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PLEASE REPLY TO:
FORT LAUDERDALE

August 11, 2010

VIA FEDERAL EXPRESS

The City of Key West, Florida
525 Angela Street, First Floor
Key West, Florida 33041-1409
Attn: Cheri Smith, City Clerk

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KEY WEST, FLORIDA

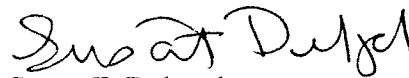
Re: Notice of Appeal of Key West Planning Board
Resolution No. 2010-028

Dear Ms. Smith:

We represent Keys Wi-Fi, Inc. as counsel. Attached is Keys Wi-Fi's Notice of Appeal of The Key West Planning Board's approval of Conditional Use as contained in Resolution No. 2010-028. Please direct any correspondence regarding this matter to both Mr. Rick Richter, President, Keys Wi-Fi, Inc. and to me.

Thank you for your assistance in this matter.

Sincerely,


Susan F. Delegal
For the Firm

SFD/rm
Encl.
cc: Mr. Rick Richter
Larry Erskine, Esq., Assistant City Attorney

Keys Wi-Fi, Inc.
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August 11, 2010

The City of Key West, Florida
525 Angela Street, First Floor
Key West, Florida 33041-1409
Attn: Cheri Smith, City Clerk

Re: Notice of Appeal of Key West Planning Board
Resolution No. 2010-028

Dear Ms. Smith:

This is an appeal by Keys Wi-Fi, Inc. (the “Appellant”) pursuant to Section 122.65 of the Code of Ordinances of the City of Key West (“City Code”) from the action of the Key West Planning Board (“Planning Board”) approving a conditional use application (“Conditional Use Application”) for property located at 1010 Kennedy Drive (“Property”). The Planning Board unanimously approved the Conditional Use Application at its meeting of July 15, 2010 and filed Resolution No. 2010-028 with the City Clerk on August 4, 2010 (“Conditional Use Approval”).

The Conditional Use Application requested approval by the Planning Board to permit a proposed wireless telecommunications facility, consisting of a monopole at ground level and associated equipment shelters on the rooftop of the adjacent building. The Property is located within the Commercial General (CG) zoning district of the City of Key West. Public and private utilities are permitted as conditional uses within this zoning district. Sec. 122-418, City Code.

Section 122.65, City Code, provides that an applicant or any other “aggrieved person” having an interest therein may file an appeal to the city commission to review an action of the planning board, including the approval of a conditional use application. An appeal is initiated by the filing of a notice of appeal in writing filed with the city clerk within ten (10) calendar days from the date of final action. This appeal is timely filed.

The Appellant is an “aggrieved person” pursuant to the City Code. The Appellant is the lessee of certain property (“Appellant’s Property”) located at 2832 North Roosevelt Boulevard, Key West, Florida, pursuant to a Ground Option and Lease Agreement and First Amendment thereto entered into between the Appellant and the Carl M. Herman Revocable Living Trust dated April 23, 2009 and January 21, 2010, respectively. The Appellant’s Property is located approximately 800 feet from the Property subject to the Conditional Use Approval hereby appealed.

The Appellant was granted conditional use approval by the Planning Board on November 19, 2009, permitting the construction of a 145 foot monopole for the placement of personal wireless facilities on Appellant’s property. One condition of the Appellant’s conditional use approval required the Appellant to obtain a height variance from the City of Key West (“City”) Board of Adjustment to permit the monopole to exceed the 40 foot height limitation of the Commercial General (CG) zoning district. On December 15, 2009, the City’s Board of Adjustment denied the Appellant’s variance application (“Variance Application”). The denial is contained in Resolution No. 09-339 dated January 12, 2010.

The Appellant subsequently filed two actions challenging the denial of the variance application. One action was filed in the United States District Court, Southern District of Florida, alleging violations of the Federal Telecommunications Act of 1996, unlawful deprivation of rights, privileges and immunities under 42 U.S.C. §§ 1983 and 1988, violation of certain Florida Statutes relating to time frames within which local governments are required to act upon requests for land use approvals relating to the placement of personal wireless facilities. The second action filed was a petition for writ of certiorari filed in the Circuit Court in and for Monroe County for review of the denial of the Variance Application. Both of these cases are currently pending and a jury trial is scheduled in the federal proceeding beginning October 12, 2010.

The Appellant requested the appropriate land use approvals from the City of Key West i.e. conditional use for a private/public utility within the Commercial General (CG) zoning district and variance from the height limitations of the CG district well prior to the filing and approval of the Conditional Use Application by the Planning Board at issue here. The Appellant will be adversely affected by actions of the City upon similar applications of a nearby business competitor resulting in a loss of business to the Appellant.

The grounds for this appeal include, but are not limited to, the following substantive and procedural issues. The substantive issue is as follows. Section 122-62., City Code, establishes the specific criteria for approval of a conditional use. This section provides that a conditional use shall be permitted upon a finding by the planning board that the proposed use complies with the criteria specified. Subsection 122.62(b) requires that certain characteristics of the proposed conditional use shall be clearly described as

part of the application including scale and intensity of the proposed conditional use as measured by several factors including floor area ratio. Subsection 122-62.(c)(5) requires that a conditional use application shall demonstrate compliance with all applicable federal, state, county and city laws and ordinances.

The intensity of a non-residential site is measured in Floor Area Ratio.¹ The purpose of intensity limitations is to adequately mitigate impacts on adjacent and nearby properties and land uses. Moreover, the City Code prohibits the granting of a variance that increases or has the effect of increasing density or intensity of use beyond that permitted by the comprehensive plan or the City Code. Sec. 90-394, City Code. The Appellant's purpose in pointing out this section is not to argue that the Planning Board's action involves the grant of a variance, but rather to demonstrate that an increase in intensity of use cannot be sustained through any processes of the City, not even a variance.

The Conditional Use Application does not comply with requirements of the City Code relating to Floor Area Ratio (FAR). The permitted FAR in the CG zoning district is 0.8. The FAR of the existing building comprising four (4) stories and the utility building comprising two (2) stories is approximately 1.32 based on data and information provided in the Conditional Use Application which currently exceeds the permitted FAR. Therefore, under Section 122-26., the building upon which the rooftop equipment is to be installed is a "noncomplying building or structure" as defined therein. Section 122-27 provides that it is the intent of this article to permit a noncomplying structure or building to be continued, but to not encourage its expansion.

In further support of the position set forth in this Appeal is the staff report of the City's Planning Director, Amy Kimball-Murley, in connection with the Appellant's conditional use application for the monopole approved in November, 2009 (attached hereto). Page 4 of the staff report reflects that the application meets the Floor Area Ratio requirements of the City Code. See Sections (b) 1) a. and c.² It is evident that the Planning Director was, at least at that time, in agreement with the Appellant's position that Floor Area Ratio requirements and limitations of the City's Code apply to the equipment shelters attendant to the monopole for which the conditional use approval was requested.

As to the procedural basis for this appeal, the Appellant asserts that the City has failed to accord due process by failing to give proper notice and opportunity to be heard

¹ *Floor area ratio* means the total floor area of the buildings on any lot, parcel or site divided by the area of the lot, parcel or site.

² In contrast, see the attached staff report of the Planning Director for the Conditional Use Application which is the subject of this Appeal stating that a Floor Area Ratio analysis is not applicable. See page 4, Sections (b) 1) a. and c.

upon a revised and amended application and revised plans (“Amendments”) submitted by the applicant for the Conditional Use Approval (“Applicant”) during the Planning Board’s meeting of July 15, 2010. Apparently in response to the Appellant’s well founded position regarding FAR as stated above, which position was transmitted in writing to the Planning Director by letter dated June 7, 2010, the Applicant for the first time submitted the Amendments at the July 15 hearing in a thinly veiled and unsuccessful attempt to correct or otherwise modify its original application to address the failure of the Applicant to comply with FAR requirements.

The Planning Director stated she did not have an opportunity to review the Amendments. Nevertheless, the Planning Board was counseled that it could proceed to consider the Amendments on the same evening they were submitted. Such action is contrary to the dictates of the City’s Code for several reasons. Section 122-63(a) requires the submittal of a conditional use application on a form provided by the planning department along with attachments as shown on the form. The development review committee (DRC) is to provide a technical review of the proposed use and provide comments to the planning department. The application form requires that a site plan be submitted showing buildings, details regarding building elevations, and specifications regarding the additions to the building.

Notice requirements for conditional use applications are contained in Section 90-65, Public Participation, which requires, among other things: broad dissemination of detailed proposals and alternatives, the opportunity for written public comments, informational services and reasonable consideration of and response to public input. One can quickly discern that these due process requirements were disregarded in the instance where an amended application and revised plans were submitted during the course of a public hearing with no opportunity for review by, nor input from, the DRC or the public, for whose protection such notice and hearing requirements exist. Neither the DRC nor the public had the opportunity to review the Amendments and provide comments for meaningful consideration by the Planning Board.

For all of the reasons stated above, and in accordance with Sections 122-65 and 90-431, City Code, the Appellant hereby appeals to the City Commission the final action of the Planning Board granting the Conditional Use Application in violation of the City’s Code. It is our understanding that the City Clerk shall place the appeal on the City Commission agenda as expeditiously as possible. The City Commission shall then set a date for a public hearing on the appeal and give public notice of the hearing as well as notice by certified mail to the Appellant and the property owner. We await your advice and notice as to the date upon which the City Commission will first consider the appeal and set a public hearing on the appeal. The Appellant reserves the right to raise additional grounds for appeal upon further review of the record and City Code.

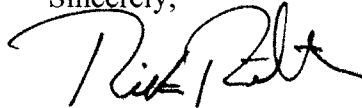
Cheryl Smith, City Clerk
August __, 2010
Page 5

In accordance with Section 90-431(6), the filing of this appeal to the City Commission stays all work on the premises and all proceedings in furtherance of the Conditional Use Application, including, but not limited to, any and all proceedings of the Board of Adjustment in connection with the variance application for the monopole which is a condition of the Planning Board for the Conditional Use Approval.

Along with this Notice of Appeal, the following documents are attached: 1) staff report of the City Planning Director for Appellant's conditional use application dated November 19, 2009; 2) staff report of the City Planning Director for the Applicant's Conditional Use Application dated July 15, 2010; 3) Planning Board Resolution 2010-028 dated August 4, 2010 and 4) verbatim transcript of the July 15, 2010 proceedings before the Planning Board. Also, included in this appeal by reference are: 1) verbatim transcript of the November 19, 2009 proceedings before the Planning Board; 2) Appellant's application for conditional use approval dated June 1, 2009; 3) Appellant's July 15, 2010 written comments to the Planning Board; and 4) the Amendments. The foregoing documents comprise documents and exhibits introduced into the record of the Planning Board meeting of July 15, 2010.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Rick Richter". The signature is fluid and cursive, with the first name "Rick" being more prominent than the last name "Richter".

Rick Richter, President
Keys Wi-Fi, Inc.

cc: Larry Erskine, Esq.
Assistant City Attorney