

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

GULFSTREAM TOWERS, LLC,

Plaintiff,

v.

Case No: 6:24-cv-10-GAP-LHP

BREVARD COUNTY,

Defendant

ORDER

This cause is before the Court pursuant to the Telecommunications Act of 1996 (“TCA”), 47 U.S.C. § 332. In compliance with the Court’s Amended Case Management Order (*see* Doc. 4), Defendant Brevard County (the “County”) has filed a certified copy of the administrative record (Doc. 15); Plaintiff Gulfstream Towers, LLC (“Gulfstream”) has filed a brief on the merits (Doc. 18);¹ the County has filed a response brief (Doc. 27);² and Plaintiff has filed a reply (Doc. 28).³ With

¹ The Court construes Gulfstream’s Motion for Summary Judgment as its brief on the merits. *See* Doc. 18; *see also* Doc. 21.

² The Court construes the County’s Motion for Summary Judgment and Response in Opposition to Gulfstream’s Motion for Summary Judgment as the County’s response brief. *See* Doc. 27; *see also id.* at 1 n.1.

³ The Court construes Gulfstream’s Response in Opposition to the County’s Motion for Summary Judgment as Gulfstream’s reply. *See* Doc. 28.

briefing complete, this matter is ripe.

I. Introduction

In this action, Gulfstream sues the County under § 332(c)(7) of the TCA, alleging that the County violated the TCA when it denied Gulfstream's application to construct a 120-foot concealed wireless telecommunications tower in Melbourne, Florida. *See* Doc. 1. Gulfstream proposed to build the monopole tower on the northwest corner of an 8.27-acre parcel of land owned by Christ Episcopal Church of Suntree-Viera, Inc. (the "Church").⁴ *See* Doc. 15-4 at 1, 9. The Church's parcel is zoned Planned Unit Development ("PUD") with a Neighborhood Commercial Future Land Use designation. *Id.* at 1-2. Gulfstream executed a lease agreement with the Church for a 0.139-acre portion of its parcel. Doc. 15-9.

Pursuant to the Communications Facilities Ordinance of Brevard County, Florida, § 62-2420,⁵ Gulfstream applied for a Conditional Use Permit ("CUP") for its proposed tower. *See* Doc. 15-6 at 1-2. The administrative record (Doc. 15) reflects: (1) that the County's telecommunications consultant, CityScape Consultants, Inc.

The County also filed a reply (Doc. 29) on May 3, 2024, in violation of the Court's Amended Case Management Order (*see* Doc. 4) and without leave of Court. The Court entered an Endorsed Order striking the County's reply on May 6, 2024 (Doc. 30).

⁴ The Church is also referred to as "Hope Episcopal Church" in the record. *See, e.g.*, Doc. 15-23 at 1.

⁵ The Communications Facilities Ordinance of Brevard County, Florida is available at https://library.municode.com/fl/brevard_county/codes/code_of_ordinances.

(“CityScape”), determined that Gulfstream “submitted all of the information required under the County Ordinance,” *see* Doc. 15-6 at 1-5; (2) that the County’s planning staff prepared comments regarding Gulfstream’s CUP application but made no recommendation as to whether it should be granted or denied, *see* Doc. 15-4; and (3) that the Brevard County Planning and Zoning Board voted (5-4) to recommend approval of Gulfstream’s CUP (with certain conditions identified by CityScape), *see* Doc. 15-15. The Brevard Board of County Commissioners, however, voted unanimously to deny Gulfstream’s CUP application based on the proposed tower’s aesthetic impacts alone. *See* Docs. 15-20; 15-23 *see also* Doc. 27 at 1-2.

This case requires the Court to consider whether the County’s denial of Gulfstream’s CUP application was “supported by substantial evidence.” 47 U.S.C. § 332(c)(7)(B)(iii). Having reviewed the record and the parties’ briefing, the Court concludes that it was not.

II. Background

A. Gulfstream’s Proposed Tower

The focal point of this action is Gulfstream’s proposed 120-foot concealed monopole telecommunications tower. While the proposed tower is designed to accommodate up to four wireless service providers, T-Mobile is slated to be the “anchor tenant,” and the primary purpose of the tower “is to provide additional connection capacity for T-Mobile subscribers.” Doc. 15-6 at 1-2.

The proposed tower's location is the northwest corner of the Church's 8.27-acre parcel. The Church's parcel is surrounded by the following properties:

To the north is a 3-acre parcel developed as a [Florida Power and Light] sub-station and a 2.36-acre parcel developed as a business park. Both parcels retain PUD zoning.

To the south is 4.72-acre parcel developed as a stormwater pond adjacent to Crystal Lakes subdivision within the Suntime PUD.

To the east, across Interlachen Road, is [a] 9.74-acre parcel with PUD zoning developed as a shopping center.

To the west is a 0.96-acre undeveloped parcel adjacent to a business park with BU-1 zoning.

Doc. 15-4 at 2 (emphasis added).

The record does not appear to contain a complete copy of Gulfstream's CUP application; however, an updated version of Gulfstream's "General Development Standards" letter is available. *See* Docs. 15; 15-10. The letter includes (among other things) simulated photographs that intend to show how the proposed tower will look from various viewpoints. *See* Doc. 15-10 at 17-24. In most of the simulated photographs, the proposed tower appears above the tree line off in the distance, although in one photograph, the proposed tower is clearly visible behind a home. *Compare* Doc. 15-10 at 17-19, 21-24 *with id.* at 20 ("View 4," looking north from Bonaventure Drive).

B. CityScape's Findings

CityScape considered the merits of Gulfstream's CUP application, and

deemed it complete on August 8, 2023. *See* Doc. 15-6. In its Telecommunications Site Review, Cityscape concluded that Gulfstream “submitted all of the information required under the County Ordinance.” *Id.* at 5. Generally, CityScape considered whether there were any alternatives to Gulfstream’s proposed construction of a new tower, and it determined that “there are no existing towers on which to collocate that are within one mile of the proposed site, and the proposed tower height is appropriate and is similar to many other Providers’ wireless towers serving the County.” *Id.* at 4-5. Finally, it recommended that the County impose four conditions “prior to permitting,” such as requiring that the tower lighting conforms “to FAA standards, the U.S. Fish and Wildlife Service’s Recommended Best Practices for Communications Towers and the County Ordinance.” *Id.*

C. The Planning Staff’s Report

After CityScape issued its Telecommunications Site Review, the County’s planning staff prepared comments regarding the application. *See* Doc. 15-4. The planning staff analyzed whether Gulfstream’s application complied with the Communications Facilities Ordinance of Brevard County, Florida, § 62-2400, *et. seq.*, and briefly mentioned Gulfstream’s simulated photographs. *Id.*; *see id.* at 7. The planning staff embraced CityScape’s proposed conditions and suggested that the Planning and Zoning Board and the Board of County Commissioners should also consider: (1) “if the request for the proposed CUP is consistent and compatible with

the surrounding area” and (2) if they should impose “additional conditions . . . to mitigate potential impacts to abutting properties.” *Id.* at 12. However, the planning staff did not recommend whether Gulfstream’s CUP application should be granted or denied. *See generally* Doc. 15-4.

D. The Planning and Zoning Board and Board of County Commissioners’ Public Hearings

Both the Planning and Zoning Board and the Board of County Commissioners considered Gulfstream’s CUP application at public hearings on October 16, 2023 and November 2, 2023, respectively.

The minutes from the Planning and Zoning Board meeting reflect that four citizens expressed their concerns about the proposed tower. Doc. 15-15. The citizens’ concerns were primarily generic “not in my backyard” (also known as “NIMBY”) complaints, focused on the fact that the proposed tower would alter the landscape of their residential communities.⁶ *Id.* at 2. Ultimately, the Planning and Zoning Board voted 5-4 to recommend approval of Gulfstream’s application (with the conditions identified by CityScape). *Id.* at 4.

Prior to the Board of County Commissioners’ meeting, sixteen citizens wrote

⁶ For example, the minutes reflect that Peter Gardner stated “he is against the request is for a commercial enterprise in a residential neighborhood” and Marla Veit testified her neighborhood is “beautiful” and she “moved there for the serenity and the developed neighborhood. Doc. 15-15 at 2.

to their commissioners regarding Gulfstream's CUP application, and eighty-two residents signed petitions indicating that they were opposed to the proposed tower.⁷ *See* Docs. 15-16, 15-17. Fifteen of the citizens who wrote to their commissioners opposed the application, whereas one citizen was in favor of it. *Id.* Of the fifteen citizens that opposed Gulfstream's application, only four mentioned the aesthetic impact of the proposed tower. *See* Doc. 15-16 at 5-7, 12; Doc. 15-17 at 9-11.

Nicole Kraemer and Carole Engi both raised general concerns regarding the appearance of the proposed tower.⁸ Doc. 15-16 at 7; Doc. 15-17 at 9-11. Steven R. Bruck and Douglas (and Denise) Schilling, however, raised more specific objections. *See* Doc. 15-16 at 5-6, 12.

Mr. Bruck's email primarily focused on his concerns regarding "the

⁷ Two petitions are included in the record. *See* Doc. 15-17 at 12-13, 26-27. Each petition simply states that the signatories oppose the proposed tower. *Id.*

⁸ In her first email, Ms. Kraemer stated (among other things): "[The proposed tower] would be a terrible eyesore[.] . . . Many of the residents of Crystal Lake residing on Bonaventure Dr have a lovely lake view across to the church and this tower would be a blight on their vista. I suspect residents of the homes which backup to Interlachen Rd and are situated on Pauma Valley Way and Granada Ct would also object to such an eyesore." Doc. 15-17 at 10-11. In her second email, Ms. Kraemer raised concerns regarding Gulfstream's simulated photographs, stating: "The photos submitted with the application for the tower approval with the county seem disingenuous. All of the photos show a monopole tower without any lights or antennae on it. The actual tower would be more of an eyesore than the submitted photos indicate." *Id.* at 9.

Ms. Engi's email contains only a passing reference to aesthetics. Doc. 15-16 at 7. She stated: "So, besides the questionable, radiation emission, [cell towers] are just plain ugly to look at in a neighborhood development." Doc. 15-16 at 7.

detrimental [health] effects of living too close to a cell tower.” *Id.* at 5. However, he also stated in passing that he lives “directly across the lake at the back of the church” and that the proposed tower would be an eyesore for him. *Id.* (“[T]his tower isn’t just an eyesore for me, it is a dangerous and potentially lethal element in our lives”).

The Schillings’ letter covered a variety of topics. *Id.* at 12. Regarding the proposed tower’s aesthetic impact, they stated:

The installation of this tower will forever change the look and character of the Suntree neighborhood and not for the better. . . . Since 1996 we live at 1266 Bonaventure Drive with a direct view of the applicant’s property from [our] front yard. Many times, children could be heard playing on church grounds across from the retention pond providing the pleasant back drop that defines this community. Although classified as commercial property, a structure this tall is not appropriate for this area.

Id. at 12.

At the Board of County Commissioners’ meeting, the Board first heard from counsel for Gulfstream. *See* Doc. 15-20 at 1-2. Nine citizens then spoke in opposition to Gulfstream’s application, and one citizen spoke in favor of it. *See id.* at 2-8.⁹ Of the nine citizens who addressed the Board of County Commissioners, only two mentioned the aesthetic impact of the proposed tower.¹⁰ *Id.* Robin Steiner, who

⁹ Two transcripts are available in the record—one prepared by the Deputy Clerk for the Board of County Commissioners, *see* Doc. 15-20, and one prepared by a court reporter, *see* Doc. 15-21. For ease of reference, the Court cites to the transcript prepared by the Deputy Clerk for the Board of County Commissioners (Doc. 15-20).

¹⁰ Six of the nine citizens who addressed the commissioners commented on their belief that

lives in the subdivision directly behind the location of the proposed tower, stated (among other things):

Like Suntime, [a] beautiful community outside of Cincinnati had spent years improving the community. They had succeeded in moving all of their utility lines underground. This was a safety move to improve connectivity and the biggest overall improvement was to the aesthetics of their community which increased the value of their biggest asset and investment, their homes. Sound familiar? Sounds like Suntime, no more unsightly poles and wires, but we'll now have a cell phone tower booming over us. But now we'll have this 5G tower at the tip of our community. Nice welcome sign don't you think? Let me ask all of you sitting here, would you have that tower put in your backyard? I don't think so.

Id. at 4. John Lapak, who lives less than 1000-feet from the Church's parcel, stated:

We have a neighborhood that from the south, the southeast, the southwest is all surrounded by two of the most beautiful, uh, development communities, both Baytree and Suntime, and they contain well over a thousand homes and there's nothing more than a one or two-story, um, on all this property. And it's been there for 20 or 30 years, and by the way, the church, you know, has been there for like 26 years on their property as a church and in the same zoning type. So, here we are faced with a . . . in one of the most beautiful areas, and we have, uh, now we're going to be faced with this tower. If we were applying for a permit to put a taller tower, probably the limit, according to the code, would be somewhere around 50-60 feet, so actually, if it was a . . . we're now 90 feet higher in the air, highly visible from all of these beautiful neighborhoods. And I want to say also that to say that there is no impact by putting this tower next to all this residential area, it just doesn't make any sense. And I want to also say that lighting, let's talk about the lighting. In the original, uh, application, that I have a copy of where they were filling it out, they never even mentioned the lighting and I guess that came later when they realized that, yes, there's a Brevard, uh, requirement by Brevard

the proposed tower would be hazardous to their health. *See* Doc. 15-20 at 2-10.

actually, to put lighting on this tower. And what they failed to mention is that the very top, 120 feet in the air, is a strobe light, that is not just a light, it's two strobe lights that flash and can be seen for miles. And so, at night time when I look out my backyard right now, I see nothing but black sky and stars and all this. And now, it's very likely that I will be looking at a flashing red light.

Id. at 5.

After public comment, the Chair of the Board of County Commissioners asked the County Attorney to advise the commissioners on the criteria that they could consider when voting on Gulfstream's CUP application. *Id.* at 8-9. The County Attorney explained that the commissioners could not consider either: (1) arguments regarding the "environmental effects of the emissions" from the proposed tower (*i.e.*, the citizens' health and safety arguments) under federal law or (2) arguments regarding a potential decrease in the citizens' property values without expert testimony (from "an appraiser or something like that") showing that "there would be a significant negative effect on property valuation." *Id.* On the other hand, he told the commissioners that they could consider "certain criteria . . . set forth in the code," such as the location of the proposed tower, aesthetic considerations, and CityScape's Telecommunications Site Review. *Id.*

After counsel for Gulfstream presented her rebuttal, the Board of County Commissioners discussed and voted on Gulfstream's application. *Id.* at 9-13. First, the Chair of the Board asked Commissioner Rob Feltner – the commissioner for the district where the proposed tower was slated to be located – to address the Board.

Id. at 13. After summarizing his position, Commissioner Feltner moved to deny Gulfstream's application:

Commissioner [Rob] Feltner: I don't think this is a good fit. Um, Administrative Policy 4 says that we can consider the aesthetic. And just to be clear, I think when we're talking about 120 feet, might not sound so bad, but it's 12 stories. It's a 12-story structure in Suntree and everyone is going to see that, um, for, from a long distance. So, um, I would make a motion to deny this based on...

Commissioner [Tom] Goodson: Second it.

...

Chair [Rita] Pritchett: Okay, um, I'm going to just weigh-in here real quick. Um, I, we typically give more weight to the Commissioner of the district because he's the one that lives there. Again, I, I probably have concerns about the impacts, but we're not allowed to consider that. It has to totally be as far as how it's going to affect on the area and the residential areas. And, so, I'm going to leave that into the hands of the Commissioner of that district, that he feels like it's, it's not a good fit. So, I will be supporting the Commissioner with that vote due to the physical location could be a hindrance to the appearance of the entrance in the residential area. So, we have a motion and a second. All in favor say Aye.

(all Commissioners say Aye)

Id.

E. The Board of County Commissioners' Resolution

After they unanimously voted to deny Gulfstream's CUP application, the Board of County Commissioners directed the County Attorney to prepare a resolution regarding same that they could address at their next meeting. *Id.* On December 5, 2023, the Board of County Commissioners adopted Resolution

No. 23-144. *See* Doc. 15-23. Resolution No. 23-144 includes an overview of the relevant provisions of the Brevard County Code, the planning staff's commentary, and the Board of County Commissioners' November 2nd meeting. *Id.* The resolution also sets forth the Board's "findings," stating:

11. . . .Visual impacts and aesthetics are a factor that must be considered when determining whether a conditional use permit can be issued and "the applicant must demonstrate that the proposed tower does not create a significant adverse visual aesthetic impact on the surrounding landscape and adjacent properties." *Section 62-2451(a)(3), Brevard County Code*. The criteria for the analysis are outlined in Section 62-2446(q), Brevard County Code, and include the following factors: overall height; configuration; physical location; mass and scale; materials and color; illumination; and architectural design.

12. The Board must consider aesthetics and the overall visual impacts of a wireless telecommunications facility on the surrounding area when determining whether such a CUP shall be approved or denied.

13. The scenic and visual character of the relevant geographic area consists of neighborhoods with one- and two-story structures. Notably, efforts to underground utility services have improved area aesthetics and reduced visual clutter in the form of poles and utility lines.

14. The requested tower would create a significant adverse aesthetic impact on the surrounding landscape and adjacent properties, would negatively impact the scenic and visual character of the geographic area, and the aesthetic effects of the tower are incompatible with the surrounding area.

Id. at 11-12.

The Board of County Commissioners ultimately found that Gulfstream's "request for a conditional use permit to allow a 120' monopole wireless telecommunications facility is incompatible with the character of the properties

surrounding the subject property and creates a negative aesthetic impact as requested.” *Id.* Based on these findings, the Board denied Gulfstream’s CUP application. *Id.*

III. Legal Standards

A. Summary Judgment

A party is entitled to summary judgment when the party can show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Which facts are material depends on the substantive law applicable to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The moving party bears the burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255. When considering cross-motions for summary judgment, the court views the facts “in the light most favorable to the non-moving party on each motion.” *See Chavez v. Mercantil Commercebank, N.A.*, 701 F.3d 896, 899 (11th Cir. 2012). The court is not, however, required to accept all of the non-movant’s factual characterizations and legal arguments. *Beal v. Paramount Pictures Corp.*, 20 F.3d 454, 458–59 (11th Cir. 1994).

B. The TCA

Congress enacted the TCA “to promote competition and higher quality in American telecommunications services and encourage the rapid deployment of new telecommunications technologies by, among other things, reducing impediments imposed by local governments to the installation of wireless communications facilities.” *Athens Cellular, Inc. v. Oconee Cnty., Ga.*, 886 F.3d 1094, 1095 (11th Cir. 2018) (quoting *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005)) (internal quotation marks and alterations omitted). Under the Act, state and local governments retain the authority to regulate “the placement, construction, and modification of personal wireless service facilities,” 47 U.S.C. § 332(c)(7)(A), but “their decision making is subject to certain substantive and procedural limitations,” *Athens*, 886 F.3d at 1095.

Section 332 of the TCA states: “Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.” § 332(c)(7)(B)(iii). The same section “allows a party to challenge—in federal court—a local zoning board’s refusal to allow the construction of a communications tower.” *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002); *see id.* § 332(c)(7)(B)(v).

“The ‘substantial evidence’ standard envisioned by Section 332 is the

traditional substantial evidence standard used by courts to review agency decisions.” *Am. Tower*, 295 at 1207 (citing H.R. Conf. Rep. No. 104–458, at 208 (1996)). Substantial evidence is generally defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1218 (11th Cir. 2002) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)) (internal quotation marks omitted). “It requires more than a mere scintilla but less than a preponderance.” *Am. Tower*, 295 at 1208 (quoting *360° Commc’ns Co. v. Bd. of Supervisors*, 211 F.3d 79, 83 (4th Cir. 2000)) (internal quotation marks omitted). The “party seeking to overturn the local zoning board’s decision has the burden of proving that the decision is not supported by substantial evidence.” *Id.* at 1208.

To “determine whether the substantial evidence standard is met,” the court must “view the record in its entirety, including evidence unfavorable” to the county’s decision. *Preferred Sites*, 296 F.3d at 1218 (citing *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490 (1981)). The court “cannot substitute its own judgment for that of the local board, but it must overturn the board’s decision if the decision is not supported by substantial evidence.” *Id.* at 1218–29.

IV. Analysis

The question before the Court is relatively narrow: whether the denial of Gulfstream’s CUP application for aesthetic reasons alone is supported by

substantial evidence.¹¹ To answer this question, the Court must “look at the whole record,” but “only in light of the locality’s stated reasons for its decision.” *Mun. Commc’ns, LLC v. Cobb Cnty., Ga.*, 796 F. App’x 663, 671 (11th Cir. 2020);¹² *see Am. Tower*, 295 F.3d at 1209 n.8; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943).

During their November 2nd meeting, none of the commissioners specifically identified *any* evidence that they considered before they voted to deny Gulfstream’s application. *See* Doc. 15-20 at 9-13. Moreover, the Board’s resolution failed to clearly articulate what evidence it relied on in concluding that the proposed tower “is incompatible with the character of the properties surrounding the subject property and creates a negative aesthetic impact.”¹³ *See* Doc. 15-23.

The Board’s clearly expressed reasons for denying Gulfstream’s application amount to nothing more than generalized aesthetic objections. *See Mun. Commc’ns*,

¹¹ It is undisputed that the Board of County Commissioners denied Gulfstream’s CUP application solely because the commissioners concluded that the proposed tower would have a negative aesthetic impact on the residential neighborhoods to the south of the Church’s parcel. Both the record from the Board of County Commissioners’ November 2nd meeting and Resolution 23-144 reflect that fact. By adopting Resolution 23-144, the Board of County Commissioners tacitly conceded that it could not identify any other reason for its denial of Gulfstream’s CUP application.

¹² The Court appreciates that unpublished Eleventh Circuit opinions constitute persuasive, and not binding, authority.

¹³ The only evidence specifically referenced in Resolution 23-144 is Ms. Steiner and Mr. Lapak’s testimony at the November 2nd hearing, which is included in the “Statement of the Case and Facts” section. Doc. 15-23 at 8. Although the “Findings” section generally includes a description of the characteristics of the residential neighborhoods to the south of the Church’s parcel, it contains no reference to evidence in the record. *See id.* at 9-12.

796 F. App'x at 672. Although the Board was required to consider "visual impacts and aesthetics" when evaluating Gulfstream's application,¹⁴ "blanket generalized aesthetic objections," without more, "are not enough to constitute substantial evidence under § 332." *Id.*; see *Preferred Sites*, 296 F.3d at 1219–20 ("Aesthetic concerns may be a valid basis for denial of a permit *if* substantial evidence of the visual impact of the tower is before the board. Mere generalized concerns regarding aesthetics, however, are insufficient to create substantial evidence justifying the denial of a permit." (citations omitted)); *Michael Linet, Inc. v. Vill. of Wellington, Fla.*, 408 F.3d 757, 761–62 (11th Cir. 2005).

A review of the entire record fails no better. In its briefing, the County argues that its decision to deny Gulfstream's application for aesthetic reasons alone is supported by substantial evidence in the form of: (1) its citizens' expressed concerns regarding the proposed tower's aesthetic impact and (2) Gulfstream's simulated photographs.

First, the six citizens who mentioned aesthetics when they addressed the Board of County Commissioners expressed "nothing more than purely subjective concerns as opposed to articulated, fact-based reasons" why the Board of County

¹⁴ Indeed, the Communications Facilities Ordinance of Brevard County, Florida provides that Gulfstream must "demonstrate that the proposed tower does not create a significant adverse visual aesthetic impact on the surrounding landscape and adjacent properties." *Id.* § 62-2451(a)(3).

Commissioners should deny Gulfstream's CUP application (for aesthetic reasons alone). *Vertex Dev., LLC v. Marion Cnty.*, No. 5:07-cv-380-Oc-10GRJ, 2008 WL 2994259, at *15 (M.D. Fla. Aug. 1, 2008) (Hodges, J.) (cleaned up). The citizens failed to point to objective evidence or testify with any degree of specificity regarding how the proposed tower would impact *their* properties or *their* views—instead, they “merely raised concerns that the tower would be an eyesore, and would ruin the beauty of the surrounding areas.” *Id.* Although these concerns may be sincere, the citizens’ “opinion-based testimony lacked sufficient factual content to support the Board’s decision.” *Id.* (collecting cases) (cleaned up).

The only objective evidence of the proposed tower’s aesthetic effect upon the residential neighborhoods to the south are the simulated photographs that were submitted by Gulfstream.¹⁵ Only three of these photographs reflect a view from the south. And of those three, only “View 4” shows any significant adverse impact. While this simulated photograph may constitute evidence supporting the Board’s denial, in relative context, it is a mere scintilla of evidence; not “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Preferred Sites*, 296 F.3d at 1218 (citation and internal quotation marks omitted).

¹⁵ There is no evidence that the Board reviewed or relied upon these photographs in reaching its decision to deny Gulfstream’s application.

V. Conclusion

Everyone wants good cell service—a necessity in today’s world—just not from a visible tower. As the Honorable William Terrell Hodges explained in *Vertex Development, LLC v. Marion County*, No. 5:07-cv-380-Oc-10GRJ, 2008 WL 2994259 (M.D. Fla. Aug. 1, 2008):

It is predictable—and entirely understandable—in every case the Court has encountered under the Federal Telecommunications Act that there will be a group of property owners or nearby residents who oppose the erection of communications towers in their neighborhoods for purely subjective and mostly aesthetic reasons. It seems that such towers, like prisons, are just not welcome additions to the landscape, and those who hold those sincere opinions are entitled to some sympathy. This makes for hard cases when they are presented to local political bodies who might find it difficult to explain to their constituents, in an emotionally charged public hearing, the arcane difference between personal preference and substantial evidence. But the law requires the latter—substantial evidence—and while the substantial evidence standard is a lenient one (being something less than a preponderance of the evidence), when a tower erector meets all of the objective and reasonably relevant prerequisites established in advance by local authority for the placement of communications towers, the purely subjective preferences of the towers’ putative neighbors, not augmented by any technical or objective facts or evidence, simply do not constitute “substantial evidence” upon which local government can properly rely in denying an application.

Id. at *1 (footnote omitted) (cleaned up). This case is no different.

Accordingly, it is **ORDERED** that:

1. The decision of the Brevard County Board of County Commissioners entitled “A Resolution Setting Forth the Findings of Fact and Conclusions of the Brevard County Board of County Commissioners Pertaining to the Denial

of the Request for a Conditional Use Permit for a 120-Foot Monopole Wireless Telecommunications Facility in a Planned Unit Development Zoning Classification on Property Owned by Hope Episcopal Church, Inc.” (Resolution No. 23-144, dated December 5, 2023) is declared null and void as contrary to the Federal Telecommunications Act of 1996, 42 U.S.C. § 332.

2. Brevard County, by and through its Board of County Commissioners, is **ORDERED and ENJOINED** to approve Plaintiff Gulfstream Towers, LLC’s application for a conditional use permit for a 120-foot monopole wireless telecommunications facility on property owned by Hope Episcopal Church, Inc., in accordance with the conditions recommended by CityScape Consultants, Inc. in its Telecommunications Site Review dated August 18, 2023.

3. The clerk is directed to enter judgment for Plaintiff Gulfstream Towers, LLC and against Defendant Brevard County and thereafter close the file.

DONE and ORDERED in Chambers, Orlando, Florida on May 6, 2024.




GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Party