IN THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

CASE NO. 17-11820
L.T. CASE NO. 9:16-cv-80195-MARRA/MATTHEWMAN

GERALD GAGLIARDI AND KATHLEEN MACDOUGAL,

Plaintiffs/Appellants,

v.

THE CITY OF BOCA RATON, FLORIDA,
Defendant/Appellee

And

CHABAD OF EAST BOCA, INC. AND TJCV LAND TRUST,
Intervenors.

ANSWER BRIEF OF CITY OF BOCA RATON

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Comes now the Defendant/Appellee, THE CITY OF BOCA RATON, pursuant to 11th Cir. R. 26.1-1(a)(1) of the Eleventh Circuit Court of Appeals do hereby file their Certificate of Interested Persons and Corporate Disclosure Statement as follows:

Abbott, Daniel Lawrence, Weiss Serota Helfman Cole & Bierman, P.L.

Ahnell, Leif, City of Boca Raton

Blomberg, Daniel Howard, Becket Fund for Religious Liberty

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City of Boca Raton

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Frieser, Diana Grub, City of Boca Raton

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TJCV Land Trust

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STATEMENT REGARDING ORAL ARGUMENT

The City does not request oral argument. The City believes this Court can adequately assess the correctness of the trial court's order of dismissal based on the record on appeal and the parties' written submissions.

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ABBREVIATIONS USED IN THIS BRIEF

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References to Plaintiff's Appendix will appear as "App. [Tab #]:[page #]-[page #].

References to the initial brief will appear as "IB: [page #]."

References to plaintiffs/appellants, Gerald Gagliardi and Kathleen MacDougal, will appear as "Appellants."

References to the defendant/appellee, the City of Boca Raton, will appear as "City."

References to intervenors Chabad of East Boca Raton and TCJV Land Trust will appear as "Chabad."

References to the property located at 770 Palmetto Park Road, Boca Raton, Florida, will appear as the "Property."

STATEMENT OF THE ISSUES

This appeal concerns whether the district court correctly applied federal law to conclude that the Appellants' (Plaintiffs below) complaint should be dismissed. The primary issue is whether Appellants had standing to bring constitutional claims against the City based upon the City's adoption of an ordinance that provided for consistent zoning treatment of places of public assembly and places of worship, and the City's later issuance of development orders that permitted construction of a place of worship on private land (and, if so, whether Appellants continued to have standing after a development order was invalidated on non-constitutional grounds). The secondary issue in this appeal is whether the district court's order may be affirmed, even if the Appellants have standing, because the complaint failed to state a claim upon which relief can be granted.

STATEMENT OF THE CASE

This lawsuit concerns the efforts of the Appellants to oppose zoning approvals authorizing the construction of a center for Jewish religious worship on the Property.

A. Course of Proceedings and Disposition Below.

Appellants filed a complaint against the City on February 8, 2016, alleging that the City violated their state and federal constitutional rights when the City (a) in 2008 adopted Ordinance Number 5040 (the "Adopted Ordinance"), which amended the City's Code of Ordinances so as to address all places of public assembly in a consistent manner and expressly allow houses of worship in zoning districts that already allowed other places of public assembly, and (b) in 2015 issued development orders allowing construction of a religious center in accordance with the Adopted Ordinance. ECF 1. The district court granted Chabad's motion to intervene on February 23, 2016. ECF 14.

The City moved to dismiss the complaint, arguing, among other things, that the Court lacked subject matter jurisdiction because Appellants did not have standing and that the complaint failed to state a cause of action upon which relief could be granted. ECF 21. Chabad filed a motion to dismiss raising similar arguments. ECF 23. On July 21, 2016, the district court entered an order granting

the motion to dismiss for lack of jurisdiction, without prejudice, based on its conclusion that the Appellants failed to sufficiently allege standing. ECF 43.[1]

Appellants unsuccessfully attempted to address the deficiencies identified in the district court's order of dismissal in an amended complaint filed on August 12, 2016 (the amended complaint, which is the operative complaint, will hereinafter be referred to as the "Complaint"). ECF 46. Once again, the City and Chabad moved to dismiss for lack of standing and for failure to state a claim. ECF 48, 49. On March 28, 2017, the district court entered an order granting the City and Chabad's motions to dismiss for lack of subject matter jurisdiction, concluding that Appellants failed to sufficiently allege constitutional or prudential standing. ECF 76. Thereafter, the district court entered a final judgment in favor of the City and Chabad and against the Appellants. ECF 77. This appeal followed. ECF 78.

[1] In its order of dismissal, the district court held that it could "not reach" the other arguments raised in the motions to dismiss after it determined that Appellants lacked standing. However, in connection with allowing Appellants "one additional opportunity to plead a proper basis for standing," after dismissing the original complaint, the district court perhaps signaled its thoughts when it noted that "the City and [Chabad] raised merits-based challenges to the complaint," the merits of which the court was unable to "opine in an advisory capacity." ECF 43 at p. 11.

B. Statement of the Facts. [2]

1. The City amends its zoning code to provide equal treatment for religious and non-religious assemblies.

The Complaint alleges that the City first violated Appellants' constitutional rights when it enacted the Adopted Ordinance in 2008. ECF 46, ¶¶ 47-49. Appellants alleged that the genesis of this zoning text change began in 2007 when Chabad sought to purchase single family homes in the Golden Triangle area of the City, near Mizner Park, for religious purposes, but that opposition groups who were motivated by religious animus and a desire to protect Golden Triangle's residential quality opposed Chabad's efforts. ECF 46 at ¶¶ 15-18. Concurrently, the City introduced Ordinance No. 5014 (the "Unadopted Ordinance") which

[2] In considering the motion to dismiss, the district court, and now this Court, should examine "documents incorporated into the amended complaint by reference, and matters of which a court may take judicial notice[.]" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The Unadopted Ordinance, the Adopted Ordinance, and the circuit court opinion referenced in the Complaint, ¶ 87 (and at IB:4) fall into this category because these documents are referenced throughout the Complaint and because these public documents may be judicially noticed. See Fed. R. Evid. 201(b); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280-81 (11th Cir. 1999) (holding that district courts are entitled to take judicial notice of public records in determining whether a plaintiff's amended complaint states a claim upon which relief may be granted).

Moreover, "when the exhibits contradict the general and conclusory allegations of the pleading, the exhibits govern." *Crenshaw v. Lister*, 556 F.3d 1283, 1292 (11th Cir. 2009). Accordingly, where unsupported "facts" alleged in Complaint (or the Initial Brief) are contradicted by the express terms of the Adopted or Unadopted Ordinance, the relevant ordinance will be cited.

would have amended its zoning code to change places of worship from a "conditional use" to a "permitted use" in single-family residential districts like Golden Triangle. ECF 48-1 at p. 2.[3] The Unadopted Ordinance would have also replaced the phrase "private clubs, lodges and fraternities" with the phrase "places of public assembly" as permitted uses in business districts, including the B-1 local business district (the "B-1 Business District") in which the Property is located. *Id.* at p. 8.[4] "Places of public assembly" would have included, *inter alia*, "places of worship." *Id.* at p. 1. Accordingly, under the Unadopted Ordinance, any religious assembly, including Chabad, would have been able to locate in most City residential and business zoning districts as a matter of right. *Id.* Appellants allege that the Unadopted Ordinance was met with stiff opposition. ECF 46 at ¶¶ 20-21.

Thereafter, the Complaint alleges that Chabad, the City, representatives and

[3] Thus, the contention that, in single family zoning districts, "a house of worship was permitted with no land use restrictions" (Complaint, ECF 46 at ¶ 19; Initial Brief at p. 5) is expressly belied by the text of the zoning code, which allowed places of worship only as a conditional use in single-family districts.

[4] The proposed legislative basis for the Unadopted Ordinance was to "provide for uniform treatment of all places of public assembly" [ECF 48-1 at p. 1], a clear acknowledgment of this Court's *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1231 (11th Cir. 2004) opinion that held that prohibiting houses of worship in zoning districts that allowed other places of public assembly violated RLUIPA, 42 U.S.C. §§ 2000cc et seq.

Similarly, the Adopted Ordinance had, as its (only) legislative basis, "to provide for consistent treatment of places of public assembly and places of worship." ECF 48-2 at p. 2.

attorneys for the Golden Triangle residents, and a local developer who owned the Property had "secret internal and nonpublic discussions" about allowing Chabad to construct a "place of worship" on the Property, located in the B-1 Business District, which district allowed a "private clubs, lodges and fraternities" as permitted uses,[5] "but did not permit construction of a 'place of worship' such as the Chabad." ECF 46 at ¶ 22.

The Complaint contains a series of sinister labels regarding the drafting of, and later enactment of, the Adopted Ordinance, most of which are belied by the text of the ordinances themselves. For instance, the Complaint alleges that under a "secret directive" to "develop a process outside the governing law to ensure that the [Chabad] be allowed to build on the [Property],[6] [City] staff advanced the issue by composing new definitions for permitted 'uses' under the definition of 'Places of Public Assembly' as then contained in the [City's] Code of Ordinances." *Id*. at ¶ 46. However, including "places of worship" within the new code definition of

[5] The Complaint is mistaken when it contends that the City code in effect prior to the adoption of the Adopted Ordinance permitted "place[s] of public assembly" as permitted uses in the B-1 Business District. Instead, it was "private clubs, lodges and fraternities" that were permitted uses. *See* ECF 48-2 at p. 11 (indicating previous language of code in strikethrough).

[6] The Adopted Ordinance did not "limit[] houses of worship in residential neighborhoods" (IB:7); rather, it kept them, as they had been in the past, "conditional uses." Indeed, the Adopted Ordinance lessened "restrictions" on houses of worship by making them "permitted uses" in two multi-family residential districts (R-3-A and R-3-C) (ECF 48-2 at pp. 5, 6), consistent with the treatment of places of assembly in other multi-family districts.

"places of public assembly" could not have been done in response to any "secret directive" because the Unadopted Ordinance, which Appellants allege was drafted and proposed before the alleged "secret meetings" and "secret directive," already included "places of worship" in the definition of "places of public assembly" (ECF 48-1 at p. 2). More importantly, the Unadopted Ordinance would have expressly allowed "places of public assembly" as permitted uses on the Property (and other property in the B-1 Business District and other zoning districts). *Id*. at p. 8. Moreover, the Adopted Ordinance, like the Unadopted Ordinance, plainly states that the purpose of the new definition was to "provide for consistent treatment of places of public assembly and places of worship." In other words, the Adopted Ordinance was enacted so as to treat consistently all places of public assembly, as required by RLUIPA, as interpreted by this Court in *Midrash* and other court decisions.

Moreover, notwithstanding Appellants' description of the Adopted Ordinance as being the result of a "secret directive," the Complaint confirms that the City Council held four public hearings prior to the adoption of the Adopted Ordinance (on July 22, 2008, August 26, 2008, September 8, 2008 and September 9, 2008). ECF 46 at ¶ 48.

2. Chabad receives development approvals to construct a religious center in accordance with the amended zoning code, and a development approval is later invalidated.

Seven years after enactment of the Adopted Ordinance, the Complaint alleges that the City granted development approvals that allowed for the construction of the Chabad's "religious project" on the Property. ECF 46 at ¶ 59.

Appellants reach outside the pleadings to advise the Court that one of the development approvals was quashed by a circuit court order, but erroneously state that the Property owner's appeal of that ruling "is now pending." IB:4. In fact, the appendix to the Initial Brief includes the Fourth District Court of Appeal's decision (rendered on November 15, 2016) that affirmed the circuit court's opinion in *TJCV Land Trust, et al. v. Royal Palm Real Estate Holdings, LLC, et al*. App. 65-1. The result of the circuit court's decision is that Chabad no longer holds necessary development approvals entitling it to build on the Property.

3. Appellants' alleged injuries.

Appellants allege that they will suffer personal injury if the Chabad project is constructed consistent with the development approvals because they are nearby homeowners and that the Chabad religious center will "generate more traffic and parking issues;" will cause "inevitable" flooding; and will "impose barriers to the ingress and egress of emergency vehicles onto and from the barrier island." IB:6-7

(citing ECF No. 46 at ¶¶ 9-10, 27, 35). Neither the Complaint nor the Initial Brief, however, contend that Appellants would change their behavior to avoid exposure to any religious component of the proposed Chabad project.

STANDARD OF REVIEW

The district court's order dismissing the Complaint for lack of subject matter jurisdiction is subject to *de novo* review. *See Elend v. Basham*, 471 F.3d 1199, 1203 (11th Cir. 2006). This Court may also affirm the district court's dismissal on the alternative basis that the Complaint fails to state a claim upon which relief may be granted. *See Baltin v. Alaron Trading Corp.*, 128 F. 3d 1466, 1473 (11th Cir. 1997) (explaining that a circuit court of appeal may affirm a dismissal "for reasons different than those stated by the district court"). In determining whether the Complaint states a cause of action, the Court should utilize the plausibility standard applicable to federal complaints wherein pleaders must allege sufficient facts for each element to move beyond mere speculation, thereby "nudg[ing] their claims across the line from conceivable to plausible[.]" *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This plausibility standard requires more than labels and conclusions or formulaic recitation of the elements that amount to "an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

SUMMARY OF THE ARGUMENT

This case is a typical zoning dispute that Appellants have attempted to transform into constitutional litigation simply by virtue of the fact that the proposed offending development is for religious assembly. After carefully examining Appellants' allegations, the district court correctly concluded that the Complaint fails to adequately allege the injury in fact necessary to establish constitutional standing for alleged violations of the Establishment Clause, Equal Protection Clause, and Due Process Clause. The Complaint identifies the passage of the Adopted Ordinance and the granting of development approvals as unconstitutional acts which caused the Appellants harm as neighboring homeowners. However, the injuries they claim as a result of these acts – increased traffic, increased flooding, more difficult ingress and egress for emergency service vehicles, and change to the overall character of the neighborhood – are neither sufficiently particularized nor non-speculative to constitute concrete, actual, and imminent harm. The district court also correctly concluded that the Complaint should be dismissed because it fails to adequately allege prudential standing. Appellants' concerns about traffic, flooding, and the character of their neighborhood are not even tangentially related to the core concerns of the Establishment Clause, Equal Protection Clause, or the Due Process Clause. Accordingly, the Court should affirm the district court's dismissal for lack of

subject matter jurisdiction. Moreover, because a development approval necessary for the project has been invalidated, the Property cannot be developed without further government approvals, and therefore any prospective injury to Appellants resulting from development is neither concrete nor imminent. Even if Appellants once had standing (which they did not), clearly now they do not.

If the Court concludes that Appellants do sufficiently allege standing, it should nevertheless affirm the order of dismissal due to the fact that the Complaint fails to state a cause of action upon which relief can be granted. Appellants' Establishment Clause claim does not pass any of the three prongs of the *Lemon* test: the Adopted Ordinance has the secular purpose of assuring that the zoning code treats religious and non-religious assemblies equally, as required by RLUIPA; the Adopted Ordinance and the development approvals do not have the principal or primary effect of advancing religion, as they merely ensure neutrality and equality regarding applications for land development; and the Adopted Ordinance and the development approvals do not foster an excessive entanglement with religion, as neither implicate any City financial involvement with Chabad or any involvement with day-to-day Chabad activities.

If the Establishment Clause claim is found to be lacking, the Court need not reach the Complaint's remaining constitutional claims because they are merely

derivative of the Establishment Clause claim.[7] Moreover, those claims are also invalid as a matter of law. Specifically, the Equal Protection claim is flawed for two reasons: first, because the Adopted Ordinance is rationally related to the legitimate purpose of ensuring RLUIPA compliance; and second, because the Complaint does not identify any comparator alleged to be similarly situated to Chabad who was treated differently by the City. The Due Process claim is also deficient because the Complaint does not allege a single instance in which Appellants were deprived of their constitutional right to notice and opportunity to be heard at any of the several public hearings concerning either the Adopted Ordinance or the development approvals and, in any event, the State of Florida has adequate remedies to address any purported procedural due process failures. Finally, if the Court opts to consider the state law claim for alleged violation of the Florida Constitution's "No-Aid" clause, it should conclude that it fails to state a cause of action because the expenditure of municipal staff time does not provide "aid" to religion.

Based on the foregoing arguments, the Court should affirm the district court's order of dismissal.

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[7] Indeed, while Appellants complain that the district court "gave short shrift" to their other constitutional claims (IB: 26), the Initial Brief contains no argument or citation to authority to suggest that the dismissal of these claims were erroneous. Accordingly, this Court need not revisit the bases for dismissal of these claims. *Continental Technical Services, Inc. v. Rockwell Intern. Corp.*, 927 F.2d 1198, 1199 (11th Cir. 1991) ("An argument not made is waived…").

ARGUMENT

I. The Court Should Affirm The District Court's Determination That Appellants Lack Standing For Any Of Their Claims[8] And That, Therefore, The Amended Complaint Was Properly Dismissed For Lack Of Subject Matter Jurisdiction.

"[B]ecause the constitutional standing doctrine stems directly from Article III's 'case or controversy' requirement, this issue implicates [the Court's] subject matter jurisdiction, and accordingly must be addressed as a threshold matter[.]" *Duty Free Americas, Inc. v. Estee Lauder Companies, Inc.*, 797 F.3d 1248 (11th Cir. 2015) (citation omitted). The district court held that Appellants do not have constitutional standing. "[Appellants] have failed to plead adequately a concrete and particularized constitutional injury in fact and are without the requisite standing to bring their action in this forum." ECF 76 at 10. Additionally, the district court held that Appellants lack prudential standing. "[E]ven had [Appellants] pled their alleged injuries with sufficient particularity and

[8] Appellants are mistaken when they contend that "[t]he decision below did not address constitutional standing for the equal protection or due process claims" IB:11-12. The district court dismissed all of the federal constitutional claims on Article III standing grounds, pursuant to the elements of standing described in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) and *Lujan v. defenders of Wildlife*, 504 U.S. 555, 560 (1992). ECF 76 at pp 8-12. Those elements are as applicable to Equal Protection claims (*Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995)) and Due Process claims (*Mclowney v. Federal Collection Deposit Corp.*, 193 F.3d 1342, 1347 (11th Cir. 1999)) as they are to Establishment Clause claims.

definiteness, [Appellants] have failed to allege that those injuries were within the zone of interests protected by the Constitution's Establishment Clause" and by the Equal Protection and Due Process Clauses "and, as such, are without prudential standing to bring the action." ECF 76 at p. 12. Accepting the allegations in the Complaint as true, the district court correctly concluded that Appellants lack both constitutional and prudential standing.

A. Appellants Lack Constitutional Standing for any of their Claims because they Failed to Allege a Sufficiently Particularized and Non-speculative Injury in Fact.

To establish constitutional standing, a plaintiff must clearly allege facts demonstrating he has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted). To establish injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual and imminent, not conjectural or hypothetical.'" *Id.* at 1548 (citation omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" *Id.* (citation omitted). To be "concrete," an injury must be "*de facto*," meaning "it must actually exist." *Id.*

Appellants fail to sufficiently allege injury in fact because their alleged

injuries are not sufficiently particularized. "The party who invokes the power [of judicial review] must be able to show … that he has sustained or is immediately in danger of sustaining some direct injury ..., and not merely that he suffers in some indefinite way in common with people generally." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 477 (1982) (emphasis added)). The Complaint alleges Appellants live in different, barrier island neighborhoods or "areas"[9] (and, accordingly, one if not both reside in a different "area" than the planned Chabad building). Therefore, impliedly, the individuals whom the Complaint claims to be at risk of "special" injury are all of the residents of (and perhaps all of the people who work on or visit) any area within the entire barrier island in Boca Raton. ECF 46 at ¶ 24. Alleging so numerous a group of "injureds" confirms that Appellants' alleged injuries "would [not] be different in kind from those suffered by the community as a whole." *Buena Vista East Historic Neighborhood Ass'n v. City of Miami*, 2008 WL 1848389, *5 (S.D. Fla. 2008). *See also Taubman Realty Grp. L.P. v. Mineta*, 198 F. Supp. 2d 744 (E.D. Va. 2002) (holding that prevention "of 'safety, environmental, and traffic' related negative impacts to a 'region' clearly is not the type of 'concrete, litigant-specific interest upon which a party may base a

[9] Appellant Gagliardi allegedly lives in the Por La Mar "area" (ECF 46 at ¶ 9), while Appellant MacDougal allegedly lives in the Riviera "area" (*id.* at ¶ 10). The Complaint does not allege in what "area" the Property is located.

procedural injury.").

Second, Appellants fail to sufficiently allege injury in fact because their alleged injuries are "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Fears of adverse neighborhood impacts that may result from the development of a parcel of land are "conjectural and speculative injuries" that do not establish injury in fact. *See Buena Vista*, 2008 WL 1848389 at *3 & n.3, *5 (concluding that fears of nearly identical impacts of development were insufficient to confer standing).[10] *See also 90 Exch., LLC v. Mayo Grp. Dev., LLC*, 2009 WL 3818847 (Mass. LCR Nov. 16, 2009) (concluding that plaintiff lacked standing to challenge the modification of an existing special use permit increasing the density of a property based on his speculative concerns about traffic, increased density, neighborhood "feel" and lowered real-estate values).

As the district court observed,

[10] Appellants attempt to distinguish themselves from the plaintiffs in *Buena Vista*, 2008 WL 1848389, by contending that they "reside very close to the real property which is the beneficiary of the [City's] unconstitutional acts." IB:20-21. This is a false distinction because, as in this case, the *Buena Vista* plaintiffs alleged that a development would have negative impacts on their "neighborhood," and that they lived close to the planned development. *Id.* at *3. Moreover, Appellants' proximity to a development that has not yet occurred does not alter the conclusion that their alleged injuries, which are nearly identical to those alleged in *Buena Vista* (which were "[i]ncreased traffic and neighborhood congestion[,] [o]verflow parking …, increased traffic congestion at a critical and dangerous intersection and I-195 on-ramp, … and [i]ncreased traffic … causing increased delays to residents, increase of danger to homes, and delays in emergency response time") are too "conjectural and speculative" to establish injury in fact. *Id.* at *3 n.3.

> Far from the particularized and concrete injury required to confer standing, [Appellants] have simply reasserted, again and again, a list of conjectural injuries to the whole area surrounding the proposed Chabad site, and potentially beyond.

ECF 76 at p. 10. Because such allegations are insufficient to confer standing, the Complaint was properly dismissed.

B. Any basis for Standing that may have Once Existed Was Lost when a Development Approval was Invalidated.

Appellants cite the state circuit court's opinion in *Royal Palm Real Estate v. City of Boca Raton*, Palm Beach County Circuit Court Case No. 502015CA009676MB, which invalidated a development approval issued to Chabad by the City, as evidence that the City "violated Appellants' constitutional rights." IB:10-11. The contention is misplaced; the *Royal Palm* panel ruled upon the zoning issues properly raised in that forum. No constitutional issues were raised, or decided, in that litigation.[11]

Significant, however, is the fact that the circuit court decision in *Royal Palm* invalidated a development approval, and took away Chabad's legal entitlement to

[11] Indeed, the panel decision in *Royal Palm* underscores why "Federal courts do not sit as zoning boards of review." *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1389 (11th Cir. 1993). If the City, or any other Florida local government, grants a development approval contrary to the requirements of its code of ordinances, Florida courts will invalidate the approval. Those challenges cannot be elevated into purported constitutional violations, contrary to federal jurisprudence.

develop the Property. That decision, which was affirmed by Florida's Fourth District Court of Appeal (ECF 65-1), serves only to further emphasize that Appellants' injuries are not "imminent," but are rather conjectural and hypothetical (and, now, wholly nonexistent). *See Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244, 1253 (11th Cir. 2003) ("Imminence … requires that 'the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all.'") (citation omitted). As a result of the circuit court's order (and appellate affirmation thereof), Chabad does not have the present ability to construct a religious center on the Property. *See* App. 41-1:2. And, as a result of Chabad's dispute with the TJCV Land Trust, the possibility of Chabad's development occurring on the Property has become even more remote. IB:4-5. Appellants did not have standing when the development approvals were extant; they certainly do not have standing now.[12] *See Tucker v. Phyfer*, 819 F.2d 1030, 1035 n.6 (11th Cir. 1987) ("[A]rticle III does not distinguish between a plaintiff who lacks standing from the start of his action and one who loses standing during the course of litigation.").

[12] Lest Appellants attempt to argue that the Court may only reach this conclusion by reaching outside the four corners of the complaint, it bears emphasis that it is Appellants that have asked this Court to take judicial notice of the records in the *Royal Palm Real Estate* case. IB:8-9.

C. The Authority Relied Upon by Appellants to Establish Standing Are Unavailing.

Faced with the above-described indistinguishable precedents, Appellants attempt to evade Article III standing requirements by analogizing to cases where litigants had standing to challenge religious displays on public property. IB:12. While it is true that a showing of non-economic injuries may be sufficient to confer standing, it is not sufficient for Appellants to merely suggest that they will suffer injury off of the Property secondary to (any) development. *See Am. Civil Liberties Union of Ga. v. Rabun Cnty. Chamber of Commerce, Inc.*, 698 F.3d 1098, 1103 (11th Cir. 1983) (citing *Valley Forge*, 454 U.S. at 486) ("The mere 'psychological consequences presumably produced by observation of conduct with which one disagrees' is not a cognizable injury"). Whether economic or non-economic, the injury must still be "particular and personalized." *Id.* at 1108. In the religious display cases (which involve public property), plaintiffs met that burden by alleging that the government's conduct directly affected their "use of public lands." *Id.* at 1103; *see also Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003) (concluding plaintiff had standing to challenge religious monument in the public rotunda of a judicial building because it is "impossible for anyone using the stairs, elevators, or restrooms to avoid it."); *Saladin v. City Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (concluding plaintiffs had standing to challenge a City's use of its

official seal as a violation of the Establishment Clause because they frequently had direct contact with government documents bearing the seal). Conversely, in this case, there is no allegation that Appellants will be subjected to unwanted religious expression. Instead, Appellants contend that (successful) development may bring traffic into their neighborhood, an impact that would be felt by the entire neighborhood.

The remaining cases to which Appellants analogize are similarly unavailing. Appellants are unlike the plaintiff in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989), because, in that case, a plaintiff sought a refund for an allegedly unconstitutional tax charged by the government that plaintiff had paid which had an exemption for religious publications. Appellants allege no similar economic harm.

Additionally, unlike the plaintiffs in *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 694 n.2 (1994), Appellants do not possess taxpayer standing. The Initial Brief concedes that "a municipal taxpayer has standing to challenge a violation of the Establishment Clause by a municipality so long as the taxpayer is a resident who can establish that tax expenditures were used for the offensive purpose." IB:25 (citing *Pelphrey v. Cobb Cnty., Ga.*, 547 F.3d 1263, 1280 (11th Cir. 2008) (emphasis added). Appellants then argue – without citation to any authority – that the "direction of the City to paid staff to

craft and spearhead a pathway to approvals to the benefit of [Chabad]" qualifies as such tax expenditure. IB:25. This argument flatly contradicts the rules for taxpayer standing established in *Flast v. Cohen*, 392 U.S. 83 (1968). First, hours expended by salaried City staff to perform the legislative and executive functions of local government are the type of "incidental expenditure of tax funds" that are insufficient to establish a "logical link" between Appellants' status as taxpayers and the Adopted Ordinance and the development approvals. *Id.* at 102. Second, the work of salaried municipal workers is not an exercise of Congress's "article I, section 8 taxing and spending power" (or its municipal equivalent), a requirement for taxpayer standing to challenge a violation of the United States Constitution. *Rocks v. City of Philadelphia*, 868 F.2d 644, 649 (3d Cir. 1989) (citing *Flast*, 392 U.S. at 85-86 and *Bowen v. Kendrick*, 487 U.S. 589 (1988)). For these reasons, Appellants fail to allege standing under the "extremely limited … rationale under which taxpayers were granted standing in *Flast*." *Korioth v. Brisco*, 523 F.2d 1271, 1277 (5th Cir. 1975).

In summary, Appellants fail to allege a sufficient injury in fact to entitle them to constitutional standing on any of their claims. Accordingly, the district court was correct to dismiss the Complaint.

D. The District Court Correctly Concluded that Appellants do not have Prudential Standing.

Prudential standing addresses "personal injury suffered by [plaintiffs] as a consequence of the alleged constitutional error." *Valley Forge*, 454 U.S at 485 (1982) (emphasis supplied). Thus, prudential standing requires, *inter alia*, "that the plaintiff's amended complaint fall within the 'zone of interests' protected by the … constitutional provision at issue." *Mulhall v. UNITE HERE Local 355*, 618 F.3d 1279, 1290 (11th Cir. 2010). The zone of interests test "limits judicial review to claims of injury that are sufficiently related to the core concerns" of the constitutional provision. *Id*. (emphasis added); *see also Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) (explaining that, to establish prudential standing, plaintiffs must show "that the relationship between [their] alleged interest and the purposes implicit in the substantive provision be more than 'marginal.'") (citation omitted).

1. Appellants lack prudential standing for their Establishment Clause claim.

The U.S. Supreme Court has explained that the Establishment Clause concerns itself with injuries that result from religious bias or endorsement, such as being "subjected to unwelcome religious exercises or [being] forced to assume special burdens to avoid them." *Valley Forge*, 454 U.S. at 487 n.22. The

Complaint contains no allegations that Appellants are being subjected to unwelcome religious exercise, or are being forced to avoid it.[13]

Instead, the purported "injuries" are those typically associated with development, whether for secular or religious purposes. ECF 46 at ¶¶ 23-40, 71-72. Put another way, Appellants' "injuries" would be exactly the same if the City were to have permitted any similarly popular commercial, office or retail use on the Property.[14] The fact that a secular use of the Property would cause the same "injuries" to Appellants highlights the fact that this is a zoning dispute, rather than a First Amendment dispute. "Federal courts do not sit as zoning boards of review and should be most circumspect in determining that constitutional rights are violated in quarrels over zoning decisions." *Spence v. Zimmerman*, 873 F.2d 256, 262 (11th Cir. 1989). *See also Corn*, 997 F.2d at 1389. Traffic, flooding, and emergency vehicle access are simply not the "core concern" of the Establishment

[13] With no reference to the Complaint, the Initial Brief, borrowing language from *Glassroth*, contends that the City's actions "mak[e] the Appellants feel disenfranchised and like 'outsiders.'" IB:18. There are simply no allegations in the Complaint remotely similar to this contention, asserted for the first time in the Initial Brief.

[14] Although the district court clearly articulated this relatively basic concept of prudential standing, Appellants miss the point entirely. The sum total the Initial Brief has to say about the district court's conclusion that the Appellants do not allege to have "suffered the injuries that the Establishment Clause exists to protect against" is to label the court's observation "hard to fathom." IB:25. They then fall back upon their "concern for parking deficiencies" and the "aesthetic" value of the neighborhood, as if assuming, *arguendo*, that the "core concerns" of the Establishment Clause are traffic control and flood prevention.

Clause.

Complaints alleging injuries unrelated to the core concerns of a Constitutional provision or federal statute are routinely dismissed on prudential standing grounds, even when Article III standing exists. For instance, in *Smith v. Jefferson County Board of School Commissioners*, 641 F.3d 197, 207-08 (6th Cir. 2011), teachers who lost their employment when their school district closed their secular school and contracted with a religious school brought an Establishment Clause claim against the school district. The court determined that, although the plaintiffs' purported economic injuries satisfied Article III standing requirements, they did not have prudential standing:

> When plaintiffs challenging government action under the Establishment Clause allege only economic injury to themselves and do not allege any infringement of their own religious freedoms, they will have standing only if they may raise the constitutional claims of third parties.

Id. at 207 (quoting, in part, *McGowan v. Maryland*, 366 U.S. 420 (1961)). *See also Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1269-70 (11th Cir. 2011) (holding that lessee of Seminole tribe lacked prudential standing to base a claim on the Indian Long-Term Leasing Act because the purpose of the Act was "to protect only Native American interests," and "because [plaintiff] is not an Indian landowner, its interests as a nontribal lessee of Indian land do not arguably fall within the zone of interests protected by [the Act]").

Appellants attempt to evade the prudential standing requirement by arguing that their "concern for the parking deficiencies, and the change in character of the neighborhood created by the City's [sic] project undoubtedly fall within the aesthetic and conservational values sufficient to give standing[.]" IB:24. Appellants' argument that their concern for "aesthetic and conservational values" is sufficient to establish prudential standing under the Establishment Clause is based on an incomplete and misleading quotation from *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). A review of the full text of that opinion makes clear that the Court recognized "aesthetic" and "conservational" values in the context of the "zone of interests" for claims brought pursuant to the Administrative Procedure Act (the statute at issue in that case), not for Establishment Clause claims. *Id.* at 153-54. Indeed, the Court expressly distinguished A.P.A. and Establishment Clause prudential standing standards, announcing, as to the latter, that a "person or a family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause". *Id.* at 154 (emphasis added). Here, Appellants' objections to the construction of Chabad's religious center are alleged to be "aesthetic and conservational" and not "spiritual." IB:24. Accordingly, the district court correctly concluded that Appellants lack prudential standing for their Establishment Clause claim.

Accordingly, the district court was exactly right when it dismissed the Establishment Clause claim on prudential standing grounds:

> [Appellants] have not alleged that they have been subject to unwelcome religious exercises, nor have [Appellants] alleged that they have been forced to assume special burdens to avoid religious exercise, nor have [Appellants] own religious practices been impacted by the City's zoning decision. Indeed, [Appellants] have not alleged any injury concerning religious activity-beyond noting that a party to the challenged zoning decision is a religious organization. Instead, [Appellants] alleged injuries relate to increased risk of flooding, increased traffic congestion, increased difficulty of emergency service access, and changes to the character of the [Appellants'] neighborhood. These injuries are not within the zone of interests protected by the Establishment Clause. Indeed, such injuries bear the clear hallmarks of a zoning dispute that incidentally involves a religious organization rather than a dispute about Government support of religious activity. [Appellants] have merely invoked the potential for a violation of the Establishment Clause without alleging to have suffered the injuries that the Establishment Clause exists to protect against. As such, [Appellants] are without prudential standing to proceed on their claims arising from the City's alleged violation of the Establishment Clause.

ECF 76 at p. 14.

2. Appellants lack prudential standing for their Equal Protection and Due Process claims.[15]

Appellants lack prudential standing for their Equal Protection claim because

[15] While the Initial Brief criticizes the district court's bases for dismissal of Appellants' Equal Protection and Due Process claims as "conclusory" (IB:27), it does not contain any argument or citation to authority to suggest that the bases were, in fact, wrong. Accordingly, this Court need not revisit the bases for dismissal of these claims. *See f.n.* 7, *supra.*

their claim, brought pursuant to 42 U.S.C. § 1983,[16] does not allege that Appellants have been personally denied equal treatment by the City. "[E]ven if a governmental actor is discriminating" in violation of the Equal Protection clause, "the resulting injury 'accords a basis for standing only to 'those persons who are personally denied equal treatment' by the challenged discriminatory conduct." *United States v. Hays*, 515 U.S. 737 (1995) (citing *Allen v. Wright*, 485 U.S. 737, 755 (1984)). As in *Citizens Concerned About Our Schools v. School Bd. of Broward Cnty., Fla.*, 193 F.3d 1285 (11th Cir. 1999), the Court should affirm the district court's dismissal of the Equal Protection claim because Appellants' do not complain that they themselves have been treated "unequally" as compared to an identified comparator. *See* ECF 46 at ¶ 78 (alleging that an unnamed third party has been denied equal protection).[17]

Appellants also lack prudential standing for the Due Process claim, similarly brought pursuant to section 1983. This claim is based on their allegation that the

[16] This statute requires a plaintiff to allege the deprivation "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Thus, the district court correctly concluded that, to establish prudential standing, Appellants needed to plead injuries "of the kind that gives rise to a claim for violation of equal protection or due process." ECF 76 at 15.

[17] *See also Harris v. Evans*, 20 F.3d 1118, 1121 (11th Cir. 1994) (explaining that one of the three "prudential considerations" is "whether the plaintiff is asserting his or her own legal rights and interests rather than the legal rights and interests of third parties.").

City did not afford procedural due process when it granted Chabad certain development approvals. ECF 46 at ¶¶ 85-94. Notably, the Complaint does not contain a single allegation that Appellants were ever deprived of notice and an opportunity to be heard. Instead, it alleges (without specificity) that the City "failed to follow governing land use procedures and practices … with respect to the [Chabad] application[.]" *Id.* at ¶ 87. Accordingly, there is no prudential standing. *Center for Reproductive Law and Policy v. Bush*, 304 F.3d 183, 196 (2d Cir. 2002) (Claim of standing based upon purported failure to provide notice to others "is precisely the sort of claim that the prudential standing doctrine is designed to foreclose." *See also Citizens' Comm. to Save Our Canyons v. U.S. Forest Serv.*, 297 F.3d 1012, 1025 (10th Cir. 2002) (concluding that plaintiffs' "generalized claims that the [defendant] failed to provide adequate notice to the public appear to fall below the prudential standing threshold").

Accordingly, the district court was correct to conclude that

> "[n]one of these injuries, though, is of the kind that gives rise to a claim for violation of equal protection or due process. Rather, these are grievances arising from an unfavorable zoning decision, dressed in the cloak of a violation of fundamental, sacrosanct constitutional rights."

ECF 76 at p. 15. The Equal Protection and Due Process claims were therefore properly dismissed on prudential standing grounds.

E. Upon Concluding that it had no Federal Subject Matter Jurisdiction, the District Court correctly Dismissed the Supplemental State Law Claim.[18]

28 U.S.C. § 1367(a) provides that, in any action in which the district courts have "original jurisdiction," they may exercise supplemental jurisdiction over state law claims related to the federal claim. "The federal courts of appeal, however, have uniformly held that once the district court determines that subject matter jurisdiction over a plaintiff's federal claims does not exist, courts *must dismiss* a plaintiff's state law claims." *Scarfo v. Ginsberg*, 175 F.3d 957, 962 (11th Cir. 1999) (emphasis added). Accordingly, once the district court determined it lacked subject matter jurisdiction over the federal claims, it did not abuse its discretion in dismissing Appellants' state law claims. *Id.*

II. The District Court's Dismissal Should Be Upheld Because The Complaint Fails To State A Cause Of Action.

This Court has repeatedly held that it may affirm a dismissal "for reasons different than those stated by the district court." *Baltin*, 128 F. 3d at 1473 (citing *Kleiman v. Dep't of Energy*, 956 F.2d 335, 339 (D.C. Cir. 1992)) (affirming district court's dismissal of a case, despite the fact that it disagreed with the district court's

[18] The Initial Brief devotes a single sentence to the dismissal of the supplemental claim: "[t]he Court never addressed the claims under the Florida Constitution." IB:27. Since the brief contains no argument, this issue has not been preserved. *See* f.n. 16, *supra*.

dismissal for lack of subject matter jurisdiction, because the complaint failed to state a claim upon which relief could be granted).[19] Accordingly, even if the Court determines that Appellants have standing, the district court's dismissal should nevertheless be affirmed on the alternate ground that the Complaint fails to state a cause of action.

A. The Court should Affirm the Dismissal of Count I of the Complaint, Alleging a Violation of the Establishment Clause, because the City's Ordinances and Actions Satisfy the Lemon test.

Appellants' principal claim is that the City has violated the Establishment Clause by (1) enacting the Adopted Ordinance in 2008, which ordinance allegedly confers an unconstitutional benefit on Chabad and (2) granting development approvals seven years later for a Chabad development that contained variances from the City's zoning code. Taking the facts in the light most favorable to the Appellants – with the exception of general and conclusory allegations contradicted by the documents the Complaint incorporates – these allegations fail to state a cause of action for violation of the Establishment Clause.

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[19] *See also Magluta v. Samples*, 162 F.3d 662 (11th Cir. 1998) (explaining that an appellate court "may not reverse a judgment of the district court if it may be affirmed on any ground, regardless of whether those grounds were used by the district court."); *Turner v. Am. Fed'n of Teachers Local 1565*, 138 F.3d 878, 880 n.1 (11th Cir. 1980) ("We must affirm the judgment of the district court if the result is correct even if the district court relied upon a wrong ground or gave a wrong reason.").

The First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. The Establishment Clause prohibits governments from promoting or affiliating with any religious organization, *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 590 (1989), and is a "specific prohibition on forms of state intervention in religious affairs[.]" *Lee v. Weisman*, 505 U.S. 577 (1992). Courts determine whether a law or government action violates the Establishment Clause by inquiring whether the law or action (1) has a secular purpose; (2) neither advances nor inhibits religion in its principal or primary effect; and (3) fosters an excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). The first two prongs focus on "whether the challenged governmental practice has the purpose or effect of 'endorsing' religion[.] *Allegheny*, 492 U.S. at 593. "Endorsement" in this context is akin to "promotion." *Id*. While this constitutional inquiry "calls for line-drawing; no fixed, per se rule can be framed." *Lynch v. Donnelly*, 465 U.S. 668 1355 (1984).

1. The Adopted Ordinance has a secular purpose.

Lemon's purpose prong "asks whether government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). "This does not mean that the law's purposes must be unrelated to religion – that would amount to a requirement 'that the government show a callous

indifference to religious groups,' and the Establishment Clause has never been so interpreted." *Corp. of Presiding Bishops of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987). "Rather, *Lemon's* 'purpose' requirement aims at preventing the relevant government decisionmaker . . . from abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters." *Id*. "A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate." *Edwards*, 428 U.S. at 599. Courts traditionally defer to a municipality's sincere articulation of a secular purpose, *Edwards*, 482 U.S. at 586, because courts are "reluctant to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983); *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (holding that when the government professes a secular purpose for an arguably religious policy, the government's characterization is entitled to deference).

In this case, the secular purpose of the City's change to its zoning code is clear on the face of the Adopted Ordinance. The ordinance's recital and title state that it was adopted to provide for "consistent treatment of places of public assembly and places of worship." ECF 4-2 at p. 1. "Prohibition of religious discrimination is unquestionably an appropriate, secular legislative purpose."

Boyajian v. Gatzunis, 212 F.3d 1, 5 (1st Cir. 2000) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). "A law that simply protects religious organizations from unfair treatment certainly cannot be impermissible as an unconstitutional endorsement of religious activity." *Id*. at 6 (citing *Wisconsin v. Yoder*, 406 U.S. 205, 220-21 (1972)). A city's "effort to eliminate local discrimination is fully in line with the Court's approval of government actions aimed at lifting burdens from the exercise of religion." *Id*. Moreover, the Adopted Ordinance was adopted so as to "establish a consistent treatment for places of worship and places of public assembly." ECF 48-2 at p. 1. And the Adopted Ordinance undoubtedly furthers that secular legislative purpose.

Before the Adopted Ordinance was adopted, the B-1 Business District allowed, as permitted uses, assembly uses such as "private clubs, lodges and fraternities," but did not allow (at least expressly) religious places of assembly. *Id.* at 11. Because "private clubs" and "lodges" are similarly situated to synagogues, *Midrash*, 366 F.3d at 1214,[20] a zoning code that allowed such secular uses but prohibited a house of worship would violate the equal terms provision RLUIPA.

[20] *Midrash* could not be more on-point. In *Midrash*, this Court expressly held that "private clubs and lodges are similarly situated to churches and synagogues" for purposes of RLUIPA's "equal terms" clause. *Midrash*, 366 F.3d at 1231. The City Code, prior to adoption of the Adopted Ordinance expressly allowed "private clubs; lodges, fraternities and similar uses" in the B-1 Business District, but not places of worship. ECF 48-2 at 9.

Midrash, 366 F.3d at 1233. The City certainly had a secular legislative purpose in avoiding an RLUIPA violation.

Lemon's "purpose" prong is also satisfied when the challenged law is neutral toward religion, the "critical question" being "whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Thus, a law is clearly neutral when it confers a benefit "upon a wide array of nonsectarian groups as well as religious organizations." *Texas Monthly, Inc. v. Bullock*, 489 U.S. at 14. The Adopted Ordinance confers benefits "to all houses of worship within a broad class of property owners." *Walz*, 397 U.S. at 673; *see also Concerned Citizens of Carderock v. Hubbard*, 84 F. Supp. 2d 668, 674 (D. Md. 2000) (holding that where an ordinance "has a valid secular purpose and achieves genuine neutrality toward religion, it does not violate the Establishment Clause of the First Amendment"). Surely the Adopted Ordinance, which treats places of worship consistently with other places of public assembly for zoning purposes, as directly required by RLUIPA and *Midrash*, *supra*, was adopted for a constitutionally permissible "purpose."

Accordingly, the Adopted Ordinance has a valid secular purpose.

2. The Adopted Ordinance and the development approvals do not have the principal or primary effect of advancing or inhibiting religion.

Lemon's "effect" prong asks whether a law or government action has a "principal or primary effect . . . that neither advances nor inhibits religion." 403 U.S. at 612. "[G]overnment may not be overtly hostile to religion" but also "may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general[.]" *Bullock*, 489 U.S. at 9. The juxtaposition of the Establishment Clause and Free Exercise Clause, and the internal tension they create, makes total separation between religion and government impossible. *Lynch*, 465 U.S. at 673. "It has never been thought either possible or desirable to enforce a regime of total separation" between religion and government. *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760 (1973). The Supreme Court has recognized that the First Amendment "affirmatively mandates accommodation," *Lynch*, 465 U.S. at 673, and "that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 135, 144-45 (1986). Accordingly, this Court's task in "navigating the course between the opposing mandates of the [Establishment Clause and Free Exercise Clause] is thus to strike that appropriate balance referred to by the Court as a 'benevolent neutrality.'"

Boyajian, 212 F.3d at 4 (citing *Walz*, 397 U.S. at 609). Additionally, a law or government action "is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government itself has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337 (emphasis in original). Simply allowing a religious entity to "better . . . advance [its] purposes" does not rise to a constitutionally prohibited endorsement of religion. *Id*. at 336.

In this case, the City enacted the Adopted Ordinance to ensure that those zoning districts that allow for places of public assembly allow both religious and nonreligious assemblies. The effect of this change was not to advance or inhibit religion (or any one religion), but rather to assure that all religions are treated with the "benevolent neutrality" required by the First Amendment and by the "equal terms" provision of RLUIPA. Indeed, had the City failed to update its zoning code, it was arguably in violation of the First Amendment. *Midrash*, 366 F.3d at 1214.[21]

The City also allegedly granted development approvals (available to any B-1 property owner) that included variances from height and parking requirements. This does not have the primary or principal effect of promoting Chabad because "the Establishment Clause does not bar the extension of general benefits to

[21] Moreover, even if the Adopted Ordinance confers an "incidental benefit upon religion," that is not a sufficient reason to find a predominant religious purpose. *See Lynch*, 465 U.S. at 683.

religious groups." *VFW John O'Connor Post #4833 v. Santa Rosa Cnty., Fla*., 506 F. Supp. 2d 1079, 1090 (N.D. Fla. 2007). In fact, courts have even upheld zoning ordinances that permitted religious assemblies as of right in residentially-zoned areas, but only allowed nonreligious assemblies under a special exception. *See Boyajian*, 212 F.3d at 5 (upholding, against Establishment Clause challenge, state law and town ordinance prohibiting zoning restrictions on the use of land for religious or educational purposes if, *inter alia*, the land is owned by "a religious organization"); *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc*., 224 F.3d 283, 292 (4th Cir. 2000) (reversing summary judgment against a city and holding that a zoning ordinance requiring some nonresidential uses to obtain special use permits but exempting religious institutions from this requirement); *Cohen v. City of Des Plaines*, 8 F.3d 484, 485 (7th Cir. 1993) (upholding, against Establishment Clause and Equal Protection challenges, a municipal zoning ordinance that allowed nursery schools operated in churches as a matter of right, but allowed secular day care centers only by special use permit); *Hubbard*, 84 F. Supp. 2d 668, 669 (D. Md. 2000) (dismissing a section 1983 case claiming that a city violated Establishment Clause by making religious assemblies a permitted use in residential neighborhoods but requiring private lodges and fraternities to obtain a special use permit).

As in *Utah Gospel Mission v. Salt Lake City Corp*., 425 F.3d 1249, 1261

(10th Cir. 2004), where the Circuit Court upheld the dismissal of an Establishment Clause claim for failure to state a claim, "the instant case is one of neutrality and equal access, in which the City does nothing to advance religion, but merely enables" the Chabad "to advance itself." Accordingly, neither the Adopted Ordinance nor the development approvals have the primary or principal effect of promoting Chabad.

3. The Adopted Ordinance and the development approvals do not foster an excessive entanglement with religion.

Lemon's final prong instructs that government "must not foster an 'excessive entanglement with religion.'" *Lemon*, 403 U.S. at 613. This inquiry requires examination of "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Id*. at 615. "Building and zoning regulations" are an example of "necessary and permissible contacts" between church and state. *Id*. at 614. Far from "entangling" the City with religion, the development approvals were one-time authorizations to construct a building, and did not entail intrusive inquiry into religious belief and practice. *See Cohen*, 8 F.3d at 486. [T]he Establishment Clause was intended to afford protection [against] 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Lemon*, 403 U.S. at 612. The Complaint makes no allegations

that either the Adopted Ordinance or the development approvals implicate any City "financial support or day-to-day involvement" with Chabad "and thus in these respects also provide no basis for concluding" that the City has "an excessive entanglement problem." *VFW John O'Conner Post #4833*, 506 F. Supp. 2d at 1901.

Because the facts alleged in the Complaint fail to establish that the Adopted Ordinance or the development approvals have a religious purpose, have the primary or principal effect of promoting religion, or entangle government with religion, Appellants have failed to state a cause of action for violation of the Establishment Clause. [22]

B. The Court should Affirm the Dismissal of Count II of the Complaint, Alleging a Violation of the Equal Protection Clause, Because the Adopted Ordinance and Development Approvals are Rationally Related to a Legitimate Government Purpose and Because Appellants Fail to Identify Similarly Situated Comparators.

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of its

[22] Because Appellants' remaining claims rely on the same theories as those that fail to support the Establishment Clause claim, they may be dismissed on similar grounds. *See Konikov v. Orange Cnty., Fla.*, 410 F.3d 1317, 1319 n.1 (11th Cir. 2005) (declining to reach equal protection, free exercise, free speech, and freedom of assembly claims because they relied on the same theories underlying the RLUIPA and due process claims dismissed by the trial court) (citing *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944)). If, however, the Court reaches these derivative claims, their dismissal should also be upheld for failure to state a claim upon which relief can be granted.

laws." U.S. Const., amend. XIV. This is "essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Appellants conclusorily allege that the Adopted Ordinance and the City's grant of the development approvals offend equal protection principles because the City gave "special treatment" to Chabad, a religious organization, that no secular proposal of similar size and impact would have received and that no other religious proposal has ever received. ECF 46 at ¶ 56. They further allege, hypothetically, that the City "has not provided the same privileges to a secular developer seeking to place a similarly intense project in Seaside Village." *Id.*, ¶ 78. These allegations are insufficient to support an Equal Protection claim.

First, as explained above, the Adopted Ordinance "is neutral on its face and [is] motivated by a permissible purpose" by ensuring consistency in the zoning treatment of religious and nonreligious assemblies. *Amos*, at 483 U.S. at 339. Consequently, in evaluating whether the Adopted Ordinance violates the Equal Protection Clause, the "proper inquiry is whether [the City] has chosen a rational classification to further a legitimate end." *Id.* The Establishment Clause analysis, *supra*, demonstrates that the City acted with a legitimate governmental purpose in updating its zoning code with respect to "places of public assembly" so that it applies consistently to both religious and nonreligious assemblies. *See also*

Kraebel v. Michetti, 1994 WL 455468, at *9 (S.D.N.Y. Aug. 22, 1994) (dismissing plaintiff's Equal Protection claims because a city ordinance was "rationally related to the legitimate government purpose of ensuring compliance with" the state's Housing Maintenance Code). Accordingly, the Adopted Ordinance is rationally related to the legitimate purposes of assuring that religious and nonreligious assemblies are treated consistently and that neither the Constitution nor the equal terms provision of RLUIPA are violated by the City's zoning code.

Second, Appellants fail to demonstrate why the development approvals violate the Equal Protection Clause. Appellants do not contend that the zoning code provisions allowing for variances are unconstitutional or that the right to request a variance was only available to Chabad (or to religious entities). Instead Appellants contend that the zoning code was unconstitutionally applied to Chabad's development application. "In order for their equal-protection claim to get even off the ground, the plaintiffs must have a colorable basis for representing that they are similarly situated to the class of persons accorded different treatment." *Kid's Care, Inc. v. State of Ala. Dep't of Human Res*., 2001 WL 35827965, at *3 (M.D. Ala. June 14, 2001). Non-religious entities "are not similarly situated to religious entities as a matter of constitutional law," and therefore alleging that Chabad received a benefit that a nonreligious entity may not, hypothetically, receive in the future does not state an Equal Protection claim. *Id*.

Furthermore, Appellants' only allegation regarding other religious entities is that "[n]o other religious entity has ever received similar City assistance" as that received by Chabad. ECF 46 at ¶ 41. Appellants do not allege that they, as Christians or members of a different religious assembly, were ever treated differently than Chabad. As the District Court explained in *Diehl v. Village of Antwerp*, 964 F.Supp. 646, 656 (N.D.N.Y. 1997), *aff'd* 131 F.3d 130 (2d Cir, 1997):

> It is well settled . . . that an equal protection claim under the Fourteenth Amendment requires a showing of intentional discrimination. To establish such intentional or purposeful discrimination, it is axiomatic that plaintiffs must allege that similarly situated persons have been treated different. In particular . . ., they must allege that defendants, as government entities, not only deliberately interpreted a statute against plaintiffs, but also singled out plaintiffs alone for that misinterpretation.

Where, as here, the complaint does not allege that the City ever actually treated Appellants differently than the Chabad, "plaintiffs' equal protection claim is insufficient as a matter of law" and must be dismissed. *Id*. *See also Gagliardi v. Village of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) (dismissing equal protection claim where amended complaint lacked allegations that others were actually treated differently). Simply put, Appellants fail to "identify comparators in the pleading in order to show intentional, discriminatory treatment different from others similarly situated." *Eisenberg v. City of Miami Beach*, 1 F. Supp. 3d 1327,

1340 (S.D. Fla. 2014). Appellants are "not permitted simply 'to rely on broad generalities in identifying a comparator." *Id*. Appellants failure to allege "at least one similarly situated comparator" with respect to the development approvals dooms their Equal Protection claim. *Id*. at 1342. Count II may be properly dismissed.

C. This Court Should Affirm the Dismissal of Count III of the Complaint, alleging a Procedural Due Process Violation, because there is no Alleged Deprivation by the City and the State of Florida Provides for Constitutionally Adequate Process as a Matter of Law.

The Complaint alleges that, with regard to a May 27, 2015, City Council meeting (at which the City issued a development approval for the Chabad building), the City "failed to follow governing land use procedures and practices." ECF 46 at ¶ 87. As a result, Appellants claim that their "procedural due process rights were violated." *Id*. at ¶ 92. These allegations fail to state a claim for a procedural due process civil rights violation.

"A § 1983 action alleging a procedural due process violation requires proof of three elements: a deprivation of a constitutionally-protected liberty[23] or

[23] Establishment Clause-based "liberty interests" are an insufficient basis for a procedural Due Process claim. Because no amount of procedural process justifies a government establishment of religion, the success of such a procedural Due Process claim directly depends on the merits of the Establishment Clause claim. For this reason, the procedural Due Process claim is "subsumed" in the Establishment Clause claim, and the stand-alone Due Process claim is subject to dismissal. *Doswell v. Smith*, 139 F.3d 888, *6 (4th Cir. 1998) (unpublished

property[24] interest; state action; and constitutionally inadequate process." *Cryder v. Oxendine*, 24 F.3d 175, 177 (11th Cir. 1994). Because the Complaint does not describe a single instance in which the City deprived Appellants of their constitutional right of notice and opportunity to be heard at a public meeting, there has been no "deprivation" by the City, and no procedural Due Process action is currently viable.[25]

More fundamentally, even if Appellants were not afforded sufficient notice and/or opportunity to be heard at the City's Planning and Zoning Board or at the City Council meeting (neither of which is alleged in the Complaint), no actionable procedural Due Process violation will have occurred because:

> a procedural due process violation is not complete . . . unless and until the State fails to provide due process. In other words, the state may cure a procedural deprivation by providing a later procedural remedy; only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise.

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decision). *See also Peloza v. Capistrano United Sch. Dist.*, 37 F.3d 517, 523 (9th Cir. 1994) (affirming dismissal of Establishment Clause-based procedural Due Process claim).

[24] There is simply no constitutionally-protected property interest in preventing activity on a neighbor's property. *Barth v. McNeely*, 603 Fed.App'x 846, 849 (11th Cir. 2015).

[25] Indeed, the Complaint affirmatively indicates that the approvals sought by Chabad were recommended by the City's Planning and Zoning Board at a "final public hearing" (ECF 46 at ¶ 57) and approved by the City Council "[a]t its May 27, 2015 meeting" (*id.* at ¶ 58).

McKinney v. Pate, 20 F.3d 1550, 1557 (11th Cir. 1994).

To that end, in Florida a party can challenge a development order issued by a local government by filing a Petition for Writ of Certiorari under the authority of Florida Rule of Appellate Procedure 9.100(c)(2). *See Bd. of Cnty. Comm'rs of Brevard Cnty. v. Snyder*, 627 So.2d 469, 474 (Fla. 1993). And, with regard to such a Petition,

> [w]here a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is afforded, whether the essential requirements of law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.

Vaillant, 419 So. 2d at 626 (emphasis supplied).[26]

With these State-created, "constitutionally adequate" review mechanisms in place, efforts by property owners to assert Section 1983 claims against Florida municipalities based upon purported procedural Due Process violations at municipal hearings meet with universal failure. *See, e.g. Flagship Lake Cnty. Dev. Number 5, LLC v. City of Mascotte, Fla.*, 559 Fed.App'x 811, 815 (11th Cir. 2014) (affirming dismissal of procedural Due Process claim in connection with City rezoning decision, noting that "[a]gain and again, this Court has repeated the basic

[26] Of course, perhaps the best indicia that circuit courts fulfill this review mandate is the *Royal Palm Real Estate v. City of Boca Raton* (Palm Beach County Circuit Court Case No. 502015CA009676MB) (ECF 41-1, pp. 3-4), wherein this review standard was employed to invalidate a development order issued to Chabad by the City.

rule that a procedural due process claim can exist only if no adequate state remedies are available); *Michael Linet, Inc. v. Village of Wellington, Fla*., 2004 WL 5565012, *7 (S.D. Fla. 2004) (Because Florida provides constitutionally-adequate review of alleged procedural due process violations, no Section 1983 due process claim is viable). Moreover, the right to file a Petition for Writ of Certiorari prevents a section 1983 procedural due process claim even if the plaintiff did not, in fact, file such a petition. *Horton v. Bd. of Cnty. Comm'rs of Flagler Cnty*., 202 F.3d 1297, 1300 (11th Cir. 2000). Count III can be properly dismissed because it fails to state a claim upon which relief can be granted.

D. This Court Should Affirm the Dismissal of Count IV of the Complaint,[27] alleging a Violation of the Florida Constitution, because the Expenditure of Municipal Staff Time does not provide Aid to Religion.

Count IV of the Complaint seeks compensation for an alleged violation of the "No Aid" provision of Article I, Section 3 of the Florida Constitution. Because the Complaint fails to allege that any municipal revenues were paid by the City to Chabad, this claim fails as a matter of law.

Under the Florida Constitution, "no revenue of … any political subdivision … shall ever be taken from the public treasury directly or indirectly in aid of any church[.]" Fla. Const. art. I sec. 3 (emphasis added). The Complaint, however,

[27] Once again, because the Initial Brief does not contain an argument that Count IV was improperly dismissed, this Court should just affirm the dismissal based upon Appellants' waiver. *See* f.n. 19, *supra*.

does not allege that any "funds" have been taken from the City's treasury at all. Instead, the Complaint only contends that there has been an "expenditure of labor" by City employees. ECF 46 at ¶ 100. Such an "expenditure" does not violate the Florida Constitution.

Appellants misread the Florida Constitution. The No-Aid provision, while prohibiting religious aid even if it is "indirect," prohibits only actual "revenue" from being taken from the public treasury. *See Council for Secular Humanism, Inc. v. McNeil*, 44 So. 3d 112, 119 (Fla. Dist. Ct. App. 2010) ("The overriding purpose of the [No Aid] provision is to prohibit the use of state funds to promote religious or sectarian activities."). Non-revenue "aid," as alleged in the Complaint, is simply not unconstitutional. Thus, "assistance to a religious institution through such mechanisms as tax exemptions, revenue bonds, and similar state involvement" are "substantially different forms of aid than the transfer of public funds expressly prohibited by the no-aid provision." *Bush v. Holmes*, 886 So.2d 340, 356 (Fla. Dist. Ct. App. 2004), *aff'd*, 919 So.2d 392 (Fla. 2005). The former are constitutional because "the prohibitions of the no-aid provision are limited to the payment of public monies." *Id.* (emphasis supplied); *see also Atheists of Fla., Inc. v. City of Lakeland, Fla.*, 713 F.3d 577, 596 (11th Cir. 2013) (upholding city's actual expenditures for mailing out prayer invitations to religious congregations against no-aid challenge because no "religious organization received financial

assistance from [the city] for the promotion and advancement of its theological views") (emphasis supplied).[28] Because the Complaint does not allege that City monies were provided to Chabad, Count IV can be properly dismissed.

CONCLUSION

The district court correctly concluded that Appellants lack constitutional and prudential standing for all of their federal claims and that, therefore, it lacked subject matter jurisdiction over the Complaint. The district court's final judgment should be affirmed on this basis. Alternatively, if the Court finds that Appellants do possess standing, it should affirm the district court's dismissal because the Complaint fails to state a cause of action upon which relief may be granted.

[28] Assuming *arguendo* that the work of City staff constitutes the use of tax revenue, Appellants still fail to state a cause of action because for a program to violate the No Aid provision, Courts must "consider such matters such as whether the government-funded program is used to promote the religion of the provider, is significantly sectarian in nature, involves religious indoctrination, requires participation in religious ritual, or encourages the preference of one religion over another." *McNeil*, 44 So. 3d at 120. The actions Appellants allege (the cost of staff labor and clerical assistance for processing an application for development approval) apply to any applicant, not just religious applicants.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,705 words, excluding the parts of the brief exempted per Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 201 in Times New Roman 14 point font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 28, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served on this day on all counsel of record or pro se parties identified on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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FOR THE ELEVENTH CIRCUIT

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