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.:

Plaintiff/Petitioner,

vs

FLAGLER COUNTY BOARD OF COUNTY
COMMISSIONERS,

Defendants/Respondents.
_____/

PETITION FOR WRIT OF CERTIORARI
PURSUANT TO FLA. R. APP. P. 9.100(f)

Plaintiff/Petitioner, HAMMOCK COMMUNITY ASSOCIATION, INC., a Florida not for profit corporation ("HCA"), by and through the undersigned counsel, files this Petition for Writ of Certiorari to obtain review of the decision of the FLAGLER COUNTY BOARD OF COUNTY COMMISSIONERS (the "Board"), rendered on November 4, 2019, (the "Decision").

The Board Decision upheld the Planning and Development Board's affirmation of the Planning and Zoning Director's determination to allow a dry boat storage facility at the site of a closed yacht manufacturing facility. The site has a commercial C-2 zoning designation. (T. 17) Dry boat storage is not a

listed permitted use under the county's zoning code for this location. (A. 008, 048) The Planning and Zoning Director decision under review is that "boat storage is less intense then the previously approved boat manufacturing and would be a permitted use within a large building on a parcel purpose-built for manufacturing boats and located on a navigable waterway." (A.028) Throughout this appeal process the County's position has been that dry boat storage is a less intense use than boat manufacturing, while the HCA's position has been that the use is more similar to warehousing or boat sales and repairs with both uses expressly prohibited by the zoning codes for this parcel.

This petition for writ of certiorari is timely filed challenging the Board's Decision as it is not supported by competent substantial evidence and it was improperly based upon ex parte communications and investigations by commissioner that were not disclosed prior to deliberations. Submitted herewith is an Appendix as required by Fla. R. App. P. 9.100(g) and 9.220. References to the Appendix will be (A), while references to the Transcripts of the Board Hearings on the November 4, 2019 Appeal of the Planning and Development Board Decision Upholding the Planning and Zoning Director's Decision, Project #3200/Application # APPL-000064-2019, included in the Appendix, will be (T.).

JURISDICTION

It is appropriate for aggrieved parties to seek review of the final order of a quasi-judicial board or agency concerning interpretation of an ordinance by way of Petition for Writ of Certiorari. See County of Volusia v. Transamerica Business Corp., 392 So. 2d 585, 586 (Fla. 5thDCA 1980); Las Olas Tower Co. v. City of Fort Lauderdale, 742 So. 2d 308, 310 (Fla. 4th DCA 1999); Bd. of County Comm'rs of Brevard v. Snyder, 627 So. 2d 469, 474 (Fla. 1993). This Court has jurisdiction pursuant to the foregoing authorities, Article V, Section 5(b) of the Florida Constitution, and Fla. R. App. P. 9.030(c)(2) and (3).

STATEMENT OF FACTS

The site involved in this appeal is located on State Road A1A in an area known as the Hammock, which received a scenic overlay zoning protection in 2004 referred to as the Scenic A1A Corridor. (A. 030,T-18) The HCA has long been a proponent of responsible growth in this area of the county. (A.016) In 2000, the Board approved a land use zoning change for a portion of this 4.26 acre site to allow the operation of a boat building operation limited to one or two luxury yachts per year on property zoned C-2. (A. 012-013) The HCA was involved in that process (A.16) which ended up with Board approval subject to limitations on the number of boats to be built and

requirements that the site would have gravel parking, an extensive landscape buffer and the HCA would receive notice of future site plans. (A. 012-016).

The boat builder typically employed 9-12 employees before it went out of business leaving the site vacant for several years. (T. 16, 37,A.014-16) The current developer is proposing to construct a 100 seat restaurant and a 240 boat dry storage facility on the property which retains its commercial C-2 zoning. (A. 024) The Planning Director opined that this would not result in an increase intensity in use, however the County has not provided any technical data to support this conclusion.(A. 026) HCA unsuccessfully appealed this interpretation initially to the Planning and Development Board (Planning Board). After the Planning Board denial, HCA appealed, raising the following issues:

1) Different Use Classes: Yacht building is in the Manufacturing Standard Industry Class of 3732. Boat Storage is in the Services Class of 4493 with marinas. The NAICS also separates the uses into those different classes.

2) FCLDC section 3.3.1.B 22) states "Other commercial uses of a nature similar to those listed may be permitted upon determination by the planning board that such uses are appropriate in the C-2 district. The standard industrial classification manual will be used as a reference for these determinations."

3) Boat storage is not listed as a permitted use in the Scenic Corridor. However, it is similar to Commercial warehousing and miniwarehousing, both of which are prohibited uses in the Scenic Corridor Overlay in the C-2 zoning district. Boat sales and repairs are also prohibited. LDC

3.06.11, A. "In the event of any conflict between the provisions of this section and other requirements of this article, the provisions of this section shall prevail."

4) Competent substantial expert testimony by a board member at the September 10, 2019 Planning Board meeting stated: "They are very different uses, manufacturing versus the boat storage."

5) Any prior vested entitlements for use have lapsed since the manufacturer has been out of business. Furthermore, the applicant plans to clear the land of all existing buildings, creating a vacant lot and should therefore revert to current code without smaller setback entitlements.

6) Intensity: The primary measures of intensity are the Floor Area Ratio and Parking. The FAR will increase from 12.8% to 33.4%, or more than double, from the previous use. Parking will increase tenfold. These huge increases contradict the decision by the Planning Director.

7) The proposed new boat storage would be over four times the area of the existing building it replaces. 20% larger than a football field and a 20% larger footprint than the Flagler County Government Services Building.

8) The number of businesses on this site is undetermined, completely changing the use from a yacht-building operation into a shopping center with extended hours of operation and the associated noise, including a huge forklift running from sunrise to sunset.

9) The location is within a residential area of 25 homes and one small hardware store. LDC 3.06.11 A: "The purpose of the A1A Scenic Corridor Overlay (SCO) district is to protect and enhance then natural and man-made environments of this unique and special portion of Flagler County, thereby preserving quality of life and property values within the corridor.

10) Feb 2000 BCC approved limitations: "Lot 41 would be used for storm water retention, access driveway and buffer area, saving all trees on that lot." (A. 08-9)

At the outset of the Board hearing, the assistant county attorney stated that the Planning Board had determined that boat storage is a related, but less intense use than boat manufacturing which was encapsulated by the Board's decision in 2000 (T. 7). He then stated that the Planning Board determined that the developer would be allowed to build a boat service establishment (T. 8).

HCA then provided evidence to the Board that as follows:

1. The new plans would increase the building area by 300% over the size of the current building that is to be torn down and would result in a ten-fold increase in parking. (A. 020-021,44)
2. The Floor Area Ratio (used to determine intensity of use) would increase by 250% with the construction of the new boat storage facility. (A. 020, 051) Evidence was also provided to establish that there would be a 447% increase in impervious area. (A. 044)
3. Sections of the county's ordinances that established that mini-warehouses and warehouses are expressly prohibited under the Scenic A1A overlay ordinance for C-2 zoned properties which would include this site. (A. 030-041, 047-49)

4. The proposed use was also similar to boat sales and repairs, which are prohibited in the Scenic A1A overlay unless the use is limited to kayaks. (A. 048, T. 45)
5. The site plan indicated that the traffic calculations were based upon a warehouse use and the property appraiser classified the use as warehouse. (T. 29, 32,A.44). The evidence also included reference to the dictionary definition of a warehouse as a large building used to store goods. (T. 29)
6. The HCA provided the only expert testimony that was part of the record for the Board to consider- from Thad Crowe, a planner with 32 years of experience in this area of Florida who established that the new proposed use would result in a significant increase in the intensity of use resulting in a negative impact on the neighbors.(A. 051-053) Crowe's opinion was:

> 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 uses. The latest edition of the ITE (Institute for Transportation Engineers) 8th Generation Trip Generation Manual did not survey boat storage, with the closest surveyed use being personal storage. However, a 2015 study done by Trident Engineering for the applicant for a proposed similar project in Monroe County (Funland Boat Storage, Overseas Highway, Big Coppitt Key) determined a boat storage trip generation rate of 1.48 per boat storage space on weekdays, 1.6 on Saturday, and 3.20 on Sunday.

> With the proposed 240 boat spaces this would produce 355 weekday trips, 386 Saturday trips, ad 768 Sunday trips. (As expected, there is considerably more activity on the weekends when recreational boaters enjoy their time off.) These high trip numbers compare to the old use, at a heavy industrial trip rate of 1.5 trips per 1,000 square feet, the old use could generate up to 36 daily trips, a fraction of the proposed use's trips. Even the 36 trips is probably high, given the infrequent activity and small number of employees of the former use. And when the 3,404 square foot restaurant is factored in, the ITE Manual indicates another 433 trips would be added, generating along with the boat storage use a whopping 1,201 Sunday trips. This is a 3,336% increase.
>
> Other indicators of intensity further prove the point that the proposed use is in no way comparable to the old use. The new use departs from the old use in the following ways:
>
> - Tripling of building area;
> - Ten-fold increase of parking;
> - Large increase in septic system with the potential for flooding or peak use events, right next to an Outstanding Florida Water;
> - Big increase in impervious surface (almost 500%), which will result in increased runoff and pollution to the river during flood events;
> - A Floor Area Ratio increase of 250 percent.
>
> These are not just modest upticks in intensity, but statistically significant increases that will result in real-world impacts. (A. 052-053)(T. 24-26)

The developer basically stated that, based upon his other boat storage facility in another county, the project should be approved and he admitted that he was not providing expert testimony. (T. 43) He made vague reference to another boat facility in the area which used to be in operation but he did not

provide any technical data related to intensity of uses (T. 43) The Planning Director did not testify to the Board or present any written analysis other than the staff report to the Planning Board to counter the evidence provided by the HCA. The staff report did not include any technical data to compare the intensity of uses and did not address the warehouse issue. (A-24-26) In fact the county did not present any evidence at the Board hearing from any witnesses.

The Commissioners then began deliberations. Even though Chairman Hansen stated that the Board should determine if the use was in fact a warehouse type of use, there was limited follow up discussion and this issue was never determined by the commission (T. 46) Commissioner O'Brien stated that he did not think the dry boat storage was a warehouse use but that it was more of a marina with boat storage (T. 52) Commissioner Hansen admitted that the dry storage would amount to an increase in intensity for the site, however based upon conversations with "lots of residents" dry boat storage is needed (T. 46-47) Commissioner Sullivan essentially stated that his gut feeling was that the new building would look better than the old building based upon a site visit that he conducted (T. 48) Commissioner Mullins stated that boat storage was needed in this area of the county, without any reference to the zoning code or any technical data (T. 50). The

commissioners then voted unanimously to deny the appeal without ever determining the intensity of use or whether the proposed dry boat storage was a warehouse use (T. 52).

STANDARD OF REVIEW

The County is a political subdivision of the State of Florida, charged with responsibility to adopt a comprehensive plan and land development regulations to guide and manage future development within the County. §163.3161, Fla. Stat. The land development regulations adopted by the County must be based on, related to, and be a means of implementing an adopted comprehensive plan. §163.3201, Fla. Stat.

There are two general types of land use approval proceedings before a local government: quasi-legislative and quasi-judicial. Bd. of County Comm'rs v. Snyder, 627 So. 2d 474 (Fla. 1993). Quasi-legislative decisions are generally described as those in which the local government is tasked with formulating policy rather than applying specific rules to a particular situation. Snyder, 627 So.2d at 474. Quasi-judicial decisions involve the application of policy to a specific development application. Common development orders that are considered in the context of a quasi-judicial hearing are site-specific rezoning, site plan approvals, variances, special exceptions, and voluntary annexations. Id.

The proceeding here was quasi-judicial in nature as seen by the agenda. (A.03) Quasi-judicial hearings are to be conducted with more formality than a legislative public hearing and are akin to informal trials. The distinction between the two types of proceedings impacts the process that the applicant is due, the relative discretion the local government has in approving or denying the requested action, and the proper method for appealing an adverse decision.

Procedural due process rights are enhanced in quasi-judicial proceedings and the standards of review differ substantially. For example, quasi-legislative hearings require little process. Indeed, allowing only 10 minutes for members of the public to speak on quasi-legislative matters comports with due process. Hadley v. Dep't of Admin., 411 So. 2d 184 (Fla. 1982) (noting "[t]here is . . . no single, unchanging test which may be applied to determine whether requirements of procedural due process have been met"). Moreover, limitations on ex parte communications with the decision makers that apply to quasi-judicial hearings do not apply to legislative determinations. There is no right in quasi-legislative hearings to cross-examine witnesses. Coral Reef Nurseries, Inc. v. Babcock Co., 410 So. 2d 648, 652-53 (Fla. 3d DCA 1982).

By contrast, in quasi-judicial hearings, parties are entitled — as a matter of due process — to cross-examine witnesses, present evidence, demand that witnesses testify under oath, and demand a decision that is based on a correct

application of the law and competent substantial evidence in the record. Jennings v. Dade County, 589 So. 2d 1337, 1340 (Fla. 5th DCA 1991).

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 Cnty. v. G.B.V. Int'l, Ltd., 787 So.2d 838, 841 (Fla. 2001).

Quasi-judicial decisions like the appeal of the Planning Director's determination about the dry boat storage are reviewed through a petition for writ of certiorari because such decisions are "not directly appealable under any other provision of general law." Fla. R. App. P. 9.100(c)(2). Section (5)(b) of Article V of the Florida Constitution gives Court "the power to issue writs of...certiorari...and all writs necessary or proper." See also Fla. R. App. P. 9.030(c)(3). Certiorari review does not reweigh the evidence, but merely determines if the agency's decision was supported by competent substantial evidence. Broward Cnty., 787 So.2d at 846; Snyder, 627 So.2d at 476. In the

instant case, HCA's position is that there is a lack of competent substantial evidence to support the Board's denial of the appeal.

ARGUMENT

The appeal to the Board focused on two issues- did the Planning Director have the authority to determine the use issue and, if so, was his opinion as to the comparable intensity of uses correct? For purposes of this petition, HCA is not challenging the Planning Director's authority to make the decision and is focused instead on the decision itself. The Planning Director determined that the dry boat storage is an allowed used because it is a less intense use than boat manufacturing on the parcel with C-2 zoning. (A. 024) He then concluded that the analysis should not include a comparison of the limitations placed on the property by the prior Board decision in 2000 but that the standard C-2 site criteria would be applied in reviewing the site plan. (A. 024). In other words, his report did not use technical data to evaluate the difference in intensity between the use approved in 2000 and the proposed 240 boat dry storage facility. There was no testimony or explanation given to the Board by the Planning Director at the time of the appeal to the commission on November 4.

The first two prongs of the analysis require a determination as to whether procedural due process was accorded and whether the essential requirements of law were observed. At least two of the commissioners considered evidence that

was not based upon the record or any material that was submitted to the Board for review.

Commissioner Hansen indicated that he had canvassed individuals that he did not identify and had come to the conclusion that the county needed more dry boat storage. (T. 50). Commissioner Mullins agreed- and indicated that the county should have dry boat storage to tidy things up. (T. 50-51). Commissioner Sullivan said that he had conducted a site visit and his decision was based upon the fact that the new building would look better than the old building (T. 51). Another reason given by Commissioner Hansen is that he was in Ponce Inlet by a dry boat storage and it did not look busy, therefore he concluded that the technical data supplied by HCA was "bogus". (T. 47) There was no other analysis given by the Board as to the technical issues raised by HCA other than Commissioner O'Brien's conclusion that this was a marina with boat storage. The Board did not make any findings of fact in its Decision.

At the outset of the quasi judicial hearing, the Commissioners were asked to disclose ex-parte communications. (T. 3-4) Several disclosures were made about meeting with the HCA and the developer, however there was no disclosure about outside interviews of residents, site visits or review of other dry boat storage operations. Ex-parte communications must be disclosed particularly where, as

here, the outside communications impacted the decision reached by that elected official.

The Court in Jennings held that once proof is provided that a quasi-judicial official received an ex-parte communication, a presumption arises under section 90.304, Fla. Stat. that the contact was prejudicial. Here the transcript clearly establishes that several commissioners relied upon outside evidence and communications that were not disclosed prior to rendering their decision. This violates the basic standards of due process and fairness, Jennings at 1341. After Jennings, section 286.0115 Fla.Stat. was enacted by the legislature mandating that the presumption of prejudice does not exist if the subject of the communication and the identity of the person, group or entity is disclosed prior to deliberations. The disclosure by commissioner Sullivan that he visited the site is not a violation unless it was disclosed while the hearing was still underway, see City of Key West v Havlicek, 57 So.3rd 900 (Fla. 3rd DCA 2011). HCA should have had an opportunity to rebut the information in addition to the fact that his decision was predicated on his observation that the new building would "look" better than the old building.

The county code incorporates the provisions of section 286.0115 by requiring that the existence of the site visit must be made a part of the record before final action on the matter. This did not occur. Here no disclosure was made

at the outset of the hearing as to the canvassing by Commissioner Hansen of residents and the identity of the persons canvassed was never revealed. The disclosure was made after HCA finished its presentation and the matter was being deliberated by the Board. An agency acting in its quasi-judicial capacity cannot act solely on its own information and cannot base its decision on secret, concealed or undisclosed knowledge, Irvine v Duval County Planning Committee, 466 So.2d 357 (Fla. 1st DCA 1985). This position was set forth in the dissent, with the dissenting opinion being adopted by the Florida Supreme Court in Irvine v Duval County Planning Committee, 495 So.2d 167 (Fla. 1986).

Section 286.011 requires public officials to disclose ex-parte communications in order to assure an adverse party the opportunity to confront, respond and rebut any such disclosures so as to prevent the appearance of impropriety, City of Hollywood v Hakanson, 866 So.2d 106 (Fla. 3rd DCA 2004). In this case, the prejudice is clear- the decision made by both commissioners Hansen and Mullins (who agreed with Hansen's observations) was based upon unknown discussions with third parties. Section 286 (c) 3 allows investigations to be conducted by commissioners if the investigation is disclosed prior to deliberations, which did not occur. For example, commissioner Hansen discounted HCA's expert's report based upon a visit to an unidentified boat storage facility on

a date not identified. There was no way for HCA to question this "investigation" since it was not raised until after the Board deliberations commenced.

The third prong of the analysis is to determine if the denial of the appeal by the Board was supported by competent and substantial evidence. As set forth in the statement of facts, the dry lift boat storage here is not an allowed use or a special exception use in the C-2 land use category for the Scenic A1A corridor. Like warehouses, boat sales and repairs are expressly prohibited uses in the C-2 zoning category in the Scenic A1A Overlay district. (A. 048) Furthermore, the Planning Director's original opinion referenced the existing building as the basis for his comparison, which is going to be demolished and replaced by a much larger building with significantly more parking (A. 020,044,051). The diagrams submitted show a 411% increase in the size of the building and a 447% increase in impervious area. (A. 020,043,052) The Planning Director's original decision was that the dry storage would be less intense than the previously approved yacht manufacturing facility, however he did not base his decision as to the permitted use on any specific citation to the zoning ordinances or any technical standards.

As stated in Marion County v. Priest, 786 So. 2d 623 (Fla. 5th DCA 2001):

> The Supreme Court of Florida has defined substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred." De Groot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957). For the "substantial" evidence to also constitute "competent" evidence, the evidence relied upon "should be sufficiently relevant and

> material that a reasonable mind would accept it as adequate to support the conclusion reached." Id.; see Irvine v. Duval County Planning Comm'n, 495 So.2d 167 (Fla. 1986). We hold that the circuit court departed from the essential requirements of law in improperly weighing the evidence and substituting its judgment for that of the County Commission.

In the present situation, the HCA is not requesting that this Court re-weigh the evidence as there is no competent substantial evidence to support the Board's decision. In fact the Board never addressed the zoning code or technical data in its deliberations or considered any technical evidence as to the intensity or nature of the proposed use in comparison to the prior use. The Planning Director, in his staff report to the Planning Board, and the Board completely ignored the limitations placed on the defunct boat manufacturing facility that made the use compatible with the neighboring properties. Consequently there is no evidence to re-weigh as the decision was not supported by any evidence whatsoever.

Non-existent evidence does not qualify as competent substantial evidence, which must be reasonable and logical, A&S Entertainment v Fla. Dept. of Revenue 44 Fla.L.Weekly 2341 (Fla.3rd DCA 2019), citing Wiggins v Fla. Dept. of Highway Safety & Motor Vehicles, 209 So.3rd 1165,1173 (Fla. 2017).

The Decision also overlooks the basic fact that the proposed use of boat storage is not related to boat manufacturing. As stated at the hearing, this is like saying that an automobile assembly plant is the same thing as an automotive

parking garage (T. 28). The proposed use is clearly a warehouse use as shown on the actual site plan submitted by the developer for calculating parking and also by the warehouse designation by the property appraiser's office. (A. 044, T 29,32) One commissioner acknowledged that if it's a warehouse, they can't approve it. (T. 47)

The next fatal flaw in the Board's decision is that the proposed use as a 240 boat storage space is not less intense than the prior boat manufacturing facility. As the assistant county attorney indicated at the outset of the hearing, the Planning Director determined that the dry boat storage is a related but less intense use than boat manufacturing as encapsulated in the zoning approval from 2000. There was no evidence provided by either the county or the developer to support this conclusion. As was established at the hearing before the commission, the use approved in 2000 was low intensity with a maximum of 12 employees building one boat per year. The unrebutted expert testimony provided by the HCA is that the actual data for traffic and Floor Area Ratio shows that the boat storage will be significantly more intense. This is the only competent substantial evidence provided on this issue. Even one commissioner admitted the dry boat storage would be more intense. (T. 47)

In conclusion, the Board of County Commissioners erred in denying the appeal filed by HCA. As set forth in section 163.3161, the county's zoning

regulations were implemented to guide and manage future growth and development in the county. The intended use is clearly a warehouse use, which, as established at the hearing, is prohibited by the code. In this situation, the Board ignored the regulations and made a decision based solely upon a perceived need for a certain land use and based upon an observation that a new building would look better than the old one. This Court is respectfully requested to issue a writ requiring the Board to file a response to this Petition.

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Florida Courts E-Filing Portal to the designated email addresses for the following this 3rd day of December, 2019.

Sean Moylan, Esq.
Assistant County Attorney
Flagler County Attorney's Office
1769 E. Moody Blvd., Bldg. 2
Bunnell, FL 32110-5991
Email: smoylan@flaglercounty.org

I HEREBY CERTIFY that the size and style of type used in the foregoing Petition is 14 point proportionally spaced Times New Roman.

Respectfully submitted,

BAYER LAW OFFICES

By: _____

DENNIS K. BAYER, ESQ.
Florida Bar Number: 0512737
109 South 6th Street
Flagler Beach, FL 32136
Telephone: (386) 439-2332
Facsimile: (386) 439-6522
dennis@bayerlegal.com
pleadings@bayerlegal.com
ATTORNEYS FOR PLAINTIFF