IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

ADELE SIMONS, and CORNER LAKES ESTATES HOMEOWNERS ASSOCIATION, INC.,
Appellants,

v.

CASE NO. 5D18-1418
Lt. Case No. ACC-17-002
DOAH Case No. 16-4556GM

ORANGE COUNTY, FLORIDA, BANKSVILLE OF FLORIDA, INC., et al.
Appellees.
_____/

APPELLANTS' RESPONSE TO APPELLEE'S JOINT MOTION TO DISMISS

The remaining Appellants are adjacent, abutting property owners, ADELE SIMONS, and CORNER LAKES ESTATESHOMEOWNERS ASSOCIATION, INC., who have clear appellate standing because the plan amendments will in fact increase the allowable density in the Rural Service Area on land directly abutting and adjacent to Appellants.[1] Appellants will be adversely affected because the subject plan amendments will in fact increase density on the subject land in the rural service area.

[1] In order to narrow the issues and parties on appeal, Appellants who are adversely affected by, but do not own adjacent property to, the subject land use amendment, are voluntarily dismissed as Appellants in this instant appeal, i.e., Seerina Farrell, Kelly Semrad, Marjorie Holt and Ariel Horner, hereby, by separate filing.

All parties, and the ALJ, agree that the subject plan amendments would increase the maximum allowable density on the subject property. The Administrative Law Judge made findings of fact and concluded the subject plan amendments were not in compliance because the plan amendments would allow urban densities within the Rural Service Area contrary to the other goals, objectives and policies in the duly adopted Comprehensive Plan that limit urban densities to the Urban Service Area where services are provided, with limited list of exceptions, and also limit densities within the Rural Service Area to rural densities.

The Appellees' motion posits that all property owners would want or prefer increased densities even rural landowners, which is not the case. Appellants chose and prefer to live in the Rural Service Area because it is rural, as reflected in their testimony, which will be discussed below. They are not developers seeking to increase their density beyond what is allowed in the Rural Service Area. They are rural homeowners who choose to live in the Rural Service Area despite the lack of urban services because they prefer to live in rural area east of the Econlockhatchee River. Therefore, they are adversely affected by the increase in density.

Appellee's motion ignores the facts contained in the ALJ's findings of fact, which were supported by record evidence, including expert witness testimony below, and cherry picks portions of record testimony in an attempt to convince this Court that the Appellants do not have standing because they are not "adversely-

affected" by the increased, urban densities that are permitted by the subject Plan Amendments.

The record contains ample evidence that Appellants are adjacent, abutting property owners, that there is an increase in density and that Appellants interests are adversely affected by the higher, increased urban densities in the rural service area on undeveloped, rural property adjacent to their land, have clear standing to bring this appeal.

Case Background

The Appellants, individually described further below, exercised their rights under Florida's Community Planning Act to request a formal administrative hearing before the Division of Administrative Hearings (DOAH) and successfully obtained findings of fact and conclusions of law by the Administrative Law Judge that the amendments to the Orange County Comprehensive Plan (the "Plan") "direct urban development to locate within a rural area." Rec. Order at 59, ¶ 189.

The ALJ after hearing the facts and evidence presented at the multiple day administrative hearing found the Plan Amendments to violate the Act's requirement that it be internally consistent[2] with all other provisions of the duly adopted Comprehensive Plan because they authorize Urban development within the Rural

[2] Required to be "in compliance" with state law requirements set forth in Section 163.3177(1) and (2), Fla. Stat.

Service Area, on undeveloped rural lands adjacent or proximate to the Appellants' rural settlement and residence. Numerous provisions of the Plan prohibit development of urban densities and intensities within the Rural Service Area, and direct the County to preserve the rural character of the Rural Service Area. The ALJ found that the Plan Amendments are inconsistent with eleven (11) different goals, objectives and policies of the Plan's Future Land Use Element. Rec. Order at 39, ¶105.

The Governor and Cabinet, sitting as the Administration Commission, impermissibly ignored evidence supporting the ALJ's findings of fact and struck or modified 10 of the ALJ's factual findings. (Final Order at 9, 10, 14, and 27). The Commission issued a Final Order that improperly changed findings of fact and reversed the ALJ's conclusions and recommendation that the plan amendments be found not in compliance with 163.3177(2), which requires that plan amendments be internally consistent with the other duly adopted goals, objectives and policies contained in the comprehensive plan.[3] Based on the Governor and Cabinet's "revised facts", the Administration Commission improperly made findings that the development authorized by the plan amendments was actually "rural" and not

[3] The illegal rejection of these material findings of fact that are supported by competent substantial evidence and are therefore binding on the Governor and Cabinet sitting as the Administration Commission and it was legal error to change these findings of fact, which were supported by evidence at the DOAH hearing below.

"urban" and concluded the plan amendments were internally consistent with the rest of the plan, but in doing so rewrote in whole cloth the ALJ's findings of fact and conclusions of law as contained in the ALJ's Recommended Order (Final Order at 7-8, 31, 32, 36). With the facts so revised draped in new cloth, the Commission declared that the densities allowed by the amendments were in fact rural and consistent with the existing Comprehensive Plan and issued a Final Order to that effect. This appeal followed.

Appellants Have Established Standing as "Adversely Affected" Persons in the Record Below

The record below is replete with evidence of how the Appellants will be adversely affected by Lake Pickett South—the proposed development that is permitted by the Plan Amendments. While the adverse effects vary for each Appellant, in general, the Plan Amendments will destroy the rural character of the area, which Appellants enjoy, and which the County has an expressed duty to preserve. In fact, several of the Appellants specifically chose their place of residence for the rural character of the area, and at least one Appellant *relied upon* the specific Comprehensive Plan provisions that require the County to preserve that rural character by limiting any new urban development to the Urban Service Area.

Appellant ADELE SIMONS owns and lives on a two (2) acre naturally wooded lot**,** within the *Rural* land use designation, **that abuts the subject** Lake Pickett land use amendment, and which is currently surrounded by large parcels

mostly ten acres in size. She would be adversely impacted by the significant increase in traffic and loss of substantial surrounding wooded areas (including wildlife habitat) to the urban development that would displace the surrounding rural lands as a result of the amendments. (DOAH Trans., V. II at 243-247; Pet. Ex. 7). Adele Simons would also be adversely affected by the Plan Amendments, as the proposed development would destroy the rural character of the area immediately surrounding her property. Id. Adele Simons intentionally chose to live in the Rural Service Area and intentionally chose to live on property that was surrounded by parcels with a rural density, because she wished to live in a rural atmosphere. DOAH Trans., V. II at 245, 247. She relied on the provisions of the Comprehensive Plan that concerned maintaining the rural character of the area, and she understood that despite the virtues of living in the Rural Service Area, there would not be traditional forms of urban services. However she chose to live where she lives because she prefers the rural character of the area, including rural densities and rural uses. While some prefer the urban, some prefer the rural and by creating an Urban Service Area and a Rural Service Area, the Orange County Comprehensive Plan establishes a clear line of demarcation. The ALJ found that the subject Plan Amendments would introduce urban development in the Rural Service Area in a manner that violates 11 important goals, objectives and policies established by the comprehensive plan. DOAH Trans., V. II at 250.

Appellant CORNER LAKES ESTATES HOMEOWNERS ASSOCIATION, INC., owns property adjacent to the proposed Plan Amendments. (Rec. Order at 8, ¶ 8.[4] The Appellees' motion fails to inform the Court of this fact.

Further, the comprehensive plan expressly recognizes the Corner Lakes Estates Rural Settlement Area as a pre-existing settlement area in the Comprehensive Plan. This pre-existing settlement area was grandfathered in with higher densities to the comprehensive plan. However, the plan specifically states that Corner Lakes Estates cannot be used as justification for increased densities. In other words, Corner Lakes Estates is to be the exception to the rule and not justification for changing the rules.

Corner Lakes HOA has clear standing because it owns abutting land that is adjacent to the subject property, and as an entity owning adjoining real property it does not need to depend on the associational standing test of *Florida Home Builders Association v. Department of Labor & Employment Security*, 412 So. 2d 351 (Fla. 1982).

The record does however support a determination that a substantial number of the members of the association would be adversely affected by this development and

[4] All parties, including all Appellees in this appeal, stipulated to this fact prior to hearing. "Corner Lakes Estates Homeowners Association, Inc., owns property ***adjacent to*** the proposed Plan Amendments")(Pre-hearing stipulation, at p. 26).

that the nature of the relief sought (a finding of non-compliance of the proposed plan amendments – as opposed, for example, to money damages) is appropriate for a homeowners association[5] to receive on behalf of those members. Andrade specifically testified as to his duty to protect the interests of the HOA residents, and testified that the residents of Corner Lakes believed that the Plan Amendments would destroy the rural character of their community. DOAH Trans., V. II at 270.

Appellant through its representative at the hearing, the President of the HOA (Richard Andrade) testified that it will be adversely affected by the loss of rural character, the loss of open space, adverse effects on Corner Lakes residents rural lifestyles including a reduction of associated wildlife observation opportunities in the neighborhood, increased traffic and potentially increased police/fire/EMT response times caused by the increase in density and corresponding increase in population prior to introduction of urban services to the area that would serve the new urban development allowed by the proposed Plan Amendments in the Rural Service Area. DOAH Trans., Vol. II, at pages 270, 271-273.

Factual Findings of the ALJ Support Appellants' Standing

The plan amendments will increase density on land within the Rural Service Area. The Motion to Dismiss fails to identify the ALJ's factual findings or record

[5] The President of the HOA testified about the Association's duty to protect the property rights of its residents. Testimony of Andrade, Vol. II, at p. 273-274.

effects of the challenged amendments. The **Administrative Law Judge found the development densities allowed by the amendments decidedly "urban" -** a key factual issue in the formal hearing. Appellants identify below the following factual findings and record evidence that explains the adverse impact of the challenged plan amendment on the rural service area where they live:

a. "The Plan Amendments establish a new future land use category named Lake Pickett (LP) and applies it to **1,187 acres of land** currently **designated Rural***"*. Final Order at 16-17; Rec. Order at 3, 16. (Emphasis added).

b. The FLUM amendment "redesignates the southern portion of the [Lake Pickett area] from the Rural to the LP category. The property encompasses "Lake Pickett South (LPS)" which is roughly bounded by Lake Pickett Road on the north, East Colonial Drive to the south, Chuluota Road on the east, and South Tanner Road on the west." Rec. Order at p. 16, ¶ 31.

c. "The property subject to the … change is **undeveloped and is currently designated *Rural* on the land use map, with a residential density limitation of 1 house per 10 acres**. Rec. Order at 16, ¶ 33. (Emphasis added).

d. It is located wholly outside of the County's Urban Service Area. Rec. Order at 16, ¶34.

e. "Overall, Lake Pickett South **allows urban development to locate next to the existing Corner Lake rural settlement[6].** The **overall density, intensity, and mix of uses allowed in Lake Pickett South is inconsistent with the single-use residential rural community setting of Corner Lake."** Rec. Order at p. 49, ¶ 149.

f. "The property's current planning designation of "Rural" does not allow the amount or intensity of development desired by the developer, hence the need to change the plan and designate it "Lake Picket, etc." Final Order at 16-17.

g. Lake Pickett South contains 835 developable acres and the LP category authorizes **2,078 dwelling units** across that community. Rec. Order at 32, ¶ 84. (Emphasis added).

h. Newly adopted FLUE Policy 6.8.2 would allow, among other uses, the following land uses on the subject lands:

> **"T3 Edge:** "…predominately single-family detached residential uses within walkable neighborhoods" and includes community buildings, community gardens and parks, and "central focal point uses" which are undefined. The policy allows an "***average***

[6] Corner Lakes HOA lies within the Corner Lakes Rural Settlement.

density" of 5 [houses per acre], a maximum floor area ratio (FAR) of .25, or a combination thereof.

T4 Center: Allows a "**mix of residential . . . and non-residential uses, including commercial, office, service, and civic uses** that serve a Lake Pickett community as well as the surrounding area." The policy allows an **"*average* residential density" of 6 [houses per acre]**, and an "average non-residential intensity" of .15 FAR…" Rec. Order at 12-13, ¶ 21. (Emphasis added)

i. The development densities and other characteristics such as required facilities and complementary uses approved by these amendments are **categorically the same as other developments that are "urban"**. Rec. Order at 32- 37, ¶-84-97. (Emphasis added).

j. "The … **development pattern planned for Lake Pickett South is, indeed, urban**." Rec. Order at 89 [fn. 7]. (Emphasis added).

k. The development "approach is recognized as 'urban' by the Comprehensive Plan. Final Order at 23 [referring to Recommended Order, ¶ 95].

l. "The Plan Amendments **authorize development of predominantly urban uses within the [Rural Service Area]**." Rec. Order at 37, ¶ 99.[7] (Emphasis added).

[7] The Commission's Final Order struck this finding in violation of Section 120.57 (1) (l), Fla. Stat. which requires that "The agency may not reject or modify the

m. "Based on the preponderance of the evidence, under the existing Comprehensive Plan, the density, uses, and pattern of development authorized by the Plan Amendments is **urban, rather than rural."** Rec. Order at 38, ¶102. (Emphasis added).

n. The testimony of two different expert planners *presented by the developer and the County* demonstrated that the development approval **allows "urban", not "rural", land uses**. Rec. Order at 39, ¶¶103 and 104. (Emphasis added).

o. "The Plan Amendments **do direct urban development to locate within a rural area**." Rec. Order at 59. ¶ 189. (Emphasis added).

p. The amendments "**direct urban development to the RSA**, which is contrary to an urban infill strategy", and "**discourage infill by authorizing urban development outside of the designated urban area**." Rec. Order at 66, ¶¶ 217 – 218.[8]

q. "The Plan Amendment **directs urban uses to a location surrounded by development** recognized in the Comprehensive Plan **as rural**

findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence …"

[8] The Commission's Final Order struck this finding, Appellants argue in violation of Section 120.57 (1) (l), Fla. Stat. because the finding was supported by evidence.

agricultural, rural residential, and conservation, or **specified exceptions** thereto." Rec. Order at 65, ¶ 215.[9] (emphasis added).

The subject property is bounded on the east by Appellant Corner Lakes Home Owners Association, an existing vested residential area known as a "Corner Lakes Rural Settlement" in the comprehensive plan. Corner Lake rural settlement is adjacent to the property. Both are served by Chuluota Road, another county road which intersects with SR 50 just beyond the frontage of the subject property. Chuluota Road runs north, where it intersects with Lake Pickett Road, which roughly bisects the subject property, and continues to run north to its intersection with McCulloch Road at the Seminole County border. Rec. Order at 9-10, ¶FOF 11. Several segments of the major county roadways to be impacted by the development authorized by the Plan Amendments, Lake Pickett Road and Chuluota Road, are already overcapacity.[10] Segments of S.R. 50[11] currently operate at an acceptable level of service, based on a six-laning [sic] project currently underway, but are projected to operate at an unacceptable level of service by the 2035 planning horizon.

[9] The Commission's Final Order struck this finding, Appellants argue in violation of Section 120.57 (1) (l), Fla. Stat. because the finding was supported by evidence.
[10] Appellant Adele Simons resides at 4236 Chuluota Rd. *Supra.* Residents of Corner Lakes are bounded by Chuluota Rd. on the East, and the proposed location for Lake Pickett South on the West. DOAH Trans. Vol. II, 266.
[11] Aka, Colonial Dr., which intersects with Chuluota Rd. at the Southeastern corner of the proposed location for Lake Pickett South.

Rec. Order at p. 62, ¶204. The FLUM amendment - "Lake Pickett South" - "is roughly bounded by Lake Pickett Road on the north, East Colonial Drive to the south, Chuluota Road on the east, and South Tanner Road on the west. Rec. Order at p. 16, ¶ 31. **Transportation analysis shows significant and adverse impacts from the proposed development on all three roadways** …." Rec. Order at p. 63, ¶ 205. **Chuluota Road[12] will require widening in conjunction with the proposed development**. Rec. Order at p. 56, ¶ 176 (Emphasis Added).

Appellants Simons and Corner Lakes HOA use of these very same roads and overcapacity road segments to access the rest of the County. Appellant ADELE SIMONS resides at 4236 Chuluota Rd. DOAH Trans. Vol. II, 242-248. Residents of CORNER LAKES ESTATES HOA, INC. are bounded by Chuluota Rd. on the East, and the proposed location for Lake Pickett South on the West. DOAH Trans. Vol. II, 266-276.

These findings as to the Appellants' spatial relationship to the proposed location for Lake Picket South corroborate the adverse effects that Appellants will suffer from the increase in urban density in the rural service area, which include a corresponding increase in traffic on existing, constrained roadways.

[12] Appellant Adele Simons resides at 4236 Chuluota Rd. *Supra*. Residents of Corner Lakes are bounded by Chuluota Rd. on the East, and the proposed location for Lake Pickett South on the West. DOAH Trans. Vol. II, 266.

Appellants' Fact Based Testimony

Appellant ADELE SIMONS' fact based testimony appears at DOAH Trans. Vol. II, 242-248. CORNER LAKES ESTATES HOA, INC.'s fact based testimony of its corporate representative HOA President RICHARD ANDRADE appears at DOAH Trans. Vol. II, 266-276. Layperson, non-expert testimony is perfectly permissible and constitutes substantial competent evidence, so long as it is fact-based. Mere generalized statements of opposition are to be disregarded, but fact-based testimony is not to be disregarded and can be competent, substantial evidence. Metropolitan Dade County v. Blumenthal 675 S.2d 598 (Fla. Dist. App. 3d 1996). In Blumenthal, the lay testimony went to the incompatibility of the proposed development with the surrounding uses, adjacent existing development around the subject site. Miami-Dade County v. Walberg, 739 So. 2d 115 at 116-117 (Fla. 3d DCA, 1999) (finding neighbors' testimony and site map to constitute substantial competent evidence); Metro. Dade County v. Sec. 11 Prop. Corp., 719 S.2d 1204, 1205 (Fla. 3d DCA 1998), rev. denied, 735 S.2d 1287 (Fla. 1999) (lay testimony on incompatibility, plus documentary evidence of record, including a proposed site plan, elevation drawings, aerials, photographs); Metro. Dade County v. Sportacres Dev. Group, Inc., 698 S.2d 281, 282 (Fla. 3d DCA 1997) (lay testimony that the proposed development would be incompatible with the existing adjacent community, bolstered by maps and other zoning records).

Expert Testimony and Evidence of the Adverse Effects on Appellants

The following expert opinion testimony of comprehensive planning expert Lara Diettrich demonstrates the adverse effect on the Appellants from an expert witness:

a. "[T]hese text amendments … are **leapfrogging swaths of rural land** to exist in a Rural Service Area[13] **for which they're entirely incompatible**." Vol. III, p. 365. See also p. 366. (Emphasis added).

b. "**This is starkly urban in a rural area, completely surrounded by it."** Vol. III, p. 367.

c. "it's **in an area that's completely incompatible**." Vol. III, p. 368. (Emphasis Added)

d. "Results in the loss of significant amounts of functional open space." Vol. III, p. 369.

e. If you look at the southern boundary along Colonial Drive, otherwise known as State Road 50, you'll see that that is where they've located transect 4 [which] is commercial uses, **average dwelling units of 6 units per acre and possibly higher density**…." Vol. III, p. 387.

[13] As noted above, Appellant Simons specifically chose to reside on property within the Rural Service Area for the "rural character" of that area which the Comprehensive Plan requires the County to preserve. Corner Lakes HOA is located within The Corner Lake Rural Settlement, which lies within the Rural Service Area.

f. **"The densest [development] zones are located on …** the **southern boundary of Lake Pickett South**… along Colonial Drive [SR 50]". (Vol. III, p. 391, 396). (Emphasis added)

g. "The text amendments **do not promote the rural character of the area**. The [proposed development locations] are **not in keeping with the required density of the Rural Service Area of 1 dwelling unit per 10 acres**." Vol. III, p. 413. (Emphasis added)

h. "they have not… enforced criteria to ensure the scale and density and/or intensity of the proposed development within the Rural Service Area… that **promotes intended rural character**." Vol. III, p. 413.

i. **The amendments "do not" promote the rural character of the area**. Vol. III, p. 418.

j. **The Lake Pickett amendments are not compatible with the surrounding area. "**[I**]**t's **not in keeping with the character of the area**" Vol. III, p. 431-432. (Emphasis added)

k. The **"**intensity, density, and especially the mixture of uses are **not compatible nor consistent with the Rural Settlements.**"[14] Vol. III, p. 432.

[14] Corner Lakes HOA owns property within, and the HOA residents all reside within, the Corner Lake Rural Settlement.

l. **The amendments do not protect the Rural Settlement areas.** Vol. III, p. 472. (Emphasis Added).

The testimony of expert witness, Thomas Hawkins, also supports and corroborates the expert opinion of Ms. Diettrich, and provides further evidence that supports the ALJ's findings of fact that the plan amendments would allow urban (not rural) development in the Rural Service Area, including, for example:

a. "**the effect of** the [Plan Amendments] is to **allow substantial urban development in the Rural Service Area**" Transcript Vol. V., at 690-691.

b. The Plan Amendments allow for development that is urban in character, and therefore **allow urban development in the Rural Service Area**, Transcript Vol. V., at 691, 695.

c. Amendments **direct urban development to the Rural Service Area**. Transcript Vol. V., at 693-694.

d. The amendment **does not promote rural character**. Transcript Vol. V., at 692.

e. "Very clearly **allowing urban development in the Rural Service Area does not promote rural character, it does exactly the opposite**." Transcript Vol. V., at 699-700.

Legal Analysis

Appellees' theory depends upon two flawed premises.

First, Appellees' efforts to present snippets of testimony of the lay-person citizens as the entire relevant record upon which their standing can be supported is misleading and incorrect. The findings of fact and record evidence described above demonstrate that the adverse effects on the rural character of the area where the Appellants live, and will in fact be adjacent to Appellants land, within the Rural Service Area where the Appellants own land and reside.[15]

Second, Appellees continuously refer to the adverse impacts on Appellants and their concerns as "general" or "generalized" interests in maintaining the quality of life."[16] This attempt to characterize the Appellants, as within the category of the "general public", is absurd and disingenuous.[17] Appellants are adjacent, abutting

[15] The Appellees theory that, if the Appellant's are already experiencing adverse effects in their community from existing levels of offsite development, they cannot be considered adversely affected by the massive increase in adjacent development is neither logical nor supported by any authority.

[16] For example, see Motion to Dismiss at p. 16, 18, 19.

[17] See e.g., Motion to Dismiss at p. 19-20, where Appellees claim that Ms. Simons, whose home abuts the subject property, is to be equated with the Appellants in *Suwannee Am. Cement Co., Inc.*, 802 So. 2d at 522-23 (denying standing based upon an "assertion of standing based upon a generalized interest in the environment") and *O'Connell*, 874 So. 2d at 677 (denying standing based upon "a general interest in maintaining the quality of life . . . by controlling future land use and managing growth in the county"). Neither Simons nor Corner Lakes HOA, as abutting landownerscan reasonably be cast as in the same category as the members of the general public relative to this case.

property owners who live, reside, recreate, and use the roads and enjoy the rural characteristics of their adjacent lands because it is rural and the increase density on the undeveloped subject lands far beyond rural densities will adversely affect the adjacent and abutting Appellants in the RSA.

The cases upon which Appellees base their argument are not relevant here, given numerous judicial interpretations that **adjacent, abutting property owners have clear legal standing** in the context of use of land and increased density.

The decision in *Legal Envtl. Assistance Found., Inc. v. Clark,* 668 So.2d 982 (Fla.1996) denied appellate standing to a non-profit organization to challenge a Public Service Commission's establishment of energy efficiency penalties (for failure to meet established goals) on Florida's four largest investor-owned electrical utilities, 668 So. 2d at 983, has no applicability to our instant case, which involves site-specific comprehensive plan density increases adjacent or proximate to where the Appellants own homes and property.

In *Bd. of Comm'rs of Jupiter Inlet Dist. v. Thibadeau,* 956 So.2d 529 (Fla. 4th DCA 2007) the Court denied appellate standing to an inland navigational district to challenge an agency's ruling that a homeowner's private dock complied with a property line setback requirement, **because the district did not own property adjoining the subject parcel and thus could not be adversely affected** by an alleged failure to meet a setback requirement. Id at 534. (Emphasis added).

Appellants in this case do **own property adjoining the subject parcel and thus could be adversely affected, therefore** *Thibadeau* has no applicability to Appellants under the facts of our case, given the scale and breadth of the development at issue here as well as the adjacent and nearby property ownership of the Appellants.

Similarly, the nature of the generalized "doing business in the County" interests in *Fla. Wildlife Fed. v. St. Johns County.*, 909 So. 2d 347, 347 (Fla. 1st DCA 2005) ("The appellants have not demonstrated that their business interests are 'adversely affected' by the challenged order, so as to give them standing to appeal.") is completely different than the property and home ownership interests directly impacting the adjacent, abutting landowner Appellants at issue in this case. See also, *O'Connell v. Fla. Dep't of Cmty. Affairs*, 874 So. 2d 673, 676 (Fla. 4th DCA 2004) (Denying appellate standing to Appellants because "they ***have not asserted that their property is located near the sites affected by the amendments*** or how they would be adversely affected by the amendments.")[18]

[18] While Appellees cite to *Battaglia Fruit Co. v. City of Maitland*, 530 So. 2d 940, 944 (Fla. 5th DCA 1988) to argue that even those Appellants who own land adjacent or proximate to the subject property do not have standing, *Battaglia Fruit* found the City of Maitland to lack standing to bring a certiorari action to challenge a development approved by Orange County because "**it never appeared or presented any evidence or objection [in the proceedings below].**" Id. (Emphasis added).

The case of *Melzer v. Fla. Dep't of Cmty. Affairs*, 881 So. 2d 623, 625 (Fla. 4th DCA 2004) also included no record demonstration that any appellants owned property or lived anywhere near the subject comprehensive plan amendments. Neither does *Florida Chapter of the Sierra Club v. Suwannee American Cement Co., Inc.*, 802 So.2d 520 (Fla. 1st DCA 2001), which does not support dismissal of these Appellants in this case. The Court in Suwannee found a lack of appellate standing because the Sierra Club had only a "generalized interest in the environment" Id. In the instant case, Appellants own adjacent property. Appellants in our case are obviously not in the same category as the Sierra Club, which the First District observed, "provided *no facts* concerning any member who is individually adversely affected by the construction of the cement plant." Id at 522.

Similar to Appellees in this case, the Appellee in City of St. Petersburg Board of Adjustment v. Marelli, 728 So.2d 1197 (Fla. 2d DCA 1999) "questions the standing of the neighboring property owners to bring this action. A ***multitude of cases recognize that neighboring property owners affected by zoning changes have standing*** to challenge the changes. See *Rinker Materials Corp. v. Metropolitan Dade County*, 528 So.2d 904 (Fla. 3d DCA 1987), and cases cited therein." In considering whether a property owner has standing because its interests have been adversely affected, a court is to consider "the proximity of [its] property to the area to be zoned or rezoned, the character of the neighborhood, ... and the type of change

proposed." *Renard*, 261 So.2d at 837; *see Paragon Group, Inc. v. Hoeksema*, 475 So.2d 244, 246 (Fla. 2d DCA 1985), *review denied*, 486 So.2d 597 (Fla. 1986).

In the instant case, specific Appellants own land adjacent to the subject property who were parties and testified at the DOAH proceedings hearing below and will be adversely impacted by the increased, urban density in the Rural Service Area. Appellants who live and reside on property they own adjacent and abutting the subject property clearly have standing to appeal an agency order approving site-specific comprehensive plan amendments in this case.

Responding to the Appellee's references to the "speculative" nature of the adverse impacts to the Appellants, as demonstrated above, the ALJ's factual findings of fact that the challenged Plan Amendments allow a substantial urban intrusion into the Rural Service Area adjacent to Appellants' property. The ALJ found that the plan amendments were inconsistent with eleven (11) goals, objectives and policies of the Orange County Comprehensive Plan and therefore not in compliance with internal consistency requirements required for plan amendments under Florida Statutes 16.3177(2). This is more than Appellants' speculation, but findings of fact supported by record evidence from the administrative hearing below.

While the Appellees' motion notes that they, not the Appellants, prevailed on some of the claims, standing is a separate question from the merits of a case. *See* e.g. *Reily Enterprises, LLC v. Florida Dept. of Environmental Protection*, 990 So.2d

1248 (Fla. 4th DCA 2008) (neighbor not required to prevail on the merits in seawall permit challenge in order to have standing); *Board of Commissioners of Jupiter Inlet District v. Thibadeau*, 956 So.2d 529 (Fla. 4th DCA 2007); *St. Martin's Episcopal Church v. Prudential-Bache Securities, Inc.*, 613 So.2d 108 (Fla. 4th DCA 1993) (concept of standing should not be confused with elements or merits of underlying claim). Standing is a "forward –looking concept" and one that "cannot disappear based on the ultimate outcome of the proceeding."

Appellee's argue that this case is similar to the facts and allegations in *Martin County Conservation Alliance v. Martin County*, 73 So. 3d 856, 861 (Fla. 1st DCA 2011). To the contrary, the instant case is fundamentally different from *Martin County* and fits within the dicta of that case under which the Appellants have appellate standing under the standard set forth therein. In the instant case, there was an increase in density and in this instant case the Appellants are adjoining, abutting landowners.

Fundamentally, the nature of the comprehensive plan amendments in this case are very different from those at issue in *Martin County*. In *Martin County* the comprehensive plan amendments were to policies of general applicability to vast areas of the County that were not being applied to any specific parcels to allow a specific development. 73 So. 3d, at 856-857. In this instant case, however, the Plan Amendments make site-specific land use changes to a specific parcel of land to allow

a very specific increases in density, and intensity of development, which the ALJ found to be urban within the Rural Service Area on specifically identified land that is adjacent to the land and homes of the Appellants.

Next, in *Martin County*, the ALJ had made findings of fact that there was no increase in density in the Martin County plan amendments that the District Court held negated any adverse impact to the appellants. 73 So. 3d, at 860-861. The undisputed facts of this case are that the Plan Amendments substantially increase residential development density adjacent or near to the Appellants' homes and property. Further, in our instant case, the ALJ's findings of fact found that the plan amendments would allow increased urban development densities in the Rural Service Area.

The *Martin County* case ruled that those appellants were not adversely affected was expressly based on the ALJs factual finding that the challenged amendments **did <u>not</u> allow a density increase.** The district court in <u>Martin</u> held:

> "Unlike in *Peace River* [*v. IMC Phosphates Co.,* 18 So.3d 1079, 1084 (Fla. 2d DCA 2009)] here, **Appellants offered no evidence below that the Plan amendments would adversely affect their legally protected interests, because the evidence cannot show any density increase** or other purported environmental affects. The **ALJ found that no density increase would occur**, and this court will not substitute its view of the facts for those of the lower court where they are supported by competent, substantial evidence." Id at 863 (emphasis added).[19]

[19] *Peace River v. IMC Phosphates Co.,* 18 So.3d 1079, 1084 (Fla. 2d DCA 2009), to which the decision in *Martin County* referred, explained, "the fact that the ALJ

The *Martin County* case was based upon the fact that density was not increased. In this instant case, there is a clear and express undisputed increase in density allowed by the plan amendments. The increase in density on adjacent land supports appellate standing for the remaining Appellants in this case, not a dismissal of the appeal.

It is also nearly universally recognized that an adjoining property owner would meet the test for standing. An adjoining adjacent property owner is an often-used hypothetical in both case law and law school to demonstrate who would most clearly meet the test for legal standing, without equivocation or difference of opinion. Justice Scalia's hypothetical in Lujan, in which an individual ***living adjacent to the site*** for a proposed federally licensed dam would have standing to challenge the licensing agency's failure to prepare an environmental impact statement is but one of many such examples. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

[Administrative Law Judge] and DEP [Department of Environmental Protection] ultimately found that [Respondent's] activities would not adversely affect the Peace River does not retroactively eliminate the [Petitioner's] standing to prosecute the action. In that case, a regional water supply authority that supplied potable water to the residents of four counties was granted appellate standing to challenge an agency's approval of a water use permit that allowed the withdraw of water from the Peace River. **Even though the Appellant did not own land or water monitoring operations proximate to the water withdrawal site**, the Court found appellate standing because the proposed mining permit ***could*** **adversely affect the river**. *Id.*

Citing to the Florida Supreme Court's adversely effected standing test for zoning in Renard v. Dade County, 261 So. 2d 832, 834 (Fla. 1972) , the District Court in Wingrove Estates Homeowners Ass'n v. Paul Curtis Realty, Inc., 744 So. 2d 1242, 1243–44 (Fla. Dist. Ct. App. 1999) explained how an adjacent property owner is an adversely affected person in the context of zoning uses of land noting that "the Associations argue that their residents, who border or are in close proximity to the proposed development, would definitely be affected and point to the fact that Orange County, the respondent herein, has no objection to their intervention. The Associations also argue that **numerous cases hold that neighboring property owners affected by zoning changes have standing to challenge those changes**. See e.g., City of St. Petersburg Board of Adjustment v. Marelli, 728 So.2d 1197 (Fla. 2d DCA 1999); National Wildlife Federation, Inc. v. Glisson, 531 So.2d 996 (Fla. 1st DCA 1988); Rinker Materials Corp. v. Metropolitan Dade County, 528 So.2d 904 (Fla. 3d DCA 1987). The Associations also rely upon Marelli, which involved a zoning variance matter. **A multitude of cases recognize that neighboring property owners affected by zoning changes have standing to challenge the changes**. See Rinker Materials Corp. v. Metropolitan Dade County, 528 So.2d 904 (Fla. 3d DCA 1987), and cases cited therein. 728 So.2d at 1198."

Rinker Materials analyzes the matter further: In considering whether a property owner has standing because its interests have been adversely affected, a

court is to consider "the proximity of [its] property to the area to be zoned or rezoned, the character of the neighborhood, ... and the type of change proposed." Renard, 261 So.2d at 837; see Paragon Group, Inc. v. Hoeksema, 475 So.2d 244, 246 (Fla. 2d DCA 1985), review denied, 486 So.2d 597 (Fla.1986). Renard, 261 So.2d at 832 (re-zoning of **petitioner's neighbor's adjoining property** from industrial to residential use conferred standing upon petitioner to challenge validity of zoning action as unreasonable because it adversely affected her legally recognizable interests by increasing her setback requirements); Hoeksema, 475 So.2d at 244 (owner of single family home directly across from land re-zoned for apartment and condominium buildings had been affected by zoning and hence had standing to bring action questioning interpretation of zoning ordinance).

In the case cited by the Rinker court above, Paragon Grp., Inc. v. Hoeksema, 475 So. 2d 244, 246 (Fla. Dist. Ct. App. 1985), Hoeksema owned a **single-family home directly across from the 77-acre parcel**. The LMDR designation would permit multi-story buildings of 1,362 apartments and condominium units **overlooking her residence**. Thus, Hoeksema, who challenged the proposed rezoning as inconsistent with the Horizon 2000 Plan, **had standing** to maintain this action.

Conclusion

The Appellees ask this court to depart from long standing case law to deny standing to adjacent, abutting landowners to appeal a comprehensive plan amendment that substantially and undisputedly increases development density on adjacent land and departs from the record facts and evidence, including testimony of Appellants and experts, supporting the findings of fact made by the Administrative Law Judge below**.**

Wherefore, Appellants respectfully request that the Court deny the Appellees' Joint Motion to Dismiss.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing complies with the font requirements of Fla. R. App. P. 9.210(a)(2), as the font utilized is 14 point Times New Roman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this June 4, 2018 by e-mail to the service list set forth below:

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NOTE: Mr. Richard Grosso, Esq. has not entered a notice of appearance as counsel of record for any Appellants in this matter, and need not be included in the certificate of service.

Undersigned counsel on this June 4, 2018 has discussed and provided a copy of this notice to his clients via U.S. Mail, e-mail, or by hand delivery.

Respectfully submitted,

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