



Agenda Report

2725 Judge Fran Jamieson
Way
Viera, FL 32940

Consent

F.22.

5/21/2024

Subject:

Gulfstream Towers, LLC v. Brevard County - Authorization to Commence Appeal in Eleventh Circuit Court of Appeals (Board Denial of CUP Request for Wireless Tower on Property Owned by Hope Episcopal Church, Inc. in Suntree)

Fiscal Impact:

In this case, pursuing an appeal will not result in any form of further liability or exposure other than any outside counsel fees and costs that exceed the \$100,000 annual aggregate for non-monetary claims under the County's Public Officials' coverage insurance agreement. To date, the County has incurred reimbursable defense costs in the amount of \$13,691 in this matter. At present, no other claims have eroded the aggregate for the 10/1/2023-24 coverage period.

Dept/Office:

County Attorney's Office

Requested Action:

Authorize the County Attorney, through insurer-assigned outside counsel, to commence an appeal in the Eleventh Circuit Court of Appeals on or before June 5, 2024.

Summary Explanation and Background:

On November 2, 2023, the Board of County Commissioners held a public hearing and considered a request for a conditional use permit ("CUP") for Wireless Telecommunications Facilities and Broadcast Towers on property owned by Hope Episcopal Church, Inc. in Suntree. The Board unanimously voted to deny the request. On December 5, 2023, the Board adopted Resolution No. 23-144 setting forth findings of fact and conclusions of law supporting the denial.

Gulfstream Towers, LLC ("Gulfstream") sued Brevard County in the United States District Court for the Middle District of Florida in Orlando, alleging that the County violated the Federal Telecommunications Act of 1996 when it denied the application to construct a 120-foot concealed wireless telecommunications tower. Both Gulfstream and the County moved for summary judgment.

In an Order filed on May 6, 2024, the Hon. Judge Gregory Presnell declared the Board's decision and Resolution No. 23-144 "null and void as contrary to the Federal Telecommunications Act of 1996...." The Court characterized the citizen testimony received by the Board - which under prevailing law certainly can be substantive evidence - as "NIMBY" testimony, and largely failed to address cases cited in the County's filings which affirmed tower application denials on facts similar to our case. The Court ordered and enjoined the Board to approve Gulfstream's CUP application.

The County has 30 days from the date of the Order to commence an appeal before the Eleventh Circuit Court of Appeals, i.e., on or before June 5, 2024. The County Attorney's Office has worked closely with the County's insurance-assigned defense counsel on this case. Both outside counsel and the County Attorney believe that, among other points of error, the District Court erred by displacing the Board's fair estimate of conflicting evidence and re-weighting the evidence, rather than simply determining whether substantial evidence existed to support the Board's decision, which is the applicable standard.

Clerk to the Board Instructions:

Please return a memo of the Board's action to the County Attorney's Office and Risk Management.



May 22, 2024

M E M O R A N D U M

TO: Morris Richardson, County Attorney

RE: Item F.22., Gulfstream Towers, LLC v. Brevard County – Authorization to Commence Appeal in Eleventh Circuit Court of Appeals (Board Denial of CUP Request for Wireless Tower on Property Owned by Hope Episcopal Church, Inc. in Suntree)

The Board of County Commissioners, in regular session on May 21, 2024, authorized you, through insurer-assigned outside counsel, to commence an appeal in the Eleventh Circuit Court of Appeals for Gulfstream Towers, LLC v. Brevard County, on or before June 5, 2024.

Your continued cooperation is always appreciated.

Sincerely,

BOARD OF COUNTY COMMISSIONERS
RACHEL M. SADOFF, CLERK

Kimberly Powell
Kimberly Powell, Clerk to the Board

/tr

cc: Risk Management
Finance
Budget