shall include:
>
> * * *
>
> (7) A community impact statement, including:
>
> a. General description of proposed development:
>
> 1. Provide a general written description of the proposed development; including any proposed phases of development, the site size, the number and type of existing and proposed dwelling units, the amount and type of existing and proposed nonresidential floor area, and parking demand and capacities; ...
>
> * * *
>
> e. Impact assessment on public facilities—transportation:
>
> 1. Provide a projection of the expected vehicle trip generation; describe in terms of external trip generation and average daily and peak hour traffic;
>
> 2. Provide a traffic study, if applicable, as specified in Section 114-200[.]

Section 130-165, MCC, entitled Aggregation of Development, provides that:

> Any development that has or is a part of a common plan or theme of development or use, including, but not limited to, an overall plan of development, common or shared amenities, utilities or facilities, shall be aggregated for the purpose of determining permitted or authorized development and compliance with each and every standard of this Land Development Code (includes clearing limits) and for the purpose of determining the appropriate form of development review.

The Application provides that "the project [i.e., the 88-unit development] will be built in one phase," and further provides that the outparcels are not part of the Project. Other than speculation and argument that failure to consider the outparcels as part of a phased or aggregated development would lead to an absurd result, there was no competent substantial evidence offered to establish such. There was no allegation of any overall plan of development or shared amenities, utilities, or facilities between the Project and the outparcels, save the likelihood that the outparcels would have to share an access point(s) onto U.S. 1.

Mr. Peterson, who has considerable experience in traffic engineering and transportation planning in Monroe County, provided testimony, and a traffic impact study that was included in the Application, and discussed at length at the Commission meeting, which concluded that there is sufficient capacity on U.S. 1 to accommodate the traffic associated with the Project, and that the study intersections within the Project study area will operate at an acceptable level of service. Mr. Peterson further testified that the data and assumptions upon which the traffic impact study was based, including its trip distribution calculations, were consistent with Department of Transportation practices, and with the published Monroe County Traffic Report Guidelines. Furthermore, he testified that the trip generation calculations for the Project were developed consistently with a trip generation manual published by the Land Use Institute of Transportation Engineers that is widely considered to be the standard for estimating traffic associated with various land use, and applied the most "robust" and trusted data set. As to the "reserved" parcels, Mr. Peterson testified that nothing was planned for those vacant parcels, and that, in his opinion, it is not unusual for vacant land to not be considered in a traffic impact study and analysis. He further noted that when those parcels are proposed for development, they will be evaluated and be subject to Commission review in accordance with the conditions and guidelines required at that time, a conclusion that was substantiated in the staff report recommended action. Mr. Peterson provided competent substantial evidence to the Commission of the Project's compliance with sections 110-70 and 130-165, MCC.

Furthermore, the staff report discussed both the scope of the proposed Project and the traffic element at length. Staff made no determination that the outparcels, though depicted on the site plan, should be considered as part of a phased project, or aggregated for the purpose of determining permitted or authorized development and compliance with the MCC, including traffic elements.

The Commission's decision was based on competent substantial evidence provided by the documentary submissions, expert testimony, the staff report, and testimony of its staff. The Commission's decision did not depart from the essential requirements of the law.

V. Whether the Project complies with, and is consistent with, the CommuniKeys Plan.

In their final point on appeal, Appellants argue that the Project is not consistent with the CommuniKeys Plan. Their argument relates primarily to density, though their briefs touch on traffic impacts and community character as well.

As stated by Mr. Stein, the CommuniKeys Plan is "a balancing of policies and priorities for the overall planning area to remain a low density primarily residential community, as well as provide affordable housing in the community." As set forth herein, the CommuniKeys Plan includes a planning area that extends from mile marker 14.2 to mile marker 29. In addition, the CommuniKeys Plan recognizes that the planning area is tied to and is designed to support the employment centers and commercial areas in Stock Island, Key West, and the Upper Keys. Monroe County Comprehensive Plan Policy 1.2.1 directs Monroe County to recognize the FLUM categories and the land use districts as the primary regulatory tool for evaluating development proposals. As applied here, the Mixed Use/Commercial FLUM and SC zoning together allow the development of employee housing with more than 18 units as a major conditional use, without the necessity of text or map amendments, and without the need for a variance.

Mr. Stein also noted the Project's compliance with CommuniKeys Plan objective 4.2, by which "Monroe County shall encourage affordable and work force housing in areas identified for appropriate for higher intensity commercial mixed use and residential development," and policy item 4.2.2., by which "Monroe County will conduct an analysis to identify sites for affordable and workforce housing in areas identified in the FLUM as residential hyde [sic] and mixed use commercial land use."

The CommuniKeys Plan identifies properties that are appropriate for medium to high-density residential development or commercial development under Monroe County's Comprehensive Plan, and the Project site is specifically mapped as an area that is appropriate for medium to high density residential development.

As stated by Ms. Schemper, and detailed in the staff report, the Project density is in compliance with the general density standards in the CommuniKeys Plan. The general density standards apply to the entire CommuniKeys Plan community, which stretch over a number of islands across a number of miles. The Project area is specifically identified as a medium to high density potential development area, and is not considered a restricted low-density development area. Ms. Schemper further testified that the CommuniKeys Plan indicates that the Commission should use the current FLUM when evaluating development proposals. Although the CommuniKeys Plan includes policies and priorities for the overall planning area to maintain a low density primarily residential character, that overall community includes specific areas with varying density requirements, including those for affordable housing, and including the adjacent Sugarloaf Key neighborhood, which is in a residential-medium category.

With regard to traffic and community character, both the record of the Public Meeting, including the comprehensive traffic study, and the staff report were replete with evidence of compliance with the traffic and community character elements of the CommuniKeys Plan. Traffic has been previously discussed. As to community character, there was ample evidence of restrictions and accommodations made by LKCCC regarding building height, parking, buffers and expanded

setbacks, architectural design, lighting, fencing and limitations on waterway access, and other elements designed to accommodate the character of the existing community. In response to inquiry, Ms. Schemper confirmed that LKCCC "is not asking for any waivers or variances from our rules and regulations and is in compliance with the code and all of its requirements," and that "they have actually exceeded them in certain cases as well," including those related to parking and landscaping. Compliance with the traffic and community character elements of the CommuniKeys Plan was supported with competent substantial evidence.

Appellants argue that, despite what adjoining landowners will see, the Project will violate the "compatibility" provisions of section 163.3164(9), Florida Statutes, which is "a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." Appellants focus that argument on adverse traffic impacts from the proposed development. The evidence, in the form of the traffic study, staff report, testimony of Mr. Peterson and staff, and discussion by the Commissioners, all constitute competent substantial evidence that the Project will not "unduly negatively impact" the existing residential uses of Sugarloaf Key.

Finally, Appellants argue that the Commission approval failed to take into account whether the Project will serve the "local community," suggesting that the residents of the proposed workforce housing should be limited to serving the needs of the Lower Sugarloaf Community Center from mile marker 16 to mile marker 17. As has been discussed and described herein, the record of the Commission's Public Meeting and the staff report include extensive discussion of the extent and purpose of the CommuniKeys Plan planning area. That evidence provides support for the Commission's determination that the Project meets the criteria established by the CommuniKeys Plan, including the local needs elements.[3] The Commission's decision did not depart from the essential requirements of the law.

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[3] Appellants' reliance on *Florida Keys Media, LLC v. Monroe County Planning Commission*, Case No. 16-0277 (DOAH June 1, 2016), as support for a definition of the "local community," is misplaced.

Conclusion

It is not the role of the undersigned to determine whether the action taken by the Commission is the best means to accomplish Monroe County's objectives. As set forth herein, the Commission applied the correct law, acted in accordance with competent substantial evidence, and did not depart from the essential requirements of the law when it adopted the Resolution.

DECISION

Based on the foregoing, Resolution No. P35-20, which approved the issuance of a major conditional use permit to LKCCC for the proposed development of 88 multifamily deed-restricted affordable employee housing dwelling units at the intersection of Overseas Highway/U.S. Highway 1 and South Point Drive on Sugarloaf Key, near approximate mile marker 16.7, oceanside, is affirmed in all respects.

DONE AND ORDERED this 22nd day of July, 2021, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of July, 2021.

In that case, the ALJ determined that a 190-foot-tall communications tower was aesthetically incompatible with the surrounding residential area. After having described the project (tall tower, noisy backup generator), and the specific documented evidence of the effect of the tower on property values (evidence that is lacking here), the ALJ concluded that "the proposed tower would be incompatible with the surrounding residential area." He further determined that the "immediate vicinity" applied not to whether the tower would *serve* the local community, as Appellants assert here, but whether the tower was compatible with the *character* of the local community. The evidence in this case was sufficient to constitute competent substantial evidence that the Project, as designed, will be compatible with the local residential community, aesthetically and otherwise.

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NOTICE OF RIGHTS TO JUDICIAL REVIEW

Pursuant to article VI, section 102-218(c), MCC, 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.