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

110 HOLLY AVE. CORPORATION, a Florida corporation, and FLAGLER BRIDGE BOATWORKS, & MARINA, INC., a Florida corporation,

Plaintiffs,

Case no.: 2010-CA-000456

v.

CITY OF FLAGLER BEACH, a Florida municipal corporation,

Defendant.
_____/

FINAL ORDER AND JUDGMENT

THIS CAUSE came before the Court to be heard on October 13, 2016 in the above-entitled action on a Motion for Summary Judgment, filed by Defendant City of Flagler Beach, pursuant to Florida Rule of Civil Procedure 1.510. Present and before the Court were Jay W. Livingston, Esq., attorney for Plaintiffs, and Dale A. Scott, Esq., attorney for Defendant. Upon considering the motion and memorandum of law, the memorandum of law in opposition, arguments at the hearing, the case file and admissible evidence therein including affidavits, the Court hereby finds and orders as follows:

I. UNDISPUTED FACTS

Plaintiff 110 Holly Ave. Corporation ("110 Holly"), is the owner of certain real property located in Flagler County, Florida located at 127-145 Lehigh Avenue, Flagler Beach, Florida, and more particularly described as: **Lots 1 through 7, inclusive, Block 84, FLAGLER HARBOR SUBDIVISION, according to the plat thereof, recorded in Map Book 3, Pages 37 through 38, of the Public Records of Flagler County, Florida ("Property").** *See*, paragraph 3 of the

Supplemental Affidavit of Howard Sklar. Plaintiff, Flagler Bridge Boatworks & Marina, Inc. leased the Property from 110 Holly. *See*, page 17 of the Transcript of the Deposition of Howard Sklar. Howard Sklar is the head of both companies.

The Property, which lies along the Florida Intercoastal Waterway, is located within the municipal limits of Defendant, The City of Flagler Beach ("City"). The Property is within the Tourist Commercial T/C Zoning District. *See*, Defendant's admission of paragraph 6 in answer to Fourth Amended Complaint. *Also see,* page 10 and 11 of the Transcript of the Deposition of Lawrence Torino.

110 Holly developed and constructed a marina ("Marina") on the Property. *See*, paragraphs 6 and 7 of the Affidavit of Howard Sklar. The marina currently has three "T" docks and 82 boat slips. In order for 110 Holly to develop the Property and construct the Marina it obtained the following permits and approvals:

a. City Permit # 97128 to pour concrete seawall panels onsite with no installation.

b. City Permit #97275 for the installation of the seawall and construction of a boat ramp.

c. City Permit #97301 for construction of fence around the Property.

d. Florida Department of Environmental Protection ("FDEP") Environmental Resource Permit #18-140599-001-EI to construct an 82-slip marina and perform navigational dredging ("Original FDEP Permit"), issued on February 18, 1999.

e. Department of the Army Permit # 1997-01994 (IP-JG) (the "Army Corp Permit") for the removal of 16 existing docks and boat slips, navigational dredging and construction of a new marina facility consisting of 82 boat slips.

f. The Original FDEP Permit was modified in 2005 by Permit Modification # 18-

140599-004-EM ("Modified FDEP permit"), which specifically restricted, *inter alia*, 50 slips of the 82 boat slips to be used solely for houseboats. The remaining 32 boat slips were to be used only for transient vessels.

g. City Permit # 2005080228 for construction of a slab for trash removal.

h. City Permit # 2006020027 for installation of electricity to the docks at the 82 Slip Marina.

i. City Permit #2011014 for a temporary sign for the boat works operation planned for the project site.

j. City Permit # 200548 to construct a restaurant shell. This permit was added to by City Permit #201104.

k. City Permit #8065 to rehabilitate and upgrade the building onsite that is used as an office.

l. City Permit #2005541 to remodel the buildings onsite to add an additional story, bathrooms and residence.

m. City Permit #201296 to install a construction trailer.

n. City Permit #8690 to tie down the trailer.

o. Site Plan Approval and City Permit #2008080009 for the sanitary sewer lines to the docks and to connect the water and sewer on the Property to the City's central systems.

See, paragraph 7 of the Supplemental Affidavit of Howard Sklar.

The City issued the permits described in Paragraphs (a) – (o) (the "City Permits") and did not object to the development and construction of the Marina. *See*, paragraph 15 of the Affidavit of Howard Sklar.

The Original FDEP Permit provides at Page 10, paragraph 19: "Each designated liveaboard slip will be provided with its own direct permanent sewage pump-out device. No liveaboard shall be allowed to dock at a slip without such a direct sewage pump-out device. All sewage pump-out devices shall be connected to an authorized sewage treatment system." The foregoing was not modified by the 2005 permit modification.

Plaintiffs first requested to connect the boat slips to the City's authorized sewage treatment system in 2001. *See*, paragraph 14 of the Affidavit of Howard Sklar. The City finally permitted the boat slips at the Marina to be connected to the City's authorized sewer treatment system in 2008. *Id.*

At his deposition, Timothy Norman of Mittauer and Associates, who were general consultants to the City from 2003 to 2009, testified that he had never dealt with a situation where it took seven years from the date of a user's request to connect to a central sewer system and that a reasonable time frame in a worst-case scenario, where a lot of testing is involved, would be one year. *See*, pages 5 and 18 of the Transcript of the Deposition of Timothy Norman.

In 2001 the City adopted Ordinance 2001-18 ("2001 Ordinance"), which prohibited living aboard watercraft in the City except at a duly licensed marina. All the docks and other improvements at the Marina were completed prior to the adoption of the 2001 Ordinance. *See*, paragraph 6 of the Affidavit of Howard Sklar.

In 2005, the City adopted Ordinance 2005-27 ("2005 Ordinance), which provided the following definition of "marina accessory uses":

> Marina Accessory uses – means uses normally ancillary and subordinate to a marina, including but not limited to: liveaboard facilities, if permitted, restaurants, gift shops, offices, self-service laundries, water taxi dockage and other commercial activities such as "ship's store," which shall be designed and situated within the marina facility to serve the boating Community.

Plaintiffs, in good faith reliance on the Original FDEP Permit as modified in 2005, the City Permits, the 2001 Ordinance, and the 2005 Ordinance, made a substantial change in position, in permitting, developing and constructing the Marina. *See*, paragraph 7 of the Affidavit of Howard Sklar.

In 2005, the Plaintiffs assembled and docked a 40' houseboat at the Marina. The 40' houseboat was assigned U.S. Coast Guard Hull Identification Number LLM00001G308. *See*, paragraphs 19 and 20 of the Affidavit of Howard Sklar.

In 2007, the Plaintiffs assembled and docked a 44' houseboat at the Marina. The 44' houseboat was assigned U.S. Coast Guard Hull Identification Number LLM00002G508. *See*, paragraphs 19 and 21 of the Affidavit of Howard Sklar.

The 40' and 44' houseboats (the "Existing Houseboats") are both registered as vessels with the State of Florida. *See*, paragraph 23 of the Affidavit of Howard Sklar. The City's position is that the houseboats are "floating structures," under section 327.02(13), Florida Statutes (2010).

The Existing Houseboats were designed by Eric W. Sponberg of Sponberg Yacht Design, Inc., who is a licensed Naval Architect. *See*, paragraph 22 of the Affidavit of Howard Sklar. *Also see generally*, Transcript of the Deposition of Eric W. Sponberg.

The Existing Houseboats are not permanently attached to land nor otherwise rendered incapable of being moved across the water or navigating inland waterways. *See*, paragraph 25 of the Affidavit of Howard Sklar. The "Existing Houseboats" are not primarily used as a means of transportation. The Existing Houseboats have no means of propulsion or steering.

Prior to 2009, Plaintiffs were also assembling small personal watercraft with hand tools from premanufactured components for retail sale at the Property. The City's Code Enforcement

Board determined that this activity constituted manufacturing, which was not a permitted use in the Tourist Commercial T/C Zoning District. Plaintiff, 110 Holly, filed a Petition for Certiorari in the Circuit Court of the Seventh Judicial Circuit, in and for Flagler County, Florida, Case No. 2009 AP 000003, challenging the decision of the City's Code Enforcement Board. The Circuit Court granted certiorari and found that the assembly of small personal watercraft from premanufactured components for retail sale was a permitted use at a marina within the Tourist Commercial T/C/ Zoning district.

On October, 8, 2009 the City adopted Ordinance 2009-17 (the "2009 Ordinance"). The 2009 Ordinance revised the City's Code of Ordinances to add additional regulations related to, *inter alia*, vessels, houseboats, liveaboard vessels, floating structures and marinas. The 2009 Ordinance also amended the City's Land Development Regulations pertaining to, *inter alia*, vessels, liveaboard vessels, houseboats, floating structures, and marinas.

The 2009 Ordinance only allows liveaboard vessels in the Tourist Commercial T/C Zoning District as a permitted special exception use requiring additional approval by the City Commission.

The 2009 Ordinance provides in a whereas clause on page 3 that "the density for liveaboard vessels shall be calculated by multiplying the total number of linear feet of shoreline of the upland property of an applicant by the length of the longest dock on the property, divided by 43,560 (which is the number of square feet in an acre), or fifty percent of the total number of wet slips on the property, whichever is less." Fifty percent of the wet slips at the Marina equals 41.

The 2009 Ordinance prohibits floating structures. *See*, page 15 of the 2009 Ordinance. The 2009 Ordinance prohibits anyone from constructing or to cause the construction of any

vessel except as permitted by the City's Land Development Regulations. *See*, page 7 of the 2009 Ordinance.

After Plaintiffs filed suit in 2010 the City amended the 2009 Ordinance by adopting Ordinance 2010-13, which by its own terms was intended to narrow the issues to be tried in litigation. Plaintiffs have never applied for a special exemption as contemplated by the 2009 and 2010 ordinances.

II. PROCEDURAL HISTORY

Plaintiffs filed suit on February 19, 2010. At issue before the Court is Plaintiffs' Fourth Amended Complaint ("FAC"), filed on November 14, 2012. The FAC has six counts: (1) Declaratory Judgment and Injunctive Relief, Express Preemption, for a declaration that the 2009 and 2010 ordinances are preempted by the Florida Statutes; (2) Declaratory Judgment and Injunctive Relief, Existing Vessels, for a declaration that the Existing Houseboats are legally vessels rather than floating structures; (3) Declaratory Judgment and Injunctive Relief, Vested Rights and Estoppel, for a declaration that Plaintiffs have vested rights preventing the City from enforcing the 2009 Ordinance against them; (4) Declaratory Judgment and Injunctive Relief, Lawful Non-conforming Uses, for a declaration that the uses in existence on the Property prior to the City's adoption of the Ordinance are lawful non-conforming uses that do not have to comply with the 2009 Ordinance; (5) Declaratory Judgment and Injunctive Relief, Assembly of Vessels, for a declaration that Plaintiffs were permitted to assemble and construct the Existing Houseboats when they were assembled and that the assembly and construction of houseboats on the Property is a permitted use or lawful non-conforming use that may continue; (6) Substantive Due Process, for a judgment against the City based on a violation of the Fifth Amendment of the

United States Constitution, as incorporated by the Fourteenth Amendment, for a violation of Plaintiffs' substantive due process rights.

The Court previously dismissed plaintiffs' regulatory takings / inverse condemnation and equal protection claims as asserted via earlier complaints. In 2015, the Court denied plaintiffs' motion for summary judgment as to Counts 1 through 5.

On April 13, 2016, defendant filed a Motion for Summary Judgment as to all remaining claims. A hearing on Defendant's motion was held on October 14, 2016.

III. LEGAL ANALYSIS

A. Summary judgment standard

This court has jurisdiction to declare the rights, status, and other equitable and legal relations between parties, including any question of construction or validity arising under a municipal ordinance pursuant to Chapter 86, *Florida Statutes* (the "Declaratory Judgment Act"). Section 86.011, *Florida Statutes*; Section 86.021, *Florida Statutes*; *East Naples Water System, Inc. v. Board of County Commissioners of Collier County*, 457 So.2d 1057, 1059 (Fla. 2nd DCA 1984).

The party seeking summary judgment must demonstrate "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fla. R. Civ. P. 1.510(c). Summary judgment may be granted where "the facts are so clear, crystallized, and undisputed that only questions of law remain." *Feagle v. Purvis*, 891 So.2d 1096, 1098 (Fla. 5th DCA 2004) (citation omitted). "Once the moving party meets its burden, then the party opposing entry of a summary judgment must prove the existence of genuine triable issues." *First N. Am. Nat. Bank v. Hummel*, 825 So.2d 502, 503 (Fla. 2nd DCA 2002) (citing *Holl v. Talcott*, 191 So.2d 40, 43-44 (Fla. 1966)). "However, the 'issue' must be one of *material* fact. Issues of

nonmaterial facts are irrelevant to the summary judgment determination." *Continental Concrete, Inc. v. Lakes at La Paz III Ltd. P'ship*, 758 So. 2d 1214, 1217 (Fla. 4th DCA 2000) (emphasis in original) (citing Fla. R. Civ. P. 1.510(c)). "A material fact, for summary judgment purposes, is a fact that is essential to the resolution of the legal questions raised in the case." *Id.* (citation omitted).

When only one party has moved for summary judgment, this court, in the absence of a timely and meritorious objection, can dispose of the whole matter by granting judgment to either party if it finds that the facts as properly construed against the prevailing party show that it is entitled to summary judgment as a matter of law. *Carpineta v. Shields*, 70 So.2d 573, 574 (Fla. 1954); *R&L Construction, Inc. v. Cullen*, 557 So.2d 931 (Fla. 5th DCA 1990); *Prince v. McLaughlin*, 431 So.2d 276 (Fla. 5th DCA 1983); *Glatstein v. City of Miami*, 399 So.2d 1005 (Fla. 3d DCA 1981).

B. The City's Ripeness Arguments

The City claims that Counts 1 through 5 are not ripe for review. However, these counts are all actions for declaratory judgments pursuant to section 86.011 and 86.021, Florida Statutes. The Court agrees with the Plaintiffs, as argued in their memorandum of law in opposition: "there is no authority to apply the principal of ripeness to an action for declaratory judgment under Chapter 86, Florida Statutes, the Declaratory Judgment Act." Memorandum of Law in Opposition at p. 1-3, *citing Angelo's Aggregate Materials, Ltd. v. Pasco Cnty*, 118 So. 3d 971, 973 (Fla. 2d DCA 2013). Therefore, the Court finds no merit in Defendant's ripeness arguments.

C. Count 1

Count 1 requests that the Court declare that Ordinances 2009-17 and 2010-13 are expressly preempted by section 327.40, Florida Statutes, because the ordinances apply to vessels

that are within the Intercoastal Waterway. In its Motion for Summary Judgment, the City argued that Count 1 is not ripe for judicial consideration because Plaintiffs had not yet filed an application for a special exemption and been denied; that section 327.60, Florida Statutes (2010) explicitly allows for local regulation of floating structures or liveaboard vessels; and that Count 1 is moot because the 2009 Ordinance was amended by the 2010 Ordinance so that it would "not run afoul of state law."

As discussed below, the Court finds the City is entitled to summary judgment as to Count 1 as a matter of law because the City Ordinances are not preempted by Florida Statutes. The Court finds no merit in the City's arguments regarding ripeness and mootness.

Ordinance 2009-17 amended Chapter 22 of the City Code. Among other things, Ordinance 2009-17 relates to the City's "regulation of vessels, floating structures, and marinas adjacent to and within the waters of Flagler Beach[.]" (Defendant's Ex. 13, p. 1). Ordinance 2010-13 further amended Chapter 22 of the City Code, and provides "limitations to [the City's] regulations of vessels upon the Florida Intercoastal Waterway[.]" (Defendant's Ex. 14, p. 1). The City Code, as amended by Ordinances 2009-17 and 2010-13, allows "liveaboard vessels" in the Tourist Commercial District by special exception. (Defendant's Ex. 2, p. 5; Defendant's Ex. 13, p. 3). Plaintiffs believe these ordinances wrongfully require them to acquire a special exception from the City "before liveaboard vessels are permitted to be at the Marina." (FAC, ¶ 15, 114).

In pertinent part, section 327.60 provides:

> (1) The provisions of this chapter and chapter 328 shall govern the operation, equipment, and all other matters relating thereto whenever *any vessel* shall be operated upon the waters of this state or when any activity regulated hereby shall take place thereon.

(2) *Nothing in this chapter or chapter 328 shall be construed to prevent the adoption of any ordinance or local regulation relating to operation of vessels, except that a county or municipality shall not enact, continue in effect, or enforce any ordinance or local regulation*:

. . .

(c) Regulating *any vessel* upon the Florida Intracoastal Waterway;

. . .

(3) *Nothing in this section shall be construed to prohibit local governmental authorities from the enactment or enforcement of regulations which prohibit or restrict the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions* or of any vessels within the marked boundaries of mooring fields permitted as provided in s. 327.40. However, local governmental authorities are prohibited from regulating the anchoring outside of such mooring fields of vessels other than live-aboard vessels as defined in s. 327.02.

(Emphasis added).[1]

The City argues the language of § 327.60, *Fla. Stat.*, explicitly allows for local regulation of floating structures and live-aboard vessels.

Local governments are prohibited from enacting ordinances that infringe on areas preempted by state law. *See City of Orlando v. Udowychenko*, 98 So.3d 589, 595 (Fla. 5th DCA 2012). "Preemption of local ordinances by state law may, of course, be accomplished by express preemption—that is, by a statutory provision stating that a particular subject is preempted by state law or that local ordinances on a particular subject are precluded." *Masone v. City of Aventura*, 147 So. 3d 492, 495 (Fla. 2014).

[1] A "live-aboard vessel" is defined as "(a) A vessel used solely as a residence and not for navigation; (b) A vessel represented as a place of business or a professional or other commercial enterprise; or (c) A vessel for which a declaration of domicile has been filed pursuant to s. 222.17." § 327.02(19), *Fla. Stat.* A "live-aboard vessel" is a kind of "floating structure." *See* § 327.02(13); § 327.02(19).

The structure of § 327.60 is clear. Local authorities may not regulate the "operation of vessels" upon the Intracoastal Waterway. § 327.60(2), Fla. Stat. (2010). However, they may regulate "the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions[.]" § 327.60(3), Fla. Stat. (2010). Ordinance 2009-17 explicitly regulates houseboats, floating structure, and liveaboard vessels.[2] Thus, § 327.60 does not preempt Ordinance 2009-17. To the contrary, it explicitly allows for the type of local regulation which Ordinance 2009-17 accomplishes.

At the hearing on October 13, 2016, plaintiffs focused on the language under § 327.60(3) which provides that a local authority may "restrict the mooring or anchoring... of any vessels within the marked boundaries of mooring fields[.]" However, this is *one of two* areas or local regulation specifically contemplated under § 327.60(3). The other area is implicated here: "regulations which prohibit or restrict the mooring or anchoring of floating structures or live-aboard vessels within their jurisdictions[.]" *Id.*

Therefore, it is clear from the plain language of section 327.60(3) that the City's 2009 Ordinance is not preempted by that section of the Florida Statutes, and the Court finds that the City is entitled to summary judgment as a matter of law as to Count 1.

D. Count 2

In Count 2, Plaintiffs requests that the Court entered a judgment declaring the Existing Houseboats are vessels as opposed to floating structures, as those terms are defined by Florida Statutes. (FAC, ¶ 108). The City argues the claim under Count 2 is not ripe and is moot, and

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[2] As discussed below, plaintiffs' structures, i.e., the "Existing Houseboats," are not "vessels," and are "floating structures or live-aboard vessels." *See* § 327.02; § 327.60, *Fla. Stat.* It is undisputed that the area where plaintiffs moor their structures, or might seek to moor similar structures in the future, is within the City's jurisdiction—immediately next to the shore along the Intracoastal Waterway.

that under § 327.02, *Fla. Stat.* ("Definitions"), the "Existing Houseboats" are in fact "floating structures," and not "vessels."

The Court finds the City is entitled to summary judgment as to Count 2 because no genuine issue of material fact exists as to the characteristics of the Existing Houseboats, and the Existing Houseboats are "floating structures" as a matter of law. The Court find no merit the City's arguments regarding ripeness and mootness.

Under § 327.02(43), a "vessel" is defined as being "synonymous with boat as referenced in s. 1(b), Art. VII of the State Constitution and includes every description of watercraft, barge, and airboat, other than a seaplane on the water, *used or capable of being used as a means of transportation on water*." (Emphasis added). A "floating structure" is excluded from this definition, and is defined as:

> [A] floating entity, with or without accommodations built thereon, *which is not primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property.* The term includes, but is not limited to, an entity *used as a residence*, place of business or office with public access... *Floating structures are expressly excluded from the definition of the term "vessel" provided in this section.* Incidental movement upon water or resting partially or entirely on the bottom does not, in and of itself, preclude an entity from classification as a floating structure.
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> § 327.02(13) (emphasis added).

The question is whether the "Existing Houseboats" are "primarily used as a means of transportation on water but which serves purposes or provides services typically associated with a structure or other improvement to real property." Plaintiffs do not claim, nor have they submitted evidence to support an argument, that these "Existing Houseboats" are primarily used as a means of transportation. Notably, Plaintiffs do not claim any means of propulsion or steering are affixed to these structures, so as to indicate they might be "primarily used as a means

of transportation[.]" And, the fact that these structures may have been designed by a naval architect or have hull identification numbers is of no consequence vis-à-vis § 327.02. (FAC, ¶ 87-88).

Previously, Plaintiffs argued the "houseboats are *capable of* movement across the water whether either by self-propulsion of (sic) under tow[,]" and therefore are vessels. (Plaintiffs' Mot. for Partial Summary Judgment, p. 6, emphasis added). Plaintiffs repeated this argument at the summary judgment hearing on October 13, 2016. This "capable of" language is a nod to the "vessel" definition, but avoids the question of whether the "floating structure" definition applies. Nonetheless, this "capable of" claim is of little consequence; any floating object is capable of being towed, or having an engine bolted to it so as to ostensibly "move[ ] across the water... by self-propulsion[.]" This does not address the question of whether the object is primarily used as a means of transportation. As these "Existing Houseboats" exist, they do not have equipment necessary to allow them to be used for transportation, or other equipment which would be indicative of a transportation "vessel," as confirmed by Eric Sponberg, the naval architect hired by Sklar to design and build the "Existing Houseboats." For example, they lack engines, steering apparatus, are flat-bottomed, and lack internal electric storage / generation equipment. (Defendant's Ex. 10, Dep. E. Sponberg, p. 15-16).

In 2013, the U.S. Supreme Court considered the definition of "vessels" in a case which originated in Florida. *Lozman v. City of Riviera Beach, Fla.*, 133 S.Ct. 735 (2013). At issue was the definition of "vessel" under The Rules of Construction Act, 1 U.S.C. § 3, which is substantively identical to the "vessel" definition under § 327.02(43). The *Lozman* floating home was described as: "[A] 60–foot by 12–foot floating home... a house-like plywood structure with French doors on three sides... It contained a sitting room, bedroom, closet, bathroom, and

kitchen, along with a stairway leading to a second level with office space... An empty bilge space underneath the main floor kept it afloat." *Id.* at 739. The issue in *Lozman* was framed as:

> The Rules of Construction Act defines a 'vessel' as including "every description of watercraft or other artificial contrivance *used, or capable of being used, as a means of transportation on water*." 1 U.S.C. § 3. The question before us is whether petitioner's floating home (which is not self-propelled) falls within the terms of that definition.
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> *Id.* at 739 (emphasis added).

The District Court found the floating home at issue was a "vessel," and thus concluded admiralty jurisdiction was proper. This was key since "maritime jurisprudence excludes from vessel status those floating structures that, based on their physical characteristics, do not 'transport people, freight, or cargo from place to place' as one of their purposes." *Id.* at 750. The District Court then found for the City on the admiralty claim in the case. The Eleventh Circuit affirmed. In its view, the home was "capable" of movement over water and the owner's subjective intent to remain moored "indefinitely" could not show the contrary. *Id.* at 739-40.

The U.S. Supreme Court reversed on the issue of whether the subject floating home was a "vessel." The Court "focus[ed] primarily upon the phrase 'capable of being used.' " *Id.* It found this "term encompasses 'practical' possibilities, not 'merely... theoretical' ones." *Id.* (citation omitted). The Court concluded: "We believe that a reasonable observer, looking to the home's physical characteristics and activities, would not consider it to be designed to any practical degree for carrying people or things on water. And we consequently conclude that the floating home is not a 'vessel.' " *Id.* The court's reasoning applies equally here:

> But the Eleventh Circuit's interpretation is too broad. Not *every* floating structure is a "vessel." To state the obvious, a wooden washtub, a plastic dishpan, a swimming platform on pontoons, a large fishing net, a door taken off its hinges, or Pinocchio (when inside the whale) are not "vessels," even if they are "artificial contrivance[s]" capable of floating, moving under tow, and incidentally carrying even a fair-sized item or two when they do so. Rather, the statute applies to an

"artificial contrivance ... capable of being used ... *as a means of transportation on water*." 1 U.S.C. § 3 (emphasis added). "[T]ransportation" involves the "conveyance (of things or persons) from one place to another." 18 Oxford English Dictionary 424 (2d ed. 1989) (OED). Accord, N. Webster, An American Dictionary of the English Language 1406 (C. Goodrich & N. Porter eds. 1873) ("[t]he act of transporting, carrying, or conveying from one place to another"). And we must apply this definition in a "practical," not a "theoretical," way. *Stewart, supra*, at 496, 125 S.Ct. 1118. Consequently, in our view a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water. ...

Though our criterion is general, the facts of this case illustrate more specifically what we have in mind. But for the fact that it floats, nothing about Lozman's home suggests that it was designed to any practical degree to transport persons or things over water. It had no rudder or other steering mechanism. 649 F.3d, at 1269. Its hull was unraked, *ibid.*, and it had a rectangular bottom 10 inches below the water. Brief for Petitioner 27; App. 37. It had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land. *Id.*, at 40. Its small rooms looked like ordinary nonmaritime living quarters. And those inside those rooms looked out upon the world, not through watertight portholes, but through French doors or ordinary windows. *Id.*, at 44–66.

Although lack of self-propulsion is not dispositive, *e.g.*, *The Robert W. Parsons*, 191 U.S. 17, 31, 24 S.Ct. 8, 48 L.Ed. 73 (1903), it may be a relevant physical characteristic. And Lozman's home differs significantly from an ordinary houseboat in that it has no ability to propel itself. Cf. 33 CFR § 173.3 (2012) ("Houseboat means a *motorized* vessel... designed primarily for multi-purpose accommodation spaces with low freeboard and little or no foredeck or cockpit" (emphasis added)). Lozman's home was able to travel over water only by being towed. Prior to its arrest, that home's travel by tow over water took place on only four occasions over a period of seven years. *Supra*, at 739. And when the home was towed a significant distance in 2006, the towing company had a second boat follow behind to prevent the home from swinging dangerously from side to side. App. 104.

The home has no other feature that might suggest a design to transport over water anything other than its own furnishings and related personal effects. In a word, we can find nothing about the home that could lead a reasonable observer to consider it designed to a practical degree for "transportation on water."

Id. at 740-41 (emphasis in original).

Based on the foregoing, the Court finds that the structures as described in the *Lozman* case are similar to the Existing Houseboats in this case. Moreover, the manufacturer specifically refers to them as "floating homes," and states "[t]hese homes are not 'houseboats' in the strictest sense," as they do not have "installed propulsion power." (Defendant's Ex. 4, p. 1-2; Defendant's Ex. 9, p. 97). Rather, "[t]hey are simply houses that float." (Id.). The manufacturer describes the structures as "great primary homes, second homes, or an office away from home[,]" and boasts "[t]his is a most affordable means for on-the-water living." (Defendant's Ex. 4, p. 2; Defendant's Ex. 9, p. 98). Nowhere does the manufacturer describe the "floating homes" in terms of water transportation, which would be impossible considering the lack of propulsion and steering. During Sponberg's deposition, he further confirmed these structures: have bedrooms, living room areas, kitchens, and sliding doors; were constructed with sheetrock walls; are merely as watertight "as any normal house," and lack watertight windows; and unlike ocean-going vessels, have off-the-shelf windows which are available at a hardware store. (Defendant's Ex. 10, 17-18).

The Court finds that there is no evidence to suggest the structures at issue are "vessels" under § 327.02. They are "floating structures" which "serve[ ] purposes or provide[ ] services typically associated with a structure or other improvement to real property," i.e., "a residence." Therefore, Defendant is entitled to summary judgment as a matter of law on Count 2.

E. Count 3

In Count 3, Plaintiffs request that the Court enter a judgment declaring that Plaintiff 110 Holly has vested rights to develop the Property and Marina, and that the doctrine of equitable estoppel prevents the City from enforcing the 2009 Ordinance against the Plaintiffs to the extent that the ordinance interferes with Plaintiff Holly's vested rights.

In its Motion for Summary Judgment, the City argues that Count 3 is not ripe for judicial consideration; Count 3 is not based upon any permits or assurances by the City, an undisputed fact; and Count 3 fails due to the timing because the property was purchased before the listed permits and the 2009 Ordinance was passed after the permits had expired.

The Court finds that Plaintiffs are entitled to summary judgment as a matter of law as to Count 3.

Plaintiffs have stated a cause of action for declaratory relief pursuant to the Declaratory Judgment Act. The use of a declaratory judgment to determine if a party obtained vested rights under a prior land use regulation is proper even if the party has not exhausted its administrative remedies. *Angelo's Aggregate Materials, LTD v. Pasco County*, 118 So.3d 971, 976 (Fla. 2d DCA 2013).

Florida common law provides that vested rights may be established if a property owner has (1) in good faith reliance, (2) upon some act or omission of government, (3) made such a substantial change in position or has incurred such extensive obligations and expenses, (4) that it would make it highly inequitable to interfere with the acquired right. *Monroe County v. Ambrose*, 866 So.2d 707, 710 (Fla. 3d DCA 2003); *also see*, *Hollywood Beach Hotel Co. v. City of Hollywood*, 329 So.2d 10 (Fla. 1976); *Salkolsky v. City of Coral Gables*, 151 So.2d 433 (Fla. 1963).

The uncontroverted evidence presented demonstrates that the Plaintiffs obtained all necessary City, State, and Federal permits and approvals to develop the Property and the Marina. In doing so, the Plaintiffs, in good faith reliance on the 2001 Ordinance, the 2005 Ordinance and the permits and approvals, including, without limitation, the permits issued by the City to connect electrical power and central water and sewer to the docks, made a substantial change in

position and incurred extensive obligations and expenses. Defendant's motion makes no argument as to the permits issued by the City.

The Marina was fully constructed and completed prior to the adoption of the 2009 Ordinance. Therefore, it would be inequitable to interfere with the vested rights acquired by the Plaintiffs prior to the adoption of the 2009 Ordinance.

The Court declares that the Plaintiffs have vested and grandfathered rights to utilize and operate the Property and the Marina consistent with the rights and obligations set forth in the Original FDEP Permit as revised by the Modified FDEP Permit, as more fully set forth therein. These rights, include, without limitation, the right to utilize 50 slips of the 82 slips for houseboats or liveaboard vessels, and the remaining 32 slips for transient vessels. The City is therefore equitably estopped from enforcing the 2009 Ordinance as amended by the 2010 Ordinance against the Plaintiffs at the Property and the Marina.

F. Count 4

In Count 4, Plaintiffs request that the Court enter a judgment declaring that the uses in existence on the Property prior to the City's adoption of the Ordinance are lawful nonconforming uses and that those uses do not have to comply with the 2009 Ordinance, as amended by the 2010 Ordinance. The City argues this count does not present a ripe claim, there was no use of the "Existing Houseboats" to establish a non-conforming use, and any use to the extent there was any use, ended long ago.

Plaintiffs have stated a cause of action for declaratory relief pursuant to the Declaratory Judgment Act. The Court finds that Plaintiffs are entitled to summary judgement as a matter of law as to Count 4.

The 40' houseboat and the 44' houseboat were moored at the Marina prior to the adopted of the 2009 Ordinance. Prior to the adoption of the 2009 Ordinance, the City permitted liveaboard vessels in particular zoning districts. Therefore, prior to the City's adoption of the 2009 Ordinance the 40' houseboat and the 44' houseboat were permitted at the Marina. When the 2009 Ordinance was adopted, the 40' houseboat and the 44' houseboat became lawful, non-conforming grandfathered uses that do not have to comply with the ordinance.

The Court is unpersuaded by the City's legal argument regarding "abandonment" of the properties. Use of the Existing Houseboats was stymied by, *inter alia*, the City's interference with Plaintiffs' efforts to connect the marina to City sewer service.

The Court finds that there is no material issue of fact in dispute in Ground 4, and the Plaintiffs have established a pre-existing, lawful use of the property when the 2009 and 2010 Ordinances were adopted. Thus, Plaintiffs shall be granted summary judgment as a matter of law, and the Court declares that the uses in existence on the Property prior to the City's adoption of the Ordinance are lawful nonconforming uses and that those uses do not have to comply with the 2009 Ordinance, as amended by the 2010 Ordinance.

G. Count 5

In Count 5, Plaintiffs seek a declaration that they were permitted to assemble and construct the Existing Houseboats when they were assembled, and that the assembly and construction of houseboats on the Property is a permitted use or lawful non-conforming use that may continue. The City argues Count 5 is not ripe, and the prior writ of certiorari case did not concern houseboats construction, and therefore cannot serve as the basis for any claim that the "assembly and construction of houseboats on the Property is a permitted use and nonconforming use."

Under Count 5, Plaintiffs seek a declaration that the "assembly and construction of houseboats on the Property is a permitted use and nonconforming use that can continue[.]" (FAC, p. 29, "wherefore" paragraph). They allege, at some point in the past, they "were assembling small personal watercraft with hand tools from premanufactured components for retail sale on the Property." (FAC, ¶ 133). They claim the City cited them "for improperly manufacturing boats in the Tourists Commercial zoning district, which does not allow manufacturing as a permitted use." (Id., ¶ 134). Plaintiffs ultimately filed a petition for writ of certiorari in circuit court, case no. 2009-AP-000003, and claim the court "granted certiorari and found that the assembly of small personal watercraft with hand tools from premanufactured components for retail sale was a permitted use at a marina within the Tourist Commercial zoning district." (Id., ¶ 135-36).

Summary judgment as a matter of law to Count 5 is granted in part to the City, and granted in part to the Plaintiffs. The Court finds that the assembly of boats at the Marina is a lawful, pre-existing and non-conforming use; however, the construction of boats, i.e., the creating and building of a boat from scratch or parts made on-site, is not.

The Court is unpersuaded by the City's legal argument that Plaintiffs are relying on case number 2009-AP-000006 to establish the rights to assemble watercraft at the Marina. Instead, the Court views this case as factual evidence of the Plaintiffs' pre-existing, lawful use of the property, to wit, the assembly of boats at the Marina.

Prior to the adoption of the 2009 Ordinance there were no provisions in the City's Code of Ordinances or its Land Development Regulations prohibiting the assembly of vessels, including houseboats substantially similar to the 40' houseboat and the 44' houseboat. Therefore, Plaintiff is entitled to summary judgment as a matter of law. The Court declares that

the assembly of small personal watercraft and vessels from premanufactured components for retail sale that are substantially similar to the 40' houseboat and the 44' houseboat is a use that may continue on and at the Property and at the Marina as lawful, nonconforming grandfathered uses.

H. Count 6

In Count 6, Plaintiffs allege that the City violated their substantive due process rights by refusing to recognize Plaintiffs' vested rights in the Marina and the Property, an act that was arbitrary, capricious, and unreasonable. Count 6 targets the City's supposed interference with Plaintiffs' efforts to connect the marina to City sewer service, and the City's passage of Ordinance 2009-17. Plaintiffs believe the City's actions amount to a constitutional violation. The City argues Count 6 is not ripe to the extent it concerns Ordinance 2009-17, and that otherwise summary judgment is due in its favor under controlling law. As discussed below, the Court finds the City is entitled to summary judgment as to Count 6.

"The substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is, rights that are 'implicit in the concept of ordered liberty.' " *McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)). Fundamental rights are those rights created by the Constitution. *DeKalb Stone, Inc. v. Cty. of DeKalb, Ga.*, 106 F.3d 956, 959 n. 6 (11th Cir. 1997). "Property interests, of course, are not created by the Constitution[, but rather] ... by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972). "As a result, there is generally no substantive due process protection for state-created property rights." *Kentner v. City of Sanibel*, 750 F.3d 1274, 1280 (11th Cir. 2014).

There is an exception to the general rule that there are no substantive due process claims for non-fundamental rights. Where a person's state-created rights are infringed by a "legislative act," the substantive component generally protects that person from arbitrary and irrational governmental action. *Kentner*, 750 F.3d at 1280 (citing *Lewis v. Brown*, 409 F.3d 1271, 1273 (11th Cir. 2005)). In this respect:

> The legislative nature of the act is key. "[N]on-legislative," or executive, "deprivations of state-created rights, which would include land-use rights, cannot support a substantive due process claim, not even if the plaintiff alleges that the government acted arbitrarily and irrationally. Constitutional due process is satisfied for these deprivations when proper procedures are employed."
>
> *Lewis*, 409 F.3d at 1273 (citations omitted).

There is no dispositive test to determine which actions are executive versus legislative, because local governing bodies often do both. *Id.* "Executive acts typically arise from the ministerial or administrative activities of the executive branch and characteristically apply to a limited number of people, often just one." *McKinney*, 20 F.3d at 1557 n. 9 (citations omitted). This includes employment terminations or individual acts of zoning enforcement. *Id.* "Legislative acts, on the other hand, generally apply to a larger segment of—if not all of—society." *Id.* "[L]aws and broad-ranging executive regulations are the most common examples." *Id.* A legislative act also involves policy-making rather than mere administrative application of existing policies. *DeKalb Stone*, 106 F.3d at 959.

In *Lewis*, the question was whether the government decision was a legislative or executive act. *Id.* at 1272-73. The Eleventh Circuit held the local government's denial of a request to re-zone the plaintiffs' property was "a textbook 'executive act' " as it affected only a limited number of people, namely the plaintiffs in that case. *Id.* As a result, the denial of the request could not form the basis of a substantive due process claim. *Id.* The Eleventh Circuit

reached a similar decision in *Flagship Lake Cty. Dev. No. 5, LLC v. City of Mascotte, Fla.*, 559 F. App'x 811, 816 (11th Cir. 2014) ("The City's decision was a 'textbook executive act' because it affected only Flagship."); *see also Bd. of Cty. Comm'rs v. Snyder*, 627 So.2d 469, 471 (Fla. 1993) ("[U]nlike initial zoning enactments and comprehensive rezonings or rezonings affecting a large portion of the public, a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities is quasi-judicial in nature.").

The Court finds that the actions of the City as to supposedly hindering Plaintiffs' effort to connect to City sewage were clearly "executive acts." *City of Pompano Beach v. Yardarm Restaurant, Inc.*, 834 So.2d 861 (Fla. 4th DCA 2002) is particular applicable here. In *Yardarm* the trial court determined city officials engaged in various activities designed to thwart a restaurant development:

> Specifically, the court determined that the City engaged in unreasonable, protracted litigation; repeatedly ignored court orders to apply the February 14, 1974 regulations to Yardarm's permit applications; and engaged in stonewalling tactics to block the Yardarm project. The court set out in detail the actions taken by various City officials and employees on Yardarm's building permits and special exception. In concluding that these actions represented an official policy, custom, or practice of the City, the court noted the testimony of a City Commissioner, Emma Lou Olsen, that, several commissioners had an "unstated policy to kill the Yardarm project." In addition, the court referred to testimony concerning secret meetings between two commissioners held on Sunday mornings to discuss Yardarm, testimony that certain City officials directed and/or interfered with the activities of the Building Official, and interoffice memos between non-elected City officials concerning plans to repeal the 18-story special exception.
>
> *Id.* at 868-69 (footnote omitted).
>
> The acts complained of consisted of delays in issuing building permits, wrongful revocation of building permits, delays in B-2 Reviews, and an attempted repeal of a special exception.
>
> *Id.* at 870.

Pompano Beach argued that, even assuming these acts occurred, the asserted substantive due process claim must fail as a matter of law, because no evidence was presented that the acts were done in a legislative, rather than an executive capacity. The Fourth District Court of Appeal agreed: "[W]e conclude that Yardarm failed to establish that the acts for which it claimed damages were legislative, rather than executive acts. The evidence shows that these acts were done by various City employees and administrators applying existing rules and ordinances specifically to Yardarm, not by the Commission as a body enacting legislation and policy decisions affecting the general public." *Id.* at 869.

The City's alleged acts here, as to Plaintiffs' efforts to connect to City sewer service, were taken by City employees, and applied only to the marina. (FAC, ¶ 143-158). Therefore, these alleged acts were "executive acts," and substantive due process protections do not apply.

As to the passage of Ordinance 2009-17, the Court finds that this is a legislative act because, although Plaintiffs allege they operate the *only* marina in Flagler Beach, the 2009 Ordinance regulated all marinas in Flagler Beach, including any future marinas. Therefore, the Court is to review such act under the "rational basis" standard:

> Under this test, a court gives great deference to economic and social legislation. *See Gary v. City of Warner Robins, Ga.*, 311 F.3d 1334, 1339 (11th Cir. 2002). The first step in determining whether legislation survives the rational basis test is identifying a legitimate government purpose which the governing body could have been pursuing. *See Restigouche*, 59 F.3d at 1214. The second step of the rational basis test asks whether a rational basis exists for the enacting government body to believe that the legislation would further the hypothesized purpose. *See id.* The proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis is actually considered by the legislative body. *See id.* The rational basis standard is highly deferential. *See Gary*, 311 F.3d at 1339.
>
> A court should not set aside the determination of public officers in land use matters unless it is clear that their action has no foundation in reason and is a mere arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense. *See Smithfield Concerned Citizens for Fair Zoning v. Town of*

> *Smithfield*, 907 F.2d 239, 243 (1st Cir. 1990). The question is only whether a rational relationship exists between the ordinance and a conceivable legitimate governmental objective. *See id.* at 245. If the question is at least debatable, there is no substantive due process violation. *See FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 174 (5th Cir. 1996).
>
> *WCI Communities, Inc. v. City of Coral Springs*, 885 So.2d 912, 914 (Fla. 4th DCA 2004).

Ordinance 2009-17 satisfies the "rational basis" standard. First, the "legitimate government purpose which the [City] could have been pursuing" is clear. The basis for the ordinance is stated in one of the "whereas" clauses:

> [H]ouseboats and floating structures, which are not self-propelled and are difficult to navigate, are a threat to the public health, safety, and welfare of the citizens when they are tied or docked within the City limits because, during wind events, tropical storms, or hurricanes, houseboats and floating structures which are not self-propelled are left unattended and break free, causing damage to docks and nearby properties.
>
> (Defendant's Ex. 13, p. 2).

A similar purpose is stated later in the ordinance: "It is the intent of the City Commission to regulate and restrict placement and maintenance of vessels and floating structures within Flagler Beach for the health, safety, and welfare of the City." (Defendant's Ex. 13, p. 5).

The next step involves examining whether a "rational basis exists for the [City] to believe that the legislation would further the hypothesized purpose." *WCI Communities*, 885 So.2d at 914. Judged against the purpose of Ordinance 2009-17, the amendments and restrictions offered therein directly address health, safety, and welfare concerns over "houseboats and floating structures." Plaintiffs take exception with the wisdom of the changes made via Ordinance 2009-17, or believe such changes unfairly impact their financial interest. But, the rational basis standard is "highly deferential," and "[i]f the question is at least debatable, there is no substantive due process violation." *WCI Communities*, 885 So.2d at 914; *see also Petroplex Int'l*

v. St. James Par., 158 F. Supp. 3d 537 (E.D. La. 2016) ("Rational basis review is an extremely lenient standard of review; therefore, '[a]ttacks against zoning ordinances under this test are rarely successful.' " (citation omitted)). Here, the "question is at least debatable," and therefore the Court cannot find a substantive due process violation. Based on the foregoing, the Court finds that Defendant is entitled to summary judgment as a matter of law as to Count 6.

IV. Conclusion

Consistent with the forgoing analysis, it is hereby **ORDERED AND ADJUDGED** that Defendant City of Flagler Beach's Motion for Summary Judgment is **GRANTED** as to Plaintiffs' Fourth Amended Complaint Counts 1, 2, in part 5, and 6.

It is further **ORDERED AND ADJUDGED** that Plaintiffs are entitled to summary judgment as a matter of law, and summary judgment is **GRANTED** as to Counts 3, 4, and in part Count 5.

Having granted summary judgment as to all pending claims, the Court now enters this Final Judgment. The Court reserves jurisdiction to tax attorney's fees and costs as may be appropriate.

DONE and ORDERED in Chambers in Bunnell, Flagler County, this 15th day of November, 2016.

CLERK OF CIRCUIT COURT & COMPTROLLER SUUM CUIQUE FLAGLER COUNTY

SCOTT C. DUPONT
CIRCUIT JUDGE

11/15/2016 1:29 PM 2010 CA
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