IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR ST. JOHNS COUNTY, FLORIDA

CASE NO.: 2019-CA-000766

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

Plaintiff/Petitioner,

vs.

FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendants/Respondents.
_____/

INTERVENING DEFENDANT/RESPONDENT
HAMMOCK HARBOUR'S RESPONSE

Pursuant to Rules 9.030(c)(3) and 9.100(j), Florida Rules of Appellate Procedure, Intervening Defendant/Respondent Hammock Harbour LLC submits the following response to the petition for writ of certiorari served by Petitioner Hammock Community Association, Inc. ("HCA") and this Court's order to show cause dated January 28, 2020:

INTRODUCTION

Petitioner HCA contests the Flagler County Planning and Zoning staff's interpretation of Section 3.03.17 of the Flagler County Land

Development Code to allow dry stack boat storage in C-2 general commercial districts. HCA also argues that Hammock Harbour's proposed development plan for a boat storage facility and other commercial uses would violate the requirements of the County's A1A Scenic Corridor Overlay District and other land development regulations. However, the proposed development plan has not yet been heard or approved at any level of the County development review process. Accordingly, the site-specific objections to the yet-to-be- approved project that HCA raises in its petition are premature and not ripe for review in this proceeding.

FACTUAL BACKGROUND

Hammock Harbour's four-acre property is located between State Road AIA and the Intracoastal Waterway in an unincorporated area of Flagler County. (P. 3; PA. 044).[1] In 2000, the Flagler County Board of County Commissioners ("BCC") rezoned the site to allow expansion of a then-existing boat building business. (PA. 013-17). That business has since relocated and the property is now vacant. (T. 6, 16).

On May 29, 2019, Hammock Harbour submitted a site development plan for review by the County's Technical Review Committee. The plan

[1] For purpose of this response, citations to HCA's petition are denoted "P. ___;" to its Appendix to the Petition "PA. _____;" and to the November 4, 2019 Board of County Commissioners' hearing transcript "T. ___."

featured a boat storage dry stack, restaurant and other permissible uses under C-2 zoning. (PA. 043-46). Prior to submittal of the plan, the County Planning and Zoning Director advised that dry boat storage is a permitted use of the property under its C-2 zoning, as a less intensive use than boat manufacturing. (PA. 005).

On August 15, 2019, HCA filed an "Application for Appeal of Planning Director's Decision" to the Planning and Development Board ("PDB"). (PA. 028). Instead of focusing on the Planning Director's interpretation of the zoning ordinance to allow boat storage in C-2 districts, HCA's appeal was preoccupied with the merits of the proposed development plan. HCA alleged that the proposed development would be more intense than the past use of the property for boat building, in terms of floor area ratio and parking; the size of the building; the other new businesses being proposed; traffic impact; level of activity; and proximity to a residential neighborhood. (Id.).

Because HCA's appeal was pending, Hammock Harbour's site development plan application did not go forward to the Technical Review Committee, and has yet to be heard, much less approved by the Committee. (T. 7). Instead, the Planning and Zoning Department duly processed HCA's appeal of the Planning Director's determination to the PDB.

On September 10, the Planning and Zoning Department staff issued its report to the PDB on the issues presented by HCA's appeal. (PA. 024-27). The report emphasized that the appeal was based on HCA's objections to Hammock Harbour's site development plan rather than the Planning Director's interpretation of the ordinance. The report stated:

> The Applicant makes several assertions that are not factually based. First and principal among these is that the Planning Director's decision approved the Hammock Harbour proposal: this is incorrect, in that the decision was that boat storage was similar – though less intense – than the previously approved boat manufacturing operation. Hammock Harbour itself was not proposed or approved by the Planning Director. Any proposal for development on this parcel must undergo site plan review by the Technical Review Committee. The Planning Director cannot unilaterally approve a development when the Land Development Code prescribes a review process inclusive of other agencies and staff.
>
> * * *
>
> [F]or the bulk of the assertions made by the Applicant in support of their appeal, the arguments are based on the Hammock Harbour proposal and not on the Planning Director's decision.

(PA. 025-26) (emphasis added).

On September 10, the PDB heard HCA's appeal. The PDB upheld the staff determination that boat storage is a permitted use and denied the appeal. (PA. 041).

On October 7, 2019, HCA submitted an application to appeal the PDB decision to the BCC. (PA. 008). Once again, the appeal focused on the details of the proposed development plan instead of the threshold question of whether boat storage is a permitted use of the property. (PA. 008-9).

At the hearing before the BCC on November 4, Assistant County Attorney Sean Moylan advised the Board that two questions had been raised in regard to the Planning Director's determination. First, "does the Planning Director have the authority to make such a determination," and secondly, if so "did he make the right determination?" (T. 7-8).

After reviewing the salient code provisions with the Board, Mr. Moylan explained that dry boat storage is permitted under Section 3.03.17.B.23. (T. 9-10). Subsection 23 lists 24 categories of permitted general commercial uses. Subsection 23(f) allows "boat, mobile home sales and service establishments." (PA. 047-48) (emphasis added). More particularly, Mr. Moylan advised that "the Planning Director determined that subpart 23 allows [dry stack boat storage as] a boat service establishment," which was "the right determination." (T. 10).

In his presentation to the Board, counsel for HCA focused on the proposed project, not the threshold question of whether boat storage is a

permitted use. He argued that the proposed development would be substantially more intense than the past use:

> [T]he existing building that is there is completely going away. The parking's increasing substantially.
>
> If you look at the report we provided, there's a 10-time increase in parking. The floor area ratio is an increase of 250 percent. And the number of the boat launches per day. There's going to be a 10,000-gallon fuel storage at the property.
>
> This is an entire different use than what was previously approved, of one luxury yacht at a time.

(T. 17) (emphasis added).[2]

Counsel also argued that a dry stack boat storage facility is similar to a warehouse, which is not allowed in the A1A Scenic Corridor Overlay District:

> So our position is that there is a – an error in the determination as to that issue. By any reasonable interpretation, based upon the planning criteria, what is proposed is a massive increase in intensity and uses that are quite dissimilar in function to what had previously occurred there. This is a warehouse. And if you look elsewhere under you C-2 category, warehouses are not a permitted use in the A1A Scenic Overlay Zoning, so for that reason why it's not a permitted use in C-2.

(T. 18) (emphasis added).

[2] In fact, there was no limit on the size or scope of the manufacturing operation incorporated as a condition of the rezoning to C-2 approved in 2000. (PA. 17).

HCA also presented a letter from a planner, Thad Crowe. In that letter, Mr. Crowe did not address the code interpretation question before the Board. Instead, he also focused on how the proposed use compared to the past use of the property. He argued:

> Regarding the evaluation of intensity in terms of traffic, the prior use was an on-again, off-again use, and even when it was operating just a handful of employee cars were there. It was about as unobtrusive as a manufacturing use could be. This is in comparison to the everyday traffic and activity created by the proposed use.

(PA. 052). In his opinion, the proposed use would generate much more traffic than the previous use. He concluded that "other indicators of intensity further prove the point that the proposed use is in no way comparable to the old use," citing increased building area; increased parking; larger septic system; an increase in impervious surface; and an increased floor ratio. (PA. 052-53).

During the colloquy that preceded the Board's vote, one of the commissioners disclosed that he had visited Ponce de Leon Inlet to observe the operation of a dry stack storage facility there. (T.47). He also spoke to residents who were in favor of dry stack storage on the site. (T. 50). Another commissioner indicated he visited the site "after we talked to both sides." (T. 51). The disclosures took place prior to the vote and are part of the record.

(T. 47, 50). HCA did not object to the disclosures nor did it request an opportunity to question the Commissioners or to offer rebuttal. (T. 47-51).

At the conclusion of the hearing, the BCC voted unanimously to deny the appeal of the PDB decision upholding the staff interpretation allowing dry stack boat storage as a permitted use. (T. 53-54).

STANDARD OF REVIEW

Quasi-judicial decisions are subject to a certiorari standard of review on appeal. In a certiorari review of a quasi-judicial decision, a circuit court must determine (1) whether procedural due process was accorded, (2) whether the essential requirements of the law were observed, and (3) whether the administrative findings and judgment are supported by competent substantial evidence. City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982). The writ is not to redress mere legal error, but is an extraordinary remedy to prevent a miscarriage of justice. Broward County v. G.B.V. Int'l Ltd., 787 So.2d 838, 841 (Fla. 2001).

Certiorari review does not reweigh the evidence, but merely determines if the agency's decision was supported by competent substantial evidence. Broward County, 787 So.2d at 846.

ARGUMENT

On the petition now before the Court, the question presented is whether dry boat storage is a permitted use in the C-2 general commercial category. It should be noted that Petitioner has withdrawn its challenge to the Planning Director's authority to make that determination. (P. 13).[3]

The merits of the proposed development plan are simply not before the Court. Although Hammock Harbour submitted its application for site plan approval on May 29, 2019, the application did not move forward to the Technical Review Committee after HCA appealed the Planning Director's threshold determination that boat storage is a permitted use. Nevertheless, in its petition, HCA continues to argue the merits of the development plan. Those arguments are premature and should be disregarded at this time.

I. DRY STACK BOAT STORAGE IS A PERMITTED USE IN C-2 GENERAL COMMERCIAL DISTRICTS

The BCC's decision upheld staff's interpretation of the code to allow dry boat storage as a permitted use in C-2 general commercial districts. The BCC's decision is supported by substantial competent evidence, including the language of the code itself, particularly Section 3.03.17.B.23(f), which permits "boat, mobile home sales and service establishments" in C-2 general

[3] Section 1.09.02 expressly authorizes the Planning Director to interpret the code.

commercial districts. The BCC's decision is also supported by the Planning Director's duly authorized interpretation of the ordinance; the PDB decision upholding that interpretation. (PA. 041); the Planning and Zoning Department staff reports dated September 10, 2019 (PA. 024-027) and November 4, 2019 (PA. 005-6); and the Assistant County Attorney's guidance to the BCC at the hearing (T. 5-10). The rezoning of the property in 2000 to C-2 to allow boat building also supports the conclusion that boat services are permitted.

A. Judicial Deference

Staff's interpretation, its reports and the decisions of the PDB and BCC upholding that interpretation are persuasive. Indeed, the general rule is that reviewing courts should defer to the interpretation of a zoning ordinance by the agency responsible for its administration. In Las Olas Tower Co. v. City of Ft. Lauderdale, 742 So.2d 308 (Fla. 4th DCA), the court stated:

> Generally, a reviewing court should defer to the interpretation given a statute or ordinance by the agency responsible for its administration. Of course, that deference is not absolute, and when the agency's construction of the statute amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand.

Id. at 312 (citations omitted). Accord, Palm Beach Polo, Inc. v. Village of Wellington, 918 So.2d 988, 993 (Fla. 4th DCA 2006) ("as required by law, this Court defers to the interpretation given to the [zoning] regulations by the

agency responsible for its administration"); ABG Development Co. v. St. Johns County, 608 So.2d 59, 63 (Fla 5th DCA 1992); Shamrock – Shamrock, Inc. v. City of Daytona Beach, 169 So.3d 1253, 1256 (Fla. 5th DCA 2015).

B. Principles of Construction

The determination that boat storage is a permitted use is also supported by the principles governing construction of zoning regulations. The cardinal rule is that since "zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." Rinker Materials Corp. v. City of North Miami, 286 So.2d 552, 553 (Fla. 1973).

C. Rinker Materials

The Supreme Court's decision in Rinker Materials is on point. In that case, the applicant sought a permit to construct a concrete batching plant on industrially-zoned property (industrial zone 3-A). At the proposed plant, the contractor would load cement, rock, sand and other ingredients into typical cement mixer trucks that would mix the ingredients on the way to the job site. Id. at 555. The application was denied by the City building and zoning department, board of adjustment, city council, circuit court and Third District

Court of Appeal.[4] However, the Supreme Court quashed the court of appeal decision and remanded for entry of an order directing the City to issue the permit.

The Supreme Court began its analysis with a summary of the principles to be followed in the interpretation of zoning regulations:

> (a) In statutory construction, statutes must be given their plain and obvious meaning and it must be assumed that the legislative body knew the plain and ordinary meanings of the words.
>
> (b) Statutes or ordinances should be given that interpretation which renders the ordinance valid and constitutional.
>
> (c) Since zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owners.

286 So.2d 553.

The zoning ordinance in Rinker Materials listed "contractor's plants and/or storage yards" as a permitted use in industrial zone 3-A. The City boards and the circuit court held that the language was not explicit enough to include a concrete batching plant. The Supreme Court rejected that

[4] The procedural history of the case is detailed in the Third District Court of Appeal opinion, Rinker Materials Corp. v. City of North Miami, 273 So.2d 436 (Fla. 3d DCA 1973).

interpretation, recognizing that under that reasoning, the absence of a list of the types of contractors whose plants would be permitted would be grounds to arbitrarily deny any contractor's application – a constitutionally intolerable result. Id. at 556. In accordance with the principles of construction, the Court broadly construed the language permitting contractor's plants in favor of the landowner to allow the proposed batch plant.

Conversely, the Court would not countenance the City's argument that the plant should be excluded because language in the prior version of the ordinance, which had allowed the manufacture of concrete products such as "concrete pipes, etc.," had been deleted from the section of the ordinance in question. Noting that the proposed plant would not be manufacturing concrete pipe or products, the Court declined to construe the ordinance against the interest of the owner in order to narrow the scope of the use permitted by its express terms. The Court quashed the decision of the court of appeal and remanded for entry of an order directing the City to issue the permit.

Rinker Materials is dispositive of the dry stack boat storage question in this case. The zoning ordinance does not specifically address boat storage, but Section 3.03.17.B.23(f) allows "boat, mobile home sales and service establishments" in C-2 general commercial districts. Rinker Materials requires that the operative "boat ... service establishment" language must be

given its plain and ordinary meaning. A dry stack storage facility is a boat service establishment because it provides a service for boats, just as much if not more than the concrete batch plant in Rinker Materials was a permitted contractor's plant.

HCA does not even try to explain why boat storage is not a boat service. Rather, HCA asks the Court to go beyond the plain meaning of the exclusionary language found in the Coastal Corridor Overlay District regulations and stretch it to reach boat storage. Actually, juxtaposition of the permitted uses of Section 3.03.17.B.23(f) relating to boats and mobile homes and the Overlay District's treatment of those uses reinforces the County's interpretation. The Overlay District regulations do refer to boats, but only exclude establishments for "sales or repair of motorized boats." (Id.). The regulations do not exclude any other kind of boat service establishments.

Subsection 23(f) allows both boat and mobile sales and service establishments. Whereas the Overlay District regulations do not purport to exclude boat service establishments, they ban mobile home sales and service across the board, excluding mobile home "dealerships, repair or service establishments." Surely, if the intent had been to bar boat services allowed under 23(f) from the Coastal Corridor, the regulations would have been banned them outright, just as they categorically ban mobile home services.

Similarly, HCA attempts to shoehorn dry stack storage into the Overlay District warehouse exclusion. It may be that a dry stack storage facility shares some characteristics with a warehouse, but the same could be said of retailers like Costco and Home Depot, lumberyards, and even hotels. To that limited extent, HCA's interpretation may not be completely untethered from the language of the ordinance, but it falls far short of establishing that the County's common sense interpretation is unreasonable and clearly erroneous. Whatever similarity there may be between a boat dry stack operation and a warehouse, the fact remains that a boat dry stack provides services to boats, and thus fits reasonably – indeed, squarely – into the permitted boat service establishment category.

As Rinker Materials teaches, absent a clear expression of intent to the contrary, the language of zoning regulations should be given its "broadest meaning ... in favor of the property owner." Id. at 553. The County's interpretation does that. On the other hand, HCA's alternative interpretation requires the exact opposite - the boat service establishment permitted use must be given a narrow meaning and interpreted against the interest of the property owner. Accordingly, the determination that boat storage is a permitted use must prevail over HCA's warehouse interpretation.

D. The Fifth District Cases

Fifth District caselaw also supports the County's position that dry stack boat storage is a permitted use. Thomas v. City of Crescent City, 503 So.2d 1299 (Fla. 5th DCA 1987), presented a zoning code interpretation issue very similar to the issue the Supreme Court decided in the landowner's favor in Rinker Materials and the one presented here.

Crescent City denied the petitioner's application for a certificate of occupancy for a recreational vehicle park on the ground that the code did not specifically allow RV parks. The petitioner argued that the use was permitted in general commercial districts under language allowing "any commercial use of a retail or service nature." The circuit court disagreed with the applicant's position and affirmed the denial of the application.

The appellate court reversed. The court rejected the view that a zoning ordinance may be interpreted to deny uses that are not expressly prohibited:

> The City argues that the ordinance prohibits the use of land for those purposes not specifically enumerated in the ordinance, but this argument ignores the catch-all phrase "any commercial use of a retail or service nature." While admittedly not a "retail" use by definition, the operation of an R.V. resort is as much service oriented as is a motel or hotel, a coin-operated car wash or a dry cleaning plant, all of which are permitted uses in the district. Neither do we find persuasive the City's argument to the effect that the enumerated uses are of a

> permanent nature, while an R.V. park caters to transitory uses, because the transient use of an R.V. resort is no greater than that of a hotel or motel. We take a broad view of the ordinance because of the legal principle that because "zoning regulations are in derogation of private rights of ownership, words used in a zoning ordinance should be given their broadest meaning when there is no definition or clear intent to the contrary and the ordinance should be interpreted in favor of the property owner." Rinker Materials Corp. v. City of North Miami, 286 So.2d 552 (Fla. 1973).

Id. at 1301. The court held that the ordinance allowed RV parks as a commercial use of a service nature and reversed.

The case here for allowing a dry stack boat storage business as a boat "service establishment" is even stronger. Subsection 23(f) of the Flagler Code specifically allows boat service establishments, whereas the Crescent City code generally allowed "commercial" uses of a "service nature," without more specific guidance as to what type of commercial services were permitted, as provided by Subsection 23(f). Surely, dry stack boat storage is no less a boat service business than an RV park is a commercial use of a service nature.

In Thomas, the Fifth District relied on its previous decision in Halifax Area Council on Alcoholism v. City of Daytona Beach, 385 So.2d 184 (Fla. 5th DCA 1980). In that case, the applicant Serenity House sought a certificate of occupancy for an alcoholic rehabilitation center on property zoned B-P

(business-professional). As in Rinker Materials, Thomas and this case, the proposed use was not specifically addressed in the zoning code. After the application was denied, Serenity House unsuccessfully appealed to the City planning board, city commission, and then to the circuit court. They all upheld the denial of the permit, finding that the proposed operation was not a permitted use nor a "similar use" permitted in a B-P zone.

The District Court of Appeal reversed. As in Rinker Materials and Thomas, the court rejected the argument that the proposed rehabilitation center was prohibited because it was not specifically listed as a permitted use. Serenity House contended that it would provide a "professional service" as a "consultant in a related field," under the code section allowing a "professional service," which was defined to include "law, architecture, engineering, medicine, dentistry, osteopaths, opticians, chiropractors or consultants in these or related fields." The court began its analysis by reviewing the applicable principles of construction:

> Appellant contends that Serenity House is a "professional service" as a "consultant in a related field." As a broad proposition, since zoning regulations are in derogation of private rights of ownership, they should be interpreted in favor of the property owner. Rinker Materials Corp. v. City of North Miami, 286 So.2d 552 (Fla. 1973). In

> addition, they are subject to the same rules of construction as are state statutes.
>
> The principle of ejusdem generis may be applied to aid in the construction of the ordinance. Under this rule, where enumeration of specific things is followed by a more general word or phrase, the general phrase is construed to refer to a thing of the same kind or species as included within the preceding and more confining terms. However, the rule does not necessarily require that the general provision be limited in its scope to the identical things specifically named, otherwise it would render the subsequent general phrase entirely inoperative.

Id. at 187. This is the same reasoning that the courts found dispositive in Rinker Materials and Thomas – specific uses do not have to be specifically enumerated in order to be permitted under a more general category such as "contractor's plants" (Rinker Materials) or "commercial uses" of a "service nature" (Thomas).

In accordance with Rinker Materials, the court squarely rejected the proposition that a zoning authority may deny a proposed use simply because it is not specifically identified as a permitted use:

> It is especially persuasive that the catchall phrase "and similar uses" must include the contemplated use, because it is designed to cover contingencies for particular uses which are not described in the comprehensive zoning ordinance. In the case before us, the City Building Official testified that, "there is no real definite zone that allows this." There being no zone which specifically permits this

> use, it is then incumbent upon the City to permit the activity within the zone most nearly applicable.
>
> The B-P zone permits "professional services, boarding houses, motels, and restaurants." None of the activities contemplated by appellant are inconsistent or incompatible with those specifically permitted. No other zoning classification defines activities more comparable to those planned by appellant. We therefore conclude that the lower court was in error in determining that the use was not permitted in the "B-P" zone.

Id. (citations omitted) (emphasis added).

HCA's contention that dry boat storage is excluded because it is not specifically listed as a permitted use cannot stand in the face of Rinker Materials, Halifax Area Council, and Thomas. In each of those cases, the proposed use was not specifically permitted by the ordinance. In each case, the court rejected the argument that since the exact use was not expressly permitted, it should be prohibited. The law is the other way around – zoning regulations must be interpreted broadly in favor of the landowner and the lawful use of its property.

In Rinker Materials, Thomas, and Halifax Area Council, the landowners all had to overcome an administrative interpretation against them that had prevailed at all levels of local review. That is not the case here – the administrative interpretation was consistently in favor of the landowner throughout the proceedings below. Accordingly, unlike those other cases, it is

the interpretation in favor of the landowner, allowing boat storage, that is entitled to judicial deference. See citations at pages 10-11, above.

HCA's argument falls far short of showing that the County's interpretation of its regulations is unreasonable or clearly erroneous. Its interpretation of "boat service establishments" to encompass boat storage facilities is no more unreasonable than the Supreme Court's determination in Rinker Materials that the batching plant was permitted as a contractor's plant, the Fifth District's determination in Thomas that an RV park constituted a commercial use of a service nature, or its conclusion in Halifax Area Council that the alcohol rehabilitation center was allowed as a professional use.

In conclusion, the County's interpretation that boat storage is permitted as a boat service establishment should be upheld in accordance with the principles that 1) the language of the ordinance must be given its plain and ordinary meaning, 2) the ordinance must be construed in the landowner's favor, and 3) the County's administrative interpretation is entitled to judicial deference, unless shown to be unreasonable or clearly erroneous.

II. THE EX PARTE COMMUNICATIONS ARGUMENT

HCA's ex parte communication argument is unavailing for several reasons. First, HCA's reliance on Section 286.0115 is misplaced. Indeed, HCA overlooks the operative section of the statute, Section 286.0115(2)(c),

which expressly applies to quasi-judicial proceedings on local land use matters:

> In a quasi-judicial proceeding on local government land use matters, a person may not be precluded from communicating directly with a member of the decisionmaking body by application of ex parte communication prohibitions. Disclosure of such communications by a member of the decisionmaking body is not required, and such nondisclosure shall not be presumed prejudicial to the decision of the decisionmaking body. All decisions of the decisionmaking body in a quasi-judicial proceeding on local government land use matters must be supported by substantial, competent evidence in the record pertinent to the proceeding, irrespective of such communications.

§ 286.0115(2)(c), Fla. Stat. (2019) (emphasis added).

The statute makes sense in the context of local zoning proceedings. Unlike other types of quasi-judicial administrative proceedings (e.g., civil service appeal in City of Hollywood v. Hakanson, 866 So.2d 106 (Fla. 4th DCA 2004)), land use proceedings of this type are a matter of local public interest, and it is not unusual for members of the public to weigh in. Section 286.0115(2)(c) expressly recognizes and protects the public's right to communicate their views to their elected representatives in zoning proceedings.

HCA's ex parte communication argument also comes up short because the transcript is clear that during the hearing, Commissioner Hansen did disclose that he had spoken with "residents" and "they say boat storage would be great." (T. 50). He also shared that he been to Ponce de Leon Inlet and observed a boat storage facility there. (T. 47). Commissioner Sullivan indicated that he had talked to both sides and visited the site. (T. 51). Although Section 286.0115(2)(c) expressly allows such communications and does not require their disclosure in a quasi-judicial local and use proceeding, the Board members did disclose those communications and visits to the site and Ponce Inlet prior to the vote being taken. (Id.).

Nevertheless, HCA complains that the disclosures were not made until "after HCA finished its presentation and the matter was being deliberated by the Board." (P. 16). The fact remains that the disclosure was made during the hearing, prior to final action.

Significantly, HCA did not object to the disclosures when they were made, and did not ask for an opportunity to voir dire the commissioners, or to offer rebuttal evidence. After sitting on its hands during the hearing, HCA is not in a position to now claim it was treated unfairly and prejudiced. As the Fifth District Court of Appeal noted in Citrus County v. Florida Rock Industries, Inc., 726 So.2d 383 (Fla. 5th DCA 1999) (footnote 17), "an

appellate court cannot consider issues not presented or addressed by the lower tribunal and not presented as issues for review") (citing Sirod, Inc. v. Lycouris, 667 So.2d 903 (Fla. 4th DCA 1996) and Sparta Bank v. Pape, 477 So.2d 3 (Fla. 5th DCA 1985)). The Fifth District Court consistently applies this rule in certiorari review of zoning decisions (e.g., Battaglia Fruit Co. v. City of Maitland, 530 So.2d 940, 943 (Fla. 5th DCA 1988) ("[T]he first time any such allegation was made was in its petition to the circuit court, where it was made too late"); First City Savings Corp. v. S & B Partners, 548 So.2d 1156, 1158 (Fla. 5th DCA 1989) (respondent "should have presented before the county commission their argument; respondent 'sandbagged'[5] the county commission by raising this issue for the first time in the circuit court certiorari proceeding").

The communications in question were innocuous. The information gleaned by Commissioner Hansen from his conversations with residents and visit to Ponce Inlet did not go to the heart of the matter before the BCC on November 4. Again, the issue of traffic generation and public opinion about whether a dry stack facility was needed had nothing to do with the threshold issue of whether dry stack storage is a permitted use under the zoning code.

[5] The point is only that HCA failed to timely object and preserve the issue for review. We are not suggesting there was any bad faith or gamesmanship below.

That question has nothing to do with how busy the facility might be or how popular the use might be with the residents. There is nothing in the record that hints that Commissioner Hansen's comments affected the outcome of the hearing in any way.

In any event, the comments of a minority of the BCC do not bind the whole collegial board. The Florida Supreme Court expressly held: "A municipal corporation speaks through its records, not through opinions of individual officers." Beck v. Littlefield, 685 So.2d 889, 892 (Fla. 1953). See also, Penn v. Pensacola-Escambia Govtl Center Authority, 311 So.2d 97, 101 (Fla. 1975), where the Court cited Beck in holding that alleged promises by various city and county officials did not bind where "the official records of all local governmental bodies were devoid" of supporting evidence.

CONCLUSION

For the reasons set forth above, this Court is respectfully requested to deny the petition for writ of certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished via the Florida Courts E-Filing Portal to the designated e-mail addresses this 25 day of FEBRUARY, 2020, as follows:

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