IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA

HAMMOCK COMMUNITY
ASSOCIATION, INC.,
A Florida Not for Profit Corporation,

CASE NO.: 2019 CA 000766

Petitioner,

vs.

FLAGLER COUNTY BOARD
OF COUNTY COMMISSIONERS,

Respondent.
_____/

FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS' RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS ("Commission" or "County") by and through its undersigned counsel pursuant to this Court's Order to Show Cause dated January 28, 2020, responds to Petitioner's, Hammock Community Association, Inc. ("HCA"), Petition for Writ of Certiorari as follows:

INTRODUCTION

This matter came to the Court as a Petition for Writ of Certiorari ("Petition") to quash the quasi-judicial decision of the County denying an appeal by the HCA of the Flagler County Planning and Development Review Board's ("Planning Board")

upholding of the Flagler County Planning Director's determination that a boat storage facility is a permissible use of land on a commercially zoned parcel within the Flagler County Scenic A1A Overlay District.

The County notes that the HCA filed a transcript but not the Appendix as stated in the Petition. The County nevertheless stipulated to an Order to Show Cause so that the Court may decide this matter on the merits. Therefore for the benefit of the Court, the County files herewith the Appendix as transmitted to the County by Petitioner. In addition, pursuant to Rule 9.100, Fla. R. App. P., the County files a Supplemental Appendix. For consistency, the Petitioner's Appendix will be referred to as (A. ___), while the County's Supplemental Appendix will be referred to as (S.A. ___). The Transcript will be referred to as (T. ___), and the Petition will be referred to as (P. ___).

STANDARD OF REVIEW

This Court's jurisdiction is based on Article V, Section 5(b) of the Florida Constitution and Rule 9.030(c)(3), Fla. R. App. Pro. *See De Groot v. Sheffield*, 95 So.2d 912, 915-916 (Fla. 1957). The standard of review for a petition for writ of certiorari to review a local government's quasi-judicial decision has three elements: (1) whether procedural due process has been accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Haines City*

Community Dev. v. Heggs, 658 So.2d 523, 530 (Fla. 1995); *Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089 (Fla. 2000); *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982).

The Court's certiorari review of an administrative decision is essentially an appellate proceeding and should be limited to the administrative record. Seated in its appellate capacity, the Court has no jurisdiction, in certiorari, to make factual findings or to enter a judgment on the merits of the underlying controversy. *See Broward County v. G.B.V. Int'l., Ltd.*, 787 So.2d 838 (Fla. 2001). Rather, the Court's role is to either grant or deny the petition. *See id*. *See also City of Atlantic Beach v. Wolfson*, 118 So.3d 993 (Fla. 1st DCA 2013). Failure to do this would violate the separation of powers doctrine and deny the public its right to notice and public hearing concerning the County's review of a decision of its Planning Board.

In *Clay County v. Kendale Land Dev., Inc.*, 969 So.2d 1177, 1180-81 (Fla. 1st DCA 2007), written by Judge Webster and concurred with by Judges Padovano and Polston, the First DCA reversed a first tier appellate court that overstepped its authority in reviewing a petition for writ of certiorari stating:

> "…another "clearly established principle of law" is that when considering a petition for writ of certiorari, a court has only two options –it may either deny the petition or grant it, and quash the order at which the petition is directed. *G.B.V. Int'l*, 787 So.2d at 843-44 (citing cases). **The court may not enter any judgment on the merits of the underlying controversy, or direct the lower tribunal to enter any particular order.** *Id*." (Emphasis added.)

If the Court grants the HCA's Petition in the present case, then the Court would thereby quash the vote of the County with the result being that the parties could pursue their rights under the law as if the County's decision had never been made. *See G.B.V. Intern., Ltd.* at 844 *quoting Tamiami Trail Tours v. Railroad Commission*, 128 Fla. 25, 174 So. 451, 454 (1937).

STATEMENT OF FACTS

The real property at issue in this case is located at 5658 North Oceanshore Boulevard (or "State Road A1A") in unincorporated Flagler County (the "Property"). The Property, approximately 4.26 acres in size, lies within a mixed use vicinity and is bounded on the west by the Intracoastal Waterway, on the east by State Road A1A, on the north by a residence, and on the south by a hardware store. The Property is also in close proximity to a water tower and associated facilities, a technical institute with tennis courts, and a fire station. In February 2000, in order to allow for the expansion of a boat building business, the County rezoned the Property from R/C (Residential/Commercial) and R-1 (Rural Residential) to C-2 (General Commercial and Shopping Center). (A. 12-19). The County omitted the northernmost forty foot strip of the Property from the rezoning approval, which strip retained its existing rural residential zoning to serve as a vegetative buffer with the

adjacent residential property. (A. 13-17).[1] This C-2 zoning along with the forty foot strip of R-1 zoning remain in place at the present time.

Contrary to the assertions in the HCA's Petition, the County's minutes from February 2000 demonstrate that the *only* conditions imposed on the rezoning approval were (i) that the parking and travel lanes would be gravel, (ii) that a meandering stormwater retention would be retained, and (iii) that the HCA would get notice of any changes in the proposed site plan. (A. 17).

In 2004, the portion of State Road A1A on which the Property lies was designated as a Florida and National Scenic Byway. The same year, the County approved County Ordinance 2004-11, establishing additional standards for the development pattern along the National Scenic Byway, known as the Scenic Corridor Overlay District ("Overlay District"), which standards are codified in the Flagler County Land Development Code ("LDC"). LDC Section 3.06.11 states in part:

> "The requirements of this Section [A1A Scenic Corridor Overlay District] shall apply to all parcels or lots adjoining State Road A1A including its right-of-way from the Northern border of the Town of Beverly Beach to the Southern border of the Town of Marineland…." (S.A. 1).

[1] As a related approval in the year 2000, the County amended the Future Land Use Map ("FLUM") designation of the Property from Low Intensity Mixed Use and Low Density/Rural Estate to Commercial High Intensity. (A. 13-17).

There is no dispute between the parties that the Property is subject to the requirements of the Overlay District.

In 2019, the current owner of the Property, Hammock Harbour, LLC, intervenor in the present case ("Hammock Harbour"), submitted a site development plan to Flagler County with the intent to redevelop the Property as an indoor, dry boat storage and restaurant in accordance with the Property's zoning regulations and the requirements of the Overlay District. Because the Property is less than five acres and zoned C-2, under the LDC, the only development approval necessary for the proposed use is a review of the site development plan conducted by the County's Technical Review Committee. LDC §3.03.17.F. (S.A. 9).

The Technical Review Committee is comprised of representatives from the County's Growth Management Department, the County Attorney's Office, Flagler County Fire Rescue, Flagler County E-911 GIS, the Florida Department of Health, and at times other County staff or certain outside agencies when applicable or necessary. The Technical Review Committee reviews development proposals for consistency with the criteria of the LDC including, in this case, that of the Overlay District. *See generally* LDC §2.06.00. (S.A. 12).

While review of Hammock Harbour's site development plan by the Technical Review Committee was pending, a member of the HCA exchanged emails with the Flagler County Planning Director in which the HCA member objected to the

proposed development and in which the Planning Director explained that Hammock Harbour's proposed use was permissible on a C-2 zoned parcel under the LDC and Overlay District restrictions. (A. 25).

Based on that gratuitous email exchange, the HCA appealed the Planning Director's determination to the Planning Board, a right of aggrieved parties under LDC Section 3.07.04. (S.A. 13). The HCA claimed that the proposed use of the Property as a boat storage amounted to a warehouse, something specifically prohibited within the Overlay District. (A. 24-27). On September 10, 2019, the Planning Board conducted a quasi-judicial hearing and denied the appeal, determining (i) that the Planning Director had the authority to make such a determination generally and (ii) that the determination relative to Hammock Harbour's proposed use of the Property was correct. (A. 41).

The HCA then appealed the Planning Board's denial of its first appeal to the Commission, which second appeal is also a right afforded aggrieved parties under LDC Section 3.07.04. On November 4, 2019, the Commission conducted a quasi-judicial hearing to decide the matter. At the hearing, the Commission members disclosed ex parte communications, and the undersigned assistant county attorney presented the item. (T. 3-5). The undersigned explained the procedural posture of the decision before the Commission and identified the issues to be decided upon. (T. 5-8).

Specifically, the undersigned instructed the Commission that it was reviewing, in an appellate capacity, the two-part decision of the Planning Board that, first, the Planning Director acted within his purview when he interpreted the permissible use of a commercially zoned parcel within the Overlay District and, second, the Planning Director correctly concluded that a boat storage facility was a permissible use on the Property in question. (T. 10).

To aid the Commission's review, the undersigned then displayed LDC Section 1.09.02, which states:

> "In the event that any question arises concerning the application of regulations, performance standards, definitions, development criteria, or any other provision of this Code, the planning and zoning director shall be responsible for proper interpretation and shall look to the county comprehensive plan for guidance. Responsibility for interpretation by the planning and zoning director shall be limited to standards, regulations and requirements of this Code, but shall not be construed to include interpretation of any technical codes adopted by reference in this Code, nor be construed as overriding the responsibilities given to any commission, board or official named in other sections or articles of this Code." (T. 8-9 and S.A. 10).

Next, the undersigned displayed and outlined the code provisions specific to C-2 zoning, LDC Section 3.03.17. Specifically, the undersigned explained the bifurcated structure of the LDC relative to C-2 zoning district, which separately encompasses both shopping center and general commercial aspects. (T. 9-10). The undersigned then displayed LDC §3.03.17.B.23, which lists general commercial uses (as opposed to shopping center uses) and identified boat service establishments as a listed,

permissible use of land in C-2 zoned districts. (T. 10 and S.A. 6). Finally, the undersigned instructed the Commission of the standard to guide its appellate review of the Planning Board's decision, namely (i) whether the Planning Board violated the HCA's due process rights, (ii) whether the Planning Board based its decision on competent substantial evidence, and (iii) whether the Planning Board applied the correct law. (T. 10).

Counsel for the HCA then argued against the decision of the Planning Director and its affirmation by the Planning Board, followed by a reply by Hammock Harbour's representative. (T. 12-24). Members of the public spoke during a public comment portion of the hearing, and the HCA's counsel closed with a rebuttal. (T. 24-46). After discussion, the Commission voted unanimously to deny the appeal, thus affirming the Planning Board's vote to uphold the Planning Director's determination that boat storage is a permissible use of the Property, a commercially zoned parcel within the scenic corridor Overlay District.[2] (T. 53-54 and S.A. 16).

RESPONSE TO ARGUMENT I. DENIAL OF PROCEDURAL DUE PROCESS

[2] In its Petition, the HCA does not challenge the Planning Director's authority to make such determinations generally, as it did before the Planning Board and the Commission. Rather, the HCA now only challenges the Planning Director's determination vis-à-vis the Property.

The HCA objects to *ex parte* communications of Commissioner Hansen and a site visit by Commissioner Sullivan. (P. 14-15). Specifically, the HCA asserts that Commissioner Hansen did not identify each individual who spoke to him about boat storage. (P. 14). The HCA mysteriously imputes this supposed taint to Commissioner Mullins who had no *ex parte* communication whatsoever. (P. 14). In addition, the HCA feels Commissioner Sullivan should have disclosed his viewing of the Property earlier in the hearing. (P. 15). Similarly, the HCA contends that its rights were violated because Commissioner Hansen mentioned an unrelated boat storage facility after the Commission began deliberating. (P. 16-17). However, for the reasons outlined below, the County did not, as asserted, base its decision on secret, undisclosed knowledge and did not violate the HCA's due process rights. (P. 15).

The extent of procedural due process protection varies with the character of the interest and nature of the proceeding involved. There is, therefore, no single unchanging test which may be applied to determine whether the requirements of procedural due process have been met. Courts instead consider the facts of the particular case to determine whether the parties have been accorded constitutional due process. *Carillon Cmty. Residential v. Seminole Cnty.*, 45 So.3d 7, 9 (Fla. 5th DCA 2010). The proceeding itself must only be "essentially fair." *Carillon Cmty.*

Residential at 9, *citing Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed.2d 120 (1997).

The quality of due process required in a quasi-judicial hearing is not the same as that entitled to a party in a full judicial proceeding, and quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, certain standards of basic fairness must be adhered to in order to afford due process. Consequently, a quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3rd DCA 1991).

In the quasi-judicial hearing below, four commissioners disclosed *ex parte* communications with the HCA and others, while the fifth commissioner had none. (T. 3-4). It is more than a little ironic that the HCA would find fault with *ex parte* communications when its members sought an audience with all five and met with four commissioners prior to the quasi-judicial hearing in order to lobby their cause in a systematic fashion. (T. 3-4). Also, Commissioner Hansen is not required to disclose a visit to an unrelated boat storage facility any more than he is required to disclose visits to other unrelated boating facilities as he and Commissioner Sullivan are both retired captains of the U.S. Navy. Nor are commissioners required to leave their common sense at the door of the Commission chambers. The fact that Commissioner Sullivan saw the Property, which lies on a major thoroughfare in full

view of the public, cannot be said to so taint his judgment as to ignore the evidence in the record or change his vote. Finally, regardless of the timing of the disclosures during the hearing, the HCA did not object to any such disclosures and only complained for the first time in its Petition.

There was substantial, competent evidence in the record on which the commissioners based their decision, most notably the language of the LDC and the proposed use of the Property. This is all that is required under Section 286.0115(2)(c), *Florida Statutes*, which excepts land use matters from the normal rules governing *ex parte* communications related to quasi-judicial hearings. This is because such matters are of public concern, the same reason the County did not object to the HCA's standing when it made its initial appeal. Commissioners by definition are responsive to the concerns of their constituents. Nevertheless, the Commission has historically disclosed such communications in the interest of fairness and transparency as they did in the present case.

The HCA has had, in short, ample due process. First, the Planning Director answered questions of the HCA when Hammock Harbour's site development plan was pending with the Technical Review Committee. The Planning Board heard HCA's appeal of the Planning Director's processing of Hammock Harbour's site development plan, and the Commission heard the HCA's appeal of the Planning Board's affirmation of the Planning Director's determination. The fact is none of

the concerns the HCA raises in its Petition regarding due process changed the outcome of the Commission's decision. The County emphatically rejects any notion that it based its decision on concealed matters or that it did not provide the HCA the opportunity to raise its concerns.

RESPONSE TO ARGUMENT II. ESSENTIAL REQUIREMENTS OF LAW WERE NOT OBSERVED

1. The HCA misconstrues the zoning of the Property.

The HCA's objection to the County's decision is based on the incorrect premise that the County's rezoning approval in the year 2000 was conditioned on boat manufacturing of a certain type and number of boats with a certain number of employees. (P. at 3). The HCA infers these conditions from the open discussion of Commission members and comments from the public prior to voting as reflected in the Commission's minutes. However, the action of the Commission as reflected in the minutes state:

> "**A motion was made by Commissioner Kanbar to approve the proposed land use amendment and also approve gravel parking spaces, gravel travel lanes, provide notice to the Hammock Civic Association of changes on the site plan. Seconded by Commissioner Hanns.** Mr. Morris asked if the motion Commissioner Kanbar made would include the meandering of the stormwater retention, as well. **Commissioner Kanbar stated that was included. Commissioner Hanns concurred.** …. **Chairman Darby called the question. No nay votes, motion carried.**" (Emphasis original.) (A. 17).

The minutes also show that the rezoning included retaining the Residential-Commercial zoning on the northernmost forty foot strip of the Property to act as a vegetative buffer with the adjacent property. (A. 13).

The individual expressions of members of the Commission during a quasi-judicial hearing have no bearing on the official action of the Commission. The Commission speaks only as an official body through its votes as memorialized in its official minutes. *See Penn v. Pensacola-Escambia Governmental Center Authority*, 311 So.2d 97 (Fla. 1975)(*citing Beck v. Littlefield*, 68 So.2d 889 (Fla. 1953)). To find otherwise would have a chilling effect on the ability of local elected representatives to freely discuss matters before them. It could also lead to inconsistent interpretations of official actions since the discussion of commissioners may conflict or evolve as hearings progress.

As one example, during the 2019 quasi-judicial hearing of the Commission, the HCA's attorney characterized the County's 2000 rezoning approval as limited to "one boat per year in the range of $10,000,000." (T. 16). According to the minutes of the year 2000 rezoning hearing, the attorney for the prior owner of the Property stated the owner intended to build "very large scale very high dollar boats and, actually took a year to build one boat." (A. 15). In the same hearing, the County's Planning Director stated the owner "built new luxury boats usually one or two per year." (A. 15). Presumably, the statement of the prior owner's attorney was based

on that owner's business plan and resources while the Planning Director's statement, when read in context, cannot fairly be construed as a limiting condition on the County's approval. Rather, that statement was made to illustrate that a more intense industrial zoning was not necessary or appropriate. Nevertheless, the HCA now asserts that these statements must be construed as a limiting condition on the use of the Property which the Commission incorporated into its rezoning approval. (P. 3).

In fact, the minutes simply do not support this conclusion as identified *supra*. Additionally, if the HCA were correct, it would mean that if the previous owner had built an $11 million instead of a $10 million yacht, such use of the Property would violate the approval subjecting the owner to citation. Likewise, the prior owner could have been cited for building three yachts per year instead of one or two. Such an absurd result was never contemplated by the Commission. The only conditions on the zoning were those stated in the motion as reflected in the minutes.

2. This appeal is a matter of LDC interpretation, not an evaluation of a grandfathered non-conforming use.

The HCA compounds its original false premise as explained above with another: that the County's denial of the HCA's appeal failed to include a comparison of the intensity of uses between the prior owner's boat manufacturing operations and Hammock Harbour's current proposal of an indoor dry boat storage and a restaurant. The HCA itself engages in a series of quantitative comparisons between the two uses

to demonstrate that Hammock Harbour's proposed use of the Property would be more intensive than the previous owner's boat manufacturing facility. (P. *passim*). For example, the HCA notes that Hammock Harbour's proposal would result in a larger building footprint and an increase in parking and impervious surfaces by an order of magnitude. (P. 6-9).

The undersigned respectfully submits that this is a red herring argument or, in other words, an analysis not relevant to the issue the Commission decided and which the HCA appeals. The Commission was not tasked with, and did not engage in, comparing the intensity of Hammock Harbour's proposed use with that of the prior owner. This framing of the issue is consistent with the Planning Board's hearing of HCA's first appeal wherein the Planning Board counsel instructed its members that it was not evaluating the site development plan for conformance with the LDC but rather was deciding whether the proposed use was permissible under C-2 zoning in the Overlay District. (A. 37-38). Because the Property is less than five acres in size, review of the site development plan is to be undertaken by the Technical Review Committee. LDC §3.03.17.F.2. (S.A. 9). The Technical Review Committee ensures the site development plan is consistent with LDC criteria including that of the Overlay District. In fact, the Technical Review Committee was conducting this evaluation when the process was truncated by the HCA's initial appeal to the Planning Board.

Nor was the question before the Commission during the appeal hearing whether Hammock Harbour's proposed use is demonstrably equal to or less intense than the prior use. Such an analysis would be appropriate if the Commission were called upon to determine, for instance, whether a grandfathered non-conforming use was being abandoned, but this was not the case. The issue before the Commission was a much simpler one: is Hammock Harbour's proposed use permissible on a C-2 zoned parcel within the Overlay District? As such, it is a question of interpretation of the LDC, not a comparison of the site development plan to prior uses of the Property or nearby uses of land.

3. This appeal is a matter of LDC interpretation, not a substantive analysis of Hammock Harbour's site development plan.

The substance of the present appeal hinges upon interpretation of the LDC. It is axiomatic that the cannons of statutory construction apply to the interpretation of local ordinances. *See Halifax Area Council on Alcoholism v. City of Daytona Beach*, 385 So.2d 184, 187 (Fla. DCA 5th 1980)(*citing Rinker Materials Corp. v. City of North Miami*, 286 So.2d 552 (Fla. 1973)). As such, it is presumed that the drafters of the LDC intended every word, and thus when interpreting the LDC, every word must be given its plain meaning. In addition, the LDC authorizes the Planning Director to interpret ambiguities in the LDC subject to the oversight of the Commission. LDC §1.09.02. (S.A. 10). Moreover, by its own terms, the provisions

of the LDC are to be liberally construed to achieve the objectives of Flagler County. LDC §1.09.01. (S.A. 10). Most importantly, since zoning regulations are in derogation of private rights of ownership, they should be interpreted in favor of property owners. *Thomas v. City of Crescent City*, 503 So.2d 1299, 1301 (Fla. 5th DCA 1987)(*quoting Rinker).*

There is no dispute between the parties that the Property at issue is zoned C-2 (General Commercial and Shopping Center), with a forty foot strip zoned R-1 to act as a vegetative buffer with an adjacent parcel. The C-2 zoning district, like every zoning district under the LDC, has a list of requirements and permissible land uses. Section 3.03.17 of the LDC governs C-2 zoned parcels. When examining the permitted uses and structures and the dimensional requirements of C-2 parcels under LDC §3.03.17, it is clear C-2 is a bifurcated zoning district that allows two broad but related categories of use: shopping centers and other general commercial uses. As explained below, HCA's appeal relies on an incorrect premise that conflates the two.

LDC Section 3.03.17, sub-part B, begins, "Permitted principal uses and structures. In the C-2 shopping center district no premises shall be used except for the following uses and their customary accessory uses or structures…." (S.A. 5). The LDC then enumerates twenty-one permissible *shopping center uses* within C-2 zoning districts. (S.A. 5-6). Then, sub-part twenty-two is a catch all provision that

allows other similar shopping center uses upon approval of the Planning Board. (S.A. 6). The HCA contends that because boat storage is not listed as a permissible *shopping center use*, the Planning Director should have required Hammock Harbour to obtain approval of the Planning Board under sub-part twenty-two, or alternatively, obtain approval of the Commission as a special use or an expansion of a nonconforming use. (A. 25 and T. 15).

This argument ignores LDC Section 3.03.17.B sub-part twenty-three which lists permissible *general commercial uses* within C-2 zoning districts. (S.A. 6). Critically important to the Court's resolution of this case is that, when presenting this matter to the Commission in the appeal hearing, the undersigned displayed the general commercial uses allowed in C-2 districts which specifically includes, "Boat, mobile home sales and service establishments." LDC §3.03.17.B.23(f). (T. 10 and S.A. 6). Significantly, boat storage is not listed as a permissible use in any zoning district of the LDC, nor does the LDC define boat service establishments.

While the HCA wishes the County to hold Hammock Harbour to the shopping center requirements of the LDC, the Planning Director, as the designated interpreter of the LDC, determined that Hammock Harbour's proposed use of the land as a boat storage and restaurant is of a general commercial nature and not a shopping center. This determination is logical and consistent with the plain meaning of the text. The Commission voted to uphold the Planning Board's affirmation of the Planning

Director's decision. Such vote of the Commission in its sound discretion cannot be characterized as a departure from the essential requirements of law and should not be overturned by the Court in certiorari.

3. Hammock Harbour's proposed boat storage building is not a warehouse.

Next, the HCA contends that Hammock Harbour's proposed dry boat storage facility is a warehouse and therefore specifically prohibited in the Overlay District. (P. 4-5 and 17). There is no dispute between the HCA and the County that commercial warehouses (as well as outdoor storage, boat sales, and boat repair establishments) are specifically identified as prohibited uses of land within the Overlay District. LDC §3.03.17.BII. (S.A. 6-7). Rather, the HCA objects that by affirming the Planning Board's decision, the Commission ultimately determined that Hammock Harbour's proposed dry boat storage is not a warehouse. (P. at 6).

The LDC does not define warehouse. The *Merriam-Webster Dictionary* defines warehouse as, "a structure or room for the storage of *merchandise or commodities*." (Emphasis added.) Thus, what the LDC prohibits in the Overlay District are structures for storing goods to be sold or shipped to wholesalers and retailers, such as in a prototypical distribution center replete with palates of goods, forklifts, and trucks for delivering such goods for sale. Clearly an indoor dry boat

storage facility devoid of any retail or wholesale component simply does not fit the definition of a warehouse.

The HCA notes that the Flagler County Property Appraiser assigned a use code to the property which is listed as warehouse. (P. 19). Rule 12D-8008, *Fla. Admin. Code*, requires the Property Appraiser to assign use codes for the purpose of appraising the value of property for taxing purposes. Subpart (2)(a) of the rule states:

> "The appraiser shall classify each parcel of real property to indicate the use of the land as arrived at by the appraiser for valuation purposes and indicate the same on the assessment roll according to the codes listed below. ***This use will not always be the use for which the property is zoned or the use for which the improvements were designed whenever there is, in the appraiser's judgment, a higher and better use for the land.***" (Emphasis added). Rule 12D-8008(2)(a), Fla. Admin. Code.

Thus, the rule itself as quoted above recognizes the potential for discrepancies between actual use and zoning and the limited number of categories used by property appraisers. The Property Appraiser does not have a use code for dry boat storage and, in his discretion, assigned a warehouse category. However, nothing in the law binds the County to the Property Appraiser's use categories.

The Commission was aware of the prohibition of warehouses within the Scenic Corridor and concluded dry boat storage was not a warehouse. This decision is consistent with the plain meaning of the term and should not be overturned by this Court in certiorari.

4. The Commission did not depart from essential requirements of law.

The Court should deny HCA's Petition because the Commission did not depart from the essential requirements of law. In *G.B.V. Intern., Ltd.*, at 842, the Florida Supreme Court stated:

> "The common law writ of certiorari is a special mechanism whereby an upper court can direct a lower tribunal to send up the record of a pending case so that the upper court can 'be informed of' events below and evaluate the proceedings for regularity. The writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists. The writ is discretionary and was intended to fill the interstices between direct appeal and the other prerogative writs. The writ never was intended to redress mere legal error, for common law certiorari—above all—is an extraordinary remedy, not a second appeal."
> The Supreme Court reiterated this point in *Combs v State*:
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> "In granting writs of common-law certiorari, the district courts of appeal should not be as concerned with the mere existence of legal error as much as with the seriousness of the error….The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." 436 So.2d 93 (Fla. 1983).
>
> And again in *Haines City Community Development*:
>
> "[T]he required 'departure from the essential requirements of law' means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error." *Haines City Community Development quoting Jones v. State*, 477 So.2d 566, 569 (Fla. 1985)(Boyd, C.J., concurring specially).

Clearly, mere legal error is not enough to quash the Commission's vote. The HCA must demonstrate a gross miscarriage of justice. The County's position is that

neither the HCA's Petition nor the record before the Court—in short, nothing at all—shows that the Commission departed from the essential requirements of law. Specifically, the Property is not restricted in its C-2 zoning in any way that would prohibit indoor dry boat storage. A comparison of intensity of the proposed use is not probative of the actual issues that were before the Commission and now this Court. Moreover, Hammock Harbour's proposed use does not amount to a warehouse in the ordinary meaning of the term, and the LDC expressly allows boat service establishments on the Property.

Response to Argument III. Decision Not Supported by Competent Substantial Evidence.

1. Standard of Review under the competent substantial evidence prong.

When reviewing the decision of a lower tribunal in certiorari, in order to overturn the local government's decision, a court must find that the record was devoid of competent substantial. *City of Dania*, *supra*; *Skaggs-Albertson's v. ABC Liquors, Inc.*, 363 So.2d 1082, 1091 (Fla. 1978). When performing its certiorari review, a court is prohibited from re-weighing or evaluating the evidence presented before the tribunal or agency whose order is under examination. The court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment and which

also is in accord with the essential requirements of the law. *De Groot, supra*; C*ity of Deland v. Benline Process Color Co.,* 493 So.2d 26, 28 (Fla. 5th DCA 1986).

In addition, the question for the Court is not whether there is evidence contradicting the conclusion of the Commission such that a different board could have reached the opposite conclusion. It is not this Court's role to determine which testimony should be given the most weight, nor to determine whether some testimony or evidence should have been rejected. In *City of Dania*, *supra*, the Florida Supreme Court reviewed a proceeding in which the City of Dania had denied Florida Power's application for a variance in order to develop an electrical power substation. The opinion stated:

> As noted above, the City Planning and Zoning Board recommended denial of FPL's application. The Commission then conducted a review of the application, heard testimony from both sides at a lengthy hearing, and ultimately agreed with the Planning and Zoning Board -- unanimously. At the circuit court level, a solitary judge quashed the Commission decision, ruling as follows: "The [homeowners] failed to show by competent substantial evidence that such use [was inconsistent with the Dania Code][.]" This ruling was improper. Under Vaillant, the circuit court was constrained to determine simply whether the Commission's decision was supported by competent substantial evidence. The circuit court instead decided anew whether the homeowners had shown by competent substantial evidence that the proposed use was deficient. In other words, a single judge conducted his own de novo review of the application and, based on the cold record, substituted his judgment for that of the Commission as to the relative weight of the conflicting testimony. The circuit court thus usurped the fact-finding authority of the agency. *City of Dania* at 1093.

Thus, even if a court would have reached a different result if it was the trier of fact, it must still affirm the quasi-judicial decision under review if the record contains any competent substantial evidence to support that decision. *City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc*., 567 So.2d 955, 957 (Fla. 4th DCA 1990), rev. denied, 581 So.2d 165 (Fla. 1991)("The test is not whether one side produced more experts than the other, but rather whether there was any substantial competent evidence upon which to base the commission's conclusion.")

Substantial evidence is such evidence as will establish a substantial basis of fact from which one fact at issue can be reasonably inferred, i.e., such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *De Groot, supra*. To be competent, the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached. *Id.*

2. HCA seeks evidence to answer the wrong question.

The HCA contends that the Commission did not base its decision on technical quantitative data, such as impervious surface ratios, and that the document, drafted by the HCA's expert and made part of the record, was uncontested. (P. 18-19). Thus, the HCA concludes, the Commission's decision was devoid of competent substantial evidence. (P. 19). Again, the HCA's position rests upon the incorrect premise that the Commission could only decide the matter based upon a comparison

of Hammock Harbour's proposed use with that of the prior owner's use. This premise is misplaced, and no such comparison was necessary in order to determine if the Planning Board correctly upheld the determination of the Planning Director.

In order to determine whether the Planning Board correctly upheld the determination of the Planning Director, the Commission did not need to determine the *intensity* of the proposed use, only the *type* of use. Specifically, the Commission was tasked with evaluating permissible uses on a C-2 zoned parcel within the Overlay District. Once it is determined that a use is permissible within a zoning district, the intensity of that particular use is controlled by the nature of the property itself and the strictures of the LDC, such as limitations on impervious surfaces and building heights, dimensional requirements, setbacks from property lines, and other planning considerations. Because the Planning Director (and as a result of the HCA's appeals, the Planning Board and Commission as well) determined that Hammock Harbour's proposed use of the Property is a permissible use, whether Hammock Harbour's site development plan adheres to the LDC regulations is the purview of the Technical Review Committee. LDC §3.03.17.F.2. (S.A. 9). The Commission only had to determine whether the Planning Board correctly upheld the Planning Director's determination that dry boat storage *of any intensity* is a permissible use on a C-2 zoned parcel within the Overlay District.

In other words, at the appeal hearing, the Commission was not approving the use as specifically laid out in Hammock Harbour's site development plan. In fact, the Commission was not evaluating or approving in any way the substance of the site development plan or specific attributes of the project. As just one of a multitude of examples that could be used, the Commission was not determining whether Hammock Harbour's site development plan complied with fence height requirements. Such review would be handled by the Technical Review Committee.

Because the Commission's evaluation of the HCA's appeal was almost entirely a matter of LDC interpretation, the only competent substantial evidence the Commission needed to decide the matter was evidence of language of the LDC and a basic understanding of the proposed use. This evidence was presented to the Commission and made part of the record as discussed *supra*. The record presented to the Commission included the staff agenda memo and its attachments, which were LDC §§1.09.02 and 3.07.04; HCA's appeal; and the agenda item and minutes of the Planning Board. (S.A. 14). The Planning Board agenda memo, made part of the record of the Commission, provided the Commission with enough competent substantial evidence to determine that (i) Hammock Harbour's proposed use was a dry boat storage and restaurant; (ii) that such use is allowed on the Property under the LDC, including the strictures of the Overlay District, and was not a prohibited use such as a warehouse; and (iii) that the Planning Board had enough competent

substantial evidence before it to determine that the Planning Director did not err in concluding that Hammock Harbour's proposed use was allowed on the Property.

Conclusion

The Commission applied the correct law, afforded due process and found substantial competent evidence that the Planning Board correctly upheld the determination of the Planning Director that dry boat storage is a permissible use of the commercially zoned Property in the Overlay District. The Petition should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by Florida e-portal to Dennis Bayer, Esq., (dennis@bayerlegal.com), counsel for petitioners, and Frank D. Upchurch III, Esq., (fdupchurch@ubulaw.com) counsel for intervenor, this 26th day of February 2020.

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Response complies with the font requirements of Fla. R. App. P. 9.100(l).

/s/Sean S. Moylan
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[3] The Flagler County Attorney recused himself from this matter in accordance with Rule 4-1.9 of the Florida Bar prohibiting conflicts of interest regarding former clients. Thus, the Assistant County Attorney represents Flagler County in this matter.

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