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Board Certified in City, County and Local Government Law

January 23, 2012

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Re: Upper Captiva Marina and Boat Storage Building CPD : Application No. DCI2011-00023

Dear Lee County:

On behalf of William Powell an adjoining property and homeowner to the proposed Dry Rack Boat Storage Building and Marina Commercial Planned Development located on Upper (North) Captiva Island, Lee County, Florida, please find and consider these preliminary concerns and objections related to the above referenced proposed Upper Captiva Marina and Dry Dock Storage Commercial Planned Development application.

1. The proposed dry storage facility, fueling facility and dredging of Safety Harbor for a new or expanded marina is not consistent with Goal 25

“GOAL 25: NORTH CAPTIVA (Upper Captiva). The North Captiva Community seeks to preserve its character, scale, fragile environment, and way of life by guiding future land use; transportation and roads; conservation and coastal management; Safety Harbor; shore and water quality, water and waste management; open space, recreation, and quality of life; and citizen participation and community education.”

And:

“OBJECTIVE 25.1: FUTURE LAND USE. Preserve the traditional character, scale, and tranquility of the North Captiva community by continuing to limit the densities and intensities of use and development to sustainable levels that will not adversely impact the natural environment or overburden the existing infrastructure.”

2. The proposed Dry Storage Facility is not compatible with adjacent residential uses to the south and west of the proposed building, which would be the largest structure and building on Upper Captiva.

3. The building's height reflects the economic desire of the applicant to have an additional third (3rd) row of dry dock boat storage (10' + 10' + 8' plus ground and ceiling clearance). However in order to minimize incompatibility with the surrounding uses, the building height should be reduced as a

condition of approval by removing the third row of dry storage rack to minimize height required for the project in an effort to both :

- a. decrease or minimize incompatibility and
- b. maximize the ability of fire district to respond to fire with Upper Captiva's existing fire truck.

4. The proposed Dry Boat Rack and Fuel Pump Station will be the biggest single and most dangerous fire hazard on Upper Captiva Island which is served by a limited fire district with containment only ability should the facility experience a fire there is a danger that fire could spread to adjacent nearby residences, and no public water supply exists on the island, which relies upon surface water pumps for fire containment. After Hurricane Charley the island was without power for 6 weeks.

The approved CPD site plan for Grady's Lodge showed a 20ft type 'D' buffer, in order to maximize fire district access. The proposed dry storage site plan only shows a 15ft type 'D' buffer. A 20' fire department access purpose buffer is still advisable for this development on the Outer Island, which also is not provided with a public water system :

"Land Development Code Chapter 10.

Division 5 **Fire Safety.**

Sec. 10-384. **Minimum standards for all developments.**

"(b) **Fire department access.** Except as noted in this subsection, buildings that fall into the classes set forth in subsections (a)(3) through (5) of this section, and any unusual and potentially hazardous circumstances as determined by the fire official, **shall provide a 20-footwide fire department access lane in the rear of such building.** This shall be an identified stabilized surface adequate to carry the load of fire apparatus. Exceptions to this requirement are as follows:

- (1) Buildings provided with a complete automatic fire sprinkler system.
- (2) Where, in opinion of the county fire official and the district fire official, due to the size, construction, location or occupancy of a building, the access width may be reduced or omitted."

See also, Sec. 10-386 (surface water drafting point assembly equipment required).

5. The previously approved Grady's Lodge CPD on this site contained a 20 foot buffer for fire protection. Grady's Lodge was limited to one (1) story buildings to ensure compatibility with surrounding residential homes. The new proposed and more intense proposed dry storage building is 35ft in height and poses a much greater fire risk hazard for the entire island with fiberglass boats storage with fuel on board and fueling facilities with underground or above ground tanks for both long term boat fuel storage and fuel pump stations.

6. Fuel storage and fuel pumps pose a fire and explosive risk that exceeds that which is currently present on Upper Captiva Island. The Fire District current capabilities will be taxed to merely contain this fire to the property to stop fires from spreading to adjacent residential areas and uncleared, vegetated lots. Electrical back up generators are not reliable and there is no details on marine fire suppression for the dry storage racks filled with fiberglass boats, fuel and volatiles.

7. The site plan is not consistent with Lee County Comprehensive Plan:

GOAL 77: DEVELOPMENT DESIGN REQUIREMENTS. To require new development to provide adequate open space for improved aesthetic appearance, visual relief, environmental quality,

preservation of existing native trees and plant communities, and the planting of required vegetation.

The proposed Dry Storage Facility is not compatible with adjacent residential uses to the south and west of the proposed building. Buffers proposed in the application site plan should contain a berm to further minimize compatibility with surrounding residential uses and existing homes under Sec. 10-416(d)(4)(note 1). "**Landscape standards**" Notes for Buffer Types Table at:

Section 10-416(d)(4)Note1.

"A solid wall, **berm** or wall and berm combination, **not less than eight feet in height** as measured from the finished grade of the project site. All trees and shrubs required in the buffer must be placed on the residential side of the wall. Walls must be constructed to ensure that historic flow patterns are accommodated and all stormwater from the site is directed to on-site detention/retention areas in accordance with the SFWMD requirements. "

8. Use of internal combustion engines (gasoline, diesel, propane) for the marina and dry storage boat storage application does not comply with the Upper Captiva Community Plan Lee County Comprehensive Plan Policy 25.2.3 which states:

POLICY 25.2.3: "Except for emergency events, public purposes, approved community needs, and permitted heavy construction equipment, internal combustion powered vehicles are banned from all pathways on North Captiva. Lee County will provide enforcement for this ban."

The application proposes to use forklift as operational equipment to lift boats during normal daily operations at the dry storage boat racks. Electric forklifts are available in today's marketplace and should be required as a condition of approval if the CPD is approved. The cost of an electric forklift is not unreasonable for reduced noise and emissions. Any additional cost of electric rather than an internal combustion operations forklift is not consistent with the express language or intent of the policy to strictly limit internal combustion engines on Upper Captiva due to noise (which includes gasoline, diesel, and propane engines which all result in far greater noise than electric engines currently utilized on Upper Captiva Island).

9. The proposed dry storage and fueling of boats is the biggest threat to fire safety on Upper Captiva. The Fire District (with limited capabilities) cannot be expected to extinguish or even contain a marina, dry dock or fuel pump fire or explosion in this location.

10. The proposed dry storage location adjoins surrounding residential uses and residentially zoned lots to the south and west. This general area has traditionally been used for residential and light "neighborhood" commercial activities. While heavier commercial/industrial activities have been located north side of the existing harbor near the barge loading sites and construction yards. The dry storage of marine vessels and larger corrugated buildings are more suitable in that location.

11. The proposed dry storage facility, fueling facility and dredging for a new or expanded marina with additional wet slips and dry storage of boats on Upper Captiva in Safety Harbor is not consistent with Future Land Use Element:

OBJECTIVE 25.3: "CONSERVATION AND COASTAL MANAGEMENT. Preserve, protect and enhance the natural resources, wildlife habitat, and natural beauty of North Captiva, by maintaining diverse and healthy native vegetation, clear offshore waters, diverse and abundant native marine life, wildlife resources, and by minimizing harm resulting from human activity."

And Coastal Conservation Element:

GOAL 104: COASTAL RESOURCE PROTECTION. To protect the natural resources of the coastal planning area from damage caused by inappropriate development. (See also Goal 113.)

Old fuel or used oil resulting from bilge and boat maintenance activities must be disposed of and poses a risk to surface and groundwater resources of the Outer Island and aquatic preserve.

12. Responses as submitted to the environmental questions contained on the application are insufficient. An Environmental Impact Study should be completed on the full environmental impacts to Upper Captiva and the Aquatic Preserve Outstanding Florida Waters before Lee County approval of the proposed CPD. Impacts to listed species, including manatee, and the aquatic preserve have not been adequately considered and should be because Manatee are present in the area of the marina and canal. The rezoning as proposed in the application is not consistent with:

POLICY 25.3.1: "The North Captiva community will work with Lee County to support the efforts of the Federal and State authorities to preserve, protect, and enhance its positive environmental qualities..."

POLICY 25.3.2: "The North Captiva community and Lee County will cooperate to support the State of Florida's efforts to protect and preserve the distinct environmental resources on North Captiva to the greatest extent possible, while addressing the other defined needs and objectives of the community. These resources include but are not limited to:

- mangroves
- the beach dune system, beach dune vegetation, and beach dune wildlife
- coastal dunes, beaches, and coastal scrub vegetation
- beach dune wildlife, including shorebird nesting habitat and sea turtle habitat
- the marine habitat, including sea grass beds and fisheries"

POLICY 107.7.5: "Construction and expansion of boat access facilities with a capacity of five vessels or more will be evaluated against the marine facility siting criteria in the Lee County Manatee Protection Plan approved on June 29, 2004."

POLICY 108.1.2: "Development affecting coastal and estuarine water resources must maintain or enhance the biological and economic productivity of these resources."

POLICY 113.1.2: "All development within the coastal planning area must be compatible with protection of natural systems."

13. The proposed marina and dry storage and refueling pumps station exceeds the minimal facilities that are desired and contemplated on this bridgeless, fragile barrier island by the Upper Captiva Community Plan, Lee County Comprehensive Plan:

OBJECTIVE 25.5: "OPEN SPACE, RECREATION, AND QUALITY OF LIFE. Lee County will seek to promote, protect, and enhance existing and potential open space, **minimal recreational facilities** and the quality of life for residents and visitors to North Captiva. The intent of these efforts is to enrich the island's aesthetic qualities while preserving its fragile barrier island character. At the same time, Lee County will consider the demands on the island's limited infrastructure."

The location of dry storage facility on Pine Island, other bridged islands or accessible mainland locations is preferable planning location for dry dock storage and a new or expanded marina, rather than siting these facilities on this bridgeless, fragile barrier island.

14. The existing septic tank has malfunctioned and is an inadequate septic tank system for the new heavy use which proposes to use only the 1 men's and 1 women's bathroom at Mangoes for the proposed project's heavy commercial (nearly light industrial) uses, including boat storage, maintenance and fueling, which is inadvisable on septic tanks due to the potential for groundwater contamination from improper disposal of liquid wastes into toilets and sinks leading directly to groundwater that supplies the drinking water of island residents using wells of less than 75 feet in depth. Potable water for the proposed uses, including boat washing, is limited on Upper Captiva by the lack of central water systems. The proposed wastewater and water use do not reflect and are not consistent with the intent of the Upper Captiva Community Plan, Lee County Comprehensive Plan including:

POLICY 25.6.4: "Upon request Lee County will collaborate with the North Captiva island community to develop an understanding of natural resources by providing educational programs on energy conservation, solid waste management, hazardous waste, surface water runoff, septic maintenance, water conservation, xeriscaping, green building, harbor management, cultural resources, and history. The site for these programs will be located on North Captiva."

15. Marinas, fueling and dry storage facilities would be better served in a location with centralized sewer service availability on the mainland or on bridged barrier islands with such facilities rather than on the bridgeless Outer Islands, as reflected in the Lee County Comprehensive Plan, Future Land Use Element:

POLICY 1.4.2: "The Outer Islands are sparsely settled, have minimal existing or planned infrastructure, and are very distant from major shopping and employment centers. Except for those services as provided in compliance with other sections of this plan, they are not expected to be programmed to receive urban-type capital improvements in the time frame of this plan, and as such can anticipate a continued level of public services below that of other land use categories. The continuation of the Outer Islands essentially in their present character is intended to provide for a rural character and lifestyle, and conserve open space and important natural upland resources. Maximum density is one dwelling unit per acre (1 du/acre)."

OBJECTIVE 113.1: "COASTAL PLANNING AREA IN GENERAL. Lee County will manage the

coastal planning area to provide a balance among conservation of resources, public safety capabilities, and development.”

16. The siting of a new or expanded marina and dry storage facility at this Outer Island location within the Aquatic Preserve is not consistent with the Lee Plan Marina siting policies:

OBJECTIVE 128.5: MARINE FACILITIES SITING CRITERIA. The county will consider the following criteria in evaluating requests for new and expanded marinas, other wet slip facilities, dry slip facilities with launches, and boat ramps in order to make efficient use of limited shoreline locations and to minimize environmental impacts.

POLICY 128.5.1: Proposed boat access facilities (and expansion of existing facilities) in the following areas face a variety of technical, legal, or environmental obstacles which must be addressed during the review process:

- Aquatic Preserve (DEP)
- Outstanding Florida Waters (DEP)
- Class I Waters (DEP)
- Marine or Estuarine Sanctuaries (NOAA)
- Manatee Sanctuaries or Critical Manatee Habitats (DEP, USFWS, USACE)
- Approved or conditionally approved shellfish harvesting areas (DEP)
- Federal navigation channel setbacks (USCG, USACE)
- ...
- Other Endangered/Threatened Species Habitat (USFWS, DEP, USACE)

Extra caution and consideration will be given prior to authorizing use of areas with high environmental values. (Amended by Ordinance No. 00-22, 07-09)

POLICY 128.5.2: Cumulative effects of several boat access facilities in a small area will be considered in the review of proposed projects.

17. Existing wet slips and docks already constructed and located within Safety Harbor Clu, NCIC and Barnicle Phil’s are not fully utilized. The cumulative impact of this additional proposed use on environmental values and resources have not been adequately considered.

POLICY 128.5.3: Boat access facilities must be consistent with the appropriate aquatic preserve management plan where applicable. (Amended by Ordinance No. 00-22, 07-09)

POLICY 128.5.6: Proposed boat access facilities and expansion of existing facilities will be evaluated in accordance with the Lee County Manatee Protection Plan (MPP), dated June 17, 2004 and approved by the Board of County Commissioners on June 29, 2004. Specifically, Section 8 of the MPP, Marine Facility Siting Requirements, will be used to determine the appropriate number of slips as defined by the MPP for each new project or allowable expansion. (Amended by Ordinance No. 00-22, 07-09)

POLICY 128.5.9: Boat access facility locations should minimize natural shoreline disruption. (Amended by Ordinance No. 07-09)

POLICY 128.5.10: Boat access facility construction in dead-end canals are discouraged due to

difficulty in meeting state water quality standards. (Amended by Ordinance No. 07-09)

18. The proposed location is not consistent with:

GOAL 105: PROTECTION OF LIFE AND PROPERTY IN COASTAL HIGH HAZARD AREAS. To protect human life and developed property from natural disasters. (See also Goal 110.)

The Outer Islands are particularly susceptible to hurricane storm event damage and post-disaster recovery on the bridgeless Outer Islands increase the difficulty and expense of removal of debris and environmental remediation in post-disaster recovery. Hurricane Charley restorations are still on-going on Upper Captiva Island many years after the storm event itself. See also,

OBJECTIVE 111.2: "POST-DISASTER ORDINANCE. Maintain an ordinance that implements (where necessary) the Post-Disaster Strategic Plan, and provides regulations that may be needed following a natural or technological disaster. The Recovery Task Force will recommend amendments as needed to the Post-Disaster Strategic Plan."

POLICY 111.2.1: "The ordinance will continue to provide for enactment of a temporary moratorium on rebuilding not immediately needed for the public health, safety, and welfare (e.g., to allow repairs to water, power, fire, police, and medical facilities; debris removal; stabilization or removal of structures in danger of collapsing; and minimal repairs to make dwellings habitable)."

19. The access to the canal on which the new or expanded Marina is proposed is severely limited in width and visibility at the mouth of the canal in this location posing a danger for boaters as well as manatees. A marina location that is more suitable for boat traffic should be chosen to minimize boater and manatee collisions. Flushing time, accumulation of copper and toxic bottom paints at the location of the proposed expanded marina near the narrow mouth of the dead end canal (that is the location of an illegal unpermitted dredging project that has not yet been restored) is of concern and objectionable when safer areas with more flushing are already available at Safety Harbor Club and Barnacle Phil's.

20. The application is not consistent with design criteria set forth in the Lee County Comprehensive Plan:

GOAL 77: DEVELOPMENT DESIGN REQUIREMENTS. To require new development to provide adequate open space for improved aesthetic appearance, visual relief, environmental quality, preservation of existing native trees and plant communities, and the planting of required vegetation.

OBJECTIVE 128.6: MARINA DESIGN CRITERIA. The county will utilize the following criteria in evaluating the design of new marinas (or expansion of wet slip facilities at existing marinas) in order to minimize negative impacts; detailed regulations on these subjects may be contained in the county's development regulations.

POLICY 128.6.1: Boat maintenance activities in new or expanded marina sites must be located as far as possible from open water bodies in order to reduce contamination of water bodies by **toxic substances common to boat maintenance**. Runoff from boat maintenance activities must be collected and treated prior to discharge.

POLICY 128.6.3: Fuel and/or oil containment facilities or contingency plans is required at all new marina sites and in marina expansion proposals.

POLICY 128.6.6: Marinas and multi-slip docking facilities must prepare hurricane plans with the assistance of the county which describe measures to be taken to minimize damage to marina sites, neighboring properties, and the environment; this hurricane plan is subject to county approval.

POLICY 128.6.7: Fueling facilities associated with marinas must be designed to preclude spills and must be prepared to contain any spills which reach the water.

POLICY 128.6.8: Marina design must incorporate natural wetland vegetative buffers near the docking area and in ingress/egress areas for erosion and sediment control, runoff purification, and habitat purposes.

POLICY 128.6.9: New fuel facilities must be located on the uplands of a marina site. Proper use and maintenance of fuel pump hoses and other fueling equipment is required.

POLICY 128.6.10: Piling construction and other non-dredge-and-fill techniques shall be utilized where possible to minimize habitat destruction.

POLICY 128.6.11: Mitigation or restoration to offset proposed adverse environmental effects will be required as a condition of approval for any new or expanded marina facilities. Mitigation/restoration is not preferred over preservation of existing resources.

POLICY 128.6.12: To reduce dredging, docks should extend to naturally deep waters when possible. County regulations will specify the criteria for such extensions.

POLICY 128.6.13: Dry storage of small boats should be encouraged, with dry storage structures located inland as far as feasible.

POLICY 128.6.14: Marina designs must not reduce water quality in adjacent natural water bodies in order to accommodate an increase in water quality in the marina basin itself.

21. The applicant has stated that the slips would be made available only to Upper Captiva Island residents, but this has not been included in a proposed Declaration of Restrictive Covenants, is difficult to enforce especially in subsequent purchase and sales of dockominium dry rack spaces and use of wet slips by non-island residents. Further, such a private use limitation condition may be contrary to, and not be permissible, under FDEP regulations and may be inconsistent with Lee Plan :

OBJECTIVE 125.2: WATER ACCESS IN PRIVATE DEVELOPMENTS. The county will encourage private landowners to provide some form of water access to the public.

Impacts from additional boaters visiting the marina for fueling and recreational access to the state park on Upper Captiva has not been adequately studied or addressed and is not consistent with limited recreational facilities contemplated by the Upper Captiva Community Plan, Lee County Comprehensive Plan:

OBJECTIVE 25.5: "OPEN SPACE, RECREATION, AND QUALITY OF LIFE. Lee County will seek to promote, protect, and enhance existing and potential open space, minimal recreational facilities and the quality of life for residents and visitors to North Captiva. The intent of these efforts is to enrich the island's aesthetic qualities while preserving its fragile barrier island character. At the same time, Lee County will consider the demands on the island's limited infrastructure."

22. Dredging of the new harbor basin and use of vertical seawalls exceeds maintenance and repair activities and is not consistent with the Lee Plan.

POLICY 113.2.2: Vertical seawalls must not be constructed along natural waterways except where such a wall is the most reasonable alternative (using criteria established by ordinance), and vertical seawalls along artificial canals will not be permitted unless an adequate littoral zone consistent with the surrounding environment is provided. Seawalls in artificial canals where 50% of the canal or greater is seawalled or for seawalls of less than 300 feet where both adjoining properties are seawalled, will be exempt from this requirement. (Amended by Ordinance No. 00-22)

The docks/slips on the island are never more than half full. The density of homes is already intense for reasons of water wells and septic fields. It will (and should) become increasingly difficult to build.

Local marinas at Pineland and Bokeelia have capacity. The county should be encouraging boaters to use the existing marinas and docking capacity and not allow boat storage and sale/service of gas and oil on a canal that borders a state park and protected aquatic preserve.

The state park land was acquired with state funds for the protecting these very important barrier island ecosystems. This project would be a major threat to the park, the aquatic preserve and these ecosystems. The County has a responsibility to help safeguard this area.

Dredging would traverse part of the canal that is owned by Stephen Hall and the state park. The adjacent private owner, Stephen Hall, is opposed to dredging the canal deeper. The canal is sufficient for existing traffic except for deep draft boats during the greatest spring tides. Dredging would cause erosion to our bank and the state canal bank. It would impact the protected mangroves on both sides of the canal. Dredging in the canal has been done in the past without consultation. When it was first done in the late 80s it was done without permission from the adjoining property owner, Stephen Hall, and it caused great erosion of the

Hall's land who were forced to build a bulkhead to prevent further erosion at great personal expense. A clause in the applicant's deed with rights to the canal and adjacent land for "ingress and egress, canal and waterway purposes only" was entirely and voluntarily eliminated in the 1990's essentially removing any legal claim or right to excavate (and dredge more deeply) shared private bottom lands (without permission or agreement of Stephen Hall) or state bottom lands eliminating any entitlement to excavate or enlarge the basin further south of the existing NCIC basin, because any new, deeper dredging would effectively erode, excavate, and widen the east side of the canal (and impact the State mangroves) adjacent to the dredging and excavation area of this project.

The canal entrance and channel are at sharp (reverse) angles and very narrow at the entrance adjacent to a private beach and bulkhead. There is already motorboat congestion at the canal entrance. Increased motor boat traffic would invite accidents and be a danger to kayaks and small sailboats. The adjacent harbor is an aquatic preserve. A sand bar with protected eel grass form the channel and are a natural protection barrier to our mangrove covered shoreline. The sandbar and harbor are protected from new dredging and boat traffic.

Due to the remote location of Upper Captiva with no bridges, there is little to no real county enforcement of county code in this very sensitive area. NCIC is a relatively small area, it is over-developed and is currently impacting the water quality of the canal and roadways whenever its septic system is overloaded, during peak periods. I believe NCIC is in violation of residential land use, fence/buffer zone, septic tank regulations (inspection date unknown) and fire safety ordinances already. There is no reasonable area or capacity for an industrial/marina, petroleum products, and antifouling paint heavy metal treatment facility.

The current rental and service of motorized personal watercraft and number of slips on the canal may not be properly permitted by the County. A compliance audit of existing NCIC facilities and a baseline analysis of the septic tank, water quality, canal, state land, and harbor must be completed by county code and building departments before any permits are issued for properties on this canal. Impact studies must be required of any projects contemplating dredging or excavation of the canal.

Sincerely,

A handwritten signature in blue ink, appearing to read "Ralf Brookes", with a long horizontal flourish extending to the right.

Ralf Brookes, Attorney

cc

Lee County Board of County Commissioners