**CASE NO. 17-11820**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

GERALD GAGLIARDI and KATHLEEN MACDOUGALL
*Plaintiffs/Appellants*

v.

THE CITY OF BOCA RATON, FLORIDA,
*Defendant/Appellee*

And

CHABAD OF EAST BOCA, INC. and TJCV LAND TRUST,
*Intervenors*

**On Appeal from the United States District Court**
**For the Southern District of Florida**

# APPELLANTS' INITIAL BRIEF

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vs. City of Boca Raton

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Comes now the Plaintiffs/Appellants, GERALD GAGLIARDI and KATHLEEN MACDOUGALL, 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 & Popok

Ahnell, Leif, City of Boca Raton

Blomberg, Daniel Howard, Becket Fund for Religious Liberty

Chabad of East Boca, Inc.

City of Boca Raton

Cole, Jamie A., Weiss Serota Helfman Bierman, PL

Ellison, Steven, Broad and Cassel, LLP

Estate of Irving Litwak

Friedman, David K., Weiss, Handler & Cornwell, PA

Freedman, Devin (Velvel), Boies, Schiller & Flexner, LLP

Gagliardi, Gerald

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Koski, Arthur C., Law Office of Arthur C. Koski, PA

Hamilton, Marci A.

Handler, Henry B., Weiss Handler & Cornwell, PA

Lefkowitz, Jay P., Kirkland & Ellis, LLP

MacDougall, Kathleen

Marra, Honorable Kenneth A.

Marshall, Lawrence C., Kirkland & Ellis, LLP

Matthewman, Magistrate Judge William

Menashi, Steven J., Kirkland & Ellis, LLP

New, Rabi Ruvi

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Representative of TJCV Land Trust

Schatmeier, Elliot C. Harvey, Kirkland & Ellis, LLP

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TJCV Land Trust

Windham, Lori Halstead, Becket Fund for Religious Liberty

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants request oral argument. Plaintiffs/Appellants believe this Court's review would be significantly aided by oral argument to clarify the facts and legal arguments presented by the parties. Rule 34(a), Fed. R. App. P.; 11th Cir. R. 34-3(c).

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## STATEMENT OF JURISDICTION

Appellants initiated this action pursuant to 42 U.S.C. § 1983 alleging violations of their rights under the United States Constitution (action for injunction, attorney's fees, costs) and 22 U.S.C. § 2201 (declaratory judgment action). Appellants' claims gave rise to federal-question jurisdiction pursuant to 28 U.S.C. § 1331 and the Florida Constitution, Art. 1, § 3. The district court exercised supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

This appeal stems from a decision of the United States District Court of the Southern District of Florida granting final summary judgment on March 28, 2017 in favor of Defendant and Intervenors on Appellants' constitutional claims.

Appellants timely filed a notice of appeal.

## STATEMENT OF THE ISSUESS

This appeal involves one issue: whether the Appellants have standing to bring constitutional claims against the City after it (1) gerrymandered its land use code primarily to benefit a religious applicant and (2) further approved the site plan in violation of its land use law to benefit the same religious applicant, where the Appellants are close neighbors and have alleged both economic and noneconomic injuries. The lawsuit was brought against the Defendant/Appellee City of Boca Raton (Appellee or "City"). The Chabad of East Boca, Inc., et al., intervened on the side of the City (Intervenor or "Chabad").

## STATEMENT OF THE CASE

This case was brought by close residential neighbors of a small vacant piece of land ("the Property") consisting of only 0.81 acres at 770 Palmetto Park Road, Boca Raton, that the City approved for multiple uses by the Intervenor, including a house of worship, study hall, and a museum, called My Israel (Doc 46 – Pg. 5, 8, 9 ¶¶ 16, 30, 34).

### ***Course of Proceedings and Disposition Below***

Gerald Gagliardi and Kathleen MacDougall ("Plaintiffs" or "Appellants") filed a complaint on February 8, 2016 against The City of Boca Raton, Florida ("City" or "Appellee") alleging that the City violated their constitutional rights in engaging in activities conflicting with the First Amendment, the Fourteenth Amendment and the Appellants' rights to equal protection and due process under the Fourteenth Amendment of the United States Constitution (Doc 1).

After the court granted the City's motion to dismiss with leave to amend on July 21, 2016 (Doc 43), a first amended complaint was filed on August 12, 2016 (Doc 46).

The court granted the City's motion to dismiss the first amended complaint on March 28, 2017 (Doc 76), and a final judgment in favor of the City and its affiliates against the Appellants was entered.

***Contemporaneous Proceedings Involving the Property***

Appellants are not the only ones to file a lawsuit in response to the illegal approval of the Intervenor's multi-use site plan. In addition, the Royal Palm Real Estate Holdings, LLC, Royal Palm Properties LLC, and David Roberts sought certiorari review of the City's resolution affirming the Planning and Zoning Board's resolution approving a site plan and granting a technical deviation to the trust that owns the property for a religious center, including a museum. The petitioners argued that the approval of the site plan was illegal, because it permitted a prohibited use by permitting a museum in a B-1 Business District, violated parking restrictions, exceeded the maximum floor area ratio in the B-1 Business District, and the project was out of character of the surrounding District. The Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, granted the petition, ruling solely on whether the museum approval was legal, and held that it was not. *Royal Palm Real Estate v. City of Boca Raton*, 502015CA009676MB, at *4-11 (Fla. Cir. Ct. 2015), *appeal pending*. The trust appealed the ruling, which is now pending. Petition for Writ of Certiorari, *TJCV Land Trust v. Royal Palm Real Estate Holdings,* 502015CA009676MB (Fla. Dist. Ct. App. filed Jul. 6, 2016). There is also a current dispute between the Chabad and the Trust over the Property.

*Chabad of East Boca v. Schneider*, 502017CA001787MB (Fla. Cir. Ct. filed Feb. 13, 2017).

## Statement of the Facts

The Intervenor, Chabad, sought to build a religious complex including a house of worship, religious school, and other functions in the Golden Triangle area of Boca Raton, Florida. The area was zoned for single-family residences, and a house of worship was permitted with no land use restrictions (Doc 46 – Pg. 5 ¶¶ 16-17). The Golden Triangle residential neighbors strongly opposed the project to the point of religious animus (Doc 46 – Pg. 5 ¶ 18). The City also expressed concern, because it was adjacent to the Mizner Park area, where there are venues for concerts, restaurants, and other general public gatherings (Doc 46 – Pgs. 5-6 ¶¶ 17, 21). To minimize the impact of the project on the neighborhood and Mizner Park, the City introduced Ordinance No. 5014, which expressly permitted places of worship in single-family residential districts but also subjected them to parking requirements and restrictions (Doc 46 – Pg. 5 ¶ 19). Despite the introduction of Ordinance No. 5014, the public opposition to the project persisted and was widely reported. As a result, the City turned to secret discussions with the Chabad and the developer of the property. The upshot of these discussions was that Ordinance No. 5014 was never passed, and instead City staff was directed to craft a pathway for the Chabad to locate on the

Property in Seaside Village, which is on a barrier island with limited access to the mainland (Doc 46 – Pgs. 11-12 ¶ 44). The area has been designated by the federal government as a high-hazard coastal area with increasingly frequent intracoastal flooding (Doc 46 – Pg. 7 ¶ 24). FEMA guidelines direct that manmade changes including grading and extraction of soil for underground parking be taken into account in such areas (Doc 46 – Pg. 7 ¶ 26). The slightest of storms causes problems for surrounding homeowners (Doc 46 – Pg. 7 ¶ 27).

The Property is located in what was a B-1 Business District, where houses of worship were not permitted uses. It is 400 yards from the bridge connecting the barrier island to the mainland and, therefore, located on an emergency vehicle route (Doc 46 – Pgs. 8, 9 ¶¶ 30, 32). Before the developer purchased the property, it was owned by a small French restaurant housed in a single-family residence from the 1920s, which had a de minimis effect on the neighborhood or traffic flow (Doc 46 – Pg. 10 ¶ 39).

Appellants, Gagliardi and MacDougall, live in single-family homes approximately 100 and 300 yards from the Property, respectively (Doc 46 – Pg. 3 ¶ 9-10). They are taxpayers of the City (Doc 46 – Pg. 4 ¶ 11). Once the City, developer, and Chabad had agreed, without the public's knowledge, that the Chabad would be permitted to use the Property for its house of worship and school, the project expanded to include a café, gift shop, day care, offices, and a

museum called "My Israel" (Doc 46 – Pgs. 9, 14 ¶¶ 33-34, 54). During a March 2015 fundraiser, over 200 vehicles converged on the Property, snarling traffic and requiring police assistance (Doc 46 – Pg. 9 ¶ 33).

The County was not informed of the project or its scope and therefore was unable to assess the likely impact of daily tour buses, school buses, catering vans, cars and pedestrians as the City hurried the site plan approval and other approvals through the process without regard to the governing requirements. The religious complex will generate more traffic and parking issues and flooding is inevitable because the plan has zero green space (Doc 46 – Pgs. 7, 9 ¶¶ 27, 35). It will also impose barriers to the ingress and egress of emergency vehicles onto and from the barrier island (Doc 46 – Pg. 9 ¶ 35).

To obtain the goals of the agreement between the City, developer, and the Chabad, Ordinance No. 5014 was shelved and instead Ordinance No. 5040 was tailor-made for the Chabad and introduced. Converse to Ordinance No. 5014, No. 5040 limited houses of worship in residential neighborhoods and added places of worship to the definition of "Places of Public Assembly," which then made it possible for the Chabad to locate on the Property (Doc 46 – Pg. 12 ¶ 47).

After enacting an Ordinance whose primary purpose was to benefit the Chabad, the City turned to granting approvals that the Chabad needs for its intense use of such a small property for the complex it envisions. As it pushed

the project through its approvals, the City knowingly and improperly permitted a prohibited use on the property, ignored parking deficiencies and allowed inadequate parking, allowed an excessively large building for the lot, permitted a complex out of character with the surrounding district, and allowed deviations from the Code that did not meet legal criteria (Doc 46 – Pgs. 15, 16 ¶¶ 57, 59). The landscape architect for the project resigned following the distribution of false promotional material to gain City approval (Doc 46 – Pg. 16 ¶ 61).

## Statement of the Standard or Scope of Review

The court below dismissed this case solely on the issue of standing. It was required to accept the allegations in the Amended Complaint as true. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Hunnings v. Texaco, Inc.*, 29 F.3d 1480, 1483 (11th Cir. 1994). Yet, the court below trivialized the facts alleged and ignored statements of fact that would establish standing. Standing is a matter of law and, therefore, this Court should review the decision below *de novo*. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Florida*, 641 F.3d 1259, 1264 (11th Cir. 2011).

This court may take judicial notice of decisions of the courts such as the decision in *Royal Palm Real Estate v. City of Boca Raton*, No. 502015CA009676MB, at *4-11, holding that the City of Boca failed to follow its appropriate regulations and standards in granting the owner of the Property

permission to build the Chabad's proposed complex. *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 127 (3d Cir. 2016); *Halmos v. Bomardier Aerospace Corp.*, 404 F. App'x 376, 377 (11th Cir. 2010) (district court may take judicial notice of matters of public record without converting a Rule 12(b)(6) motion into a Rule 56 motion); *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 217 (2d Cir. 2004); *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

## SUMMARY OF THE ARGUMENT

The City failed to follow its own land use procedures and in doing so violated Appellants' constitutional rights. Appellants pleaded federal and state constitutional violations stemming from the City's gerrymandering of land use code for the primary purpose of benefiting the Chabad. The court below erroneously concluded that appellants did not have standing based on its incorrect application of the governing law and its failure to take the allegations in the complaint as true.

Appellants are in danger of suffering the specific and particularized injuries alleged in the first amended complaint. The injuries were caused by the City's illegal land use schemes to benefit the Chabad, and the relief sought can redress Appellants' injuries. Consequently, Appellants have constitutional

standing to bring their Establishment Clause claims. The court below did not address constitutional standing for the other three claims.

Appellants are also well within the "zone of interest" required to establish prudential standing. The lower court's prudential standing analysis of equal protection and due process theories underestimated Appellants' claims in concluding they are not within the zone of interest.

## ARGUMENT

### I. Appellants Have Constitutional and Prudential Standing

The decision below erroneously concluded that the Appellants do not have standing by failing to take the allegations as true and applying the governing law incorrectly. The Appellants' first amended complaint pleads three federal constitutional violations and a state constitutional violation for the City's gerrymandering of the land use code for the primary purpose of benefitting the Chabad and for its illegal application of its land use code to benefit the Chabad. The first amended complaint further alleges both economic and noneconomic injuries resulting from the City's unconstitutional acts.

A state court has already ruled that the City transgressed its land use law when it approved the site plan for a museum on the property. *Royal Palm Real Estate v. City of Boca Raton*, No. 502015CA009676MB, at *10 (concluding "to the extent the City approved a site plan…it departed from the essential

requirements of the law"). The Appellants' argument is that the City violated the land use law, just as the *Royal Palm* petitioners argued, and that in so doing it violated Appellants' constitutional rights.

To determine standing, it is necessary to identify the underlying legal right asserted. *Allen v. Wright*, 468 U.S. 737, 763 (1984); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 499 (1982). In this case, the Appellants have asserted three federal constitutional claims and one state constitutional claim. The court below bifurcated its standing decision into two categories: constitutional standing and prudential standing. Constitutional standing is a bedrock requirement. *Raine v. Byrd*, 521 U.S. 811 (1997). *Valley Forge Christian College*, 454 U.S. 464; *Warth v. Selding*, 422 U.S. 490, 498 (1975) (constitutional standing is the threshold question in every federal case). Prudential standing is not a constitutional requirement but rather at the discretion of the court. *CAMP Legal Defense Fund, Inc. v. City of Atlanta*, 451 F.3d 1257, 1270 (11th Circuit 2006); *Warth v. Selding*, 422 U.S. at 499-500 (prudential standing requirements are essentially a matter of judicial self-governance). Rules of prudential standing are more flexible rules, designed to protect courts from "deciding abstract questions of wide public significance." *U.S. v. Windsor*, 133 S. Ct. 2675, 2686 (2013). The decision below did not address constitutional standing for the equal

protection or due process claims, and only addressed prudential standing for these claims in passing. It addressed neither constitutional nor prudential standing for the state constitutional claim. Rather, the decision below constrained its full constitutional and prudential standing analysis to the Establishment Clause theory.

The court correctly stated the standard for constitutional standing as follows, but then applied it incorrectly:

> The "irreducible constitutional minimum" of standing consists of three elements: "The plaintiff must have (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) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). At the pleading stage, "the plaintiff must 'clearly . . . allege facts demonstrating' each element." Id. (quoting Warth, 422 U.S. at 518) (alteration in original). The court below failed, however, to apply these principles correctly to the allegations of the Amended Complaint.
>
> To establish the first element, 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 or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan, 504 U.S. at 560). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'" Id. (quoting Lujan, 504 U.S. at 560 n.1). To be "concrete," an injury must be "de facto," meaning "it must actually exist."

(Doc 76 – Pgs. 8-9.)

The injury can be economic and noneconomic. Appellants have alleged both as they are understood under Eleventh Circuit case law. *Ford v. Strange*, 580 Fed. Appx. 701 (2014); *Alabama-Tombigbee Rivers Coalition v. Norton*, 338 F.3d 1244 (11th Cir. 2003). The injuries to the Appellants in this case are like those in other Establishment Clause cases in the Eleventh Circuit. For example, in *Am. Civil Liberties Union of Georgia v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1106 (11th Cir. 1983), plaintiffs demonstrated a particular and personalized noneconomic injury sufficient to trigger standing where they were forced to change their behavior by no longer camping in the state park. Similarly, in *Glassroth v. Moore*, 335 F.3d 1282, 1292 (11th Cir. 2003), plaintiffs who altered their behavior to avoid exposure to a religious monument had suffered noneconomic injuries in fact sufficient for standing. Appellants' alleged economic and noneconomic injuries are comparable, if not more extensive, than others that have been deemed sufficient for standing by this court and the Supreme Court.

The court below concluded that the Appellants lack constitutional standing on the theory that their allegations failed to specify particular injuries they would suffer from the City's decision to shape the land use code on a property merely 100-300 yards away from their homes and illegal application of land use law to the Chabad's benefit (Doc 76 – Pg. 12). The court discounted

the alleged injuries to Appellants on the theory that others might also suffer similar harm (Doc 76 – Pg. 12). The court treated the specific injuries alleged in the first amended complaint as "generalized" because others might be affected as well. Having found no injuries, the court did not specifically address causation or consider redressability (Doc 76 – Pg. 8). The court further held that the Appellants are not in the "zone of interests" for any of the federal constitutional claims to satisfy prudential standing requirements.

**1. The Establishment Clause**

The First Amendment contains two Religion Clauses: the Establishment Clause and the Free Exercise Clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." *U.S. Const. amend. I.* Standing for a violation of the Establishment Clause is not limited to economic injuries but also can be triggered by noneconomic injuries, though not merely psychological injuries such as being offended. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982). If the Establishment Clause violation forces someone to make a change in their behavior, that is a noneconomic injury. "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in

some indefinite way in common with people generally. . . ." *Valley Forge Christian Coll.*, 454 U.S. at 477. Under Eleventh Circuit precedent, Appellants have standing if they are "directly affected by the laws and practices against [which] their complaints are directed." *Saladin v. City of Milledgeville,* 812 F.2d 687, 692 (11th Cir. 1987). Noneconomic injury can be proven through inconvenience and expense, including the need to avoid or circumvent the unconstitutional item that offends the Establishment Clause. *Glassroth v. Moore*, 335 F.3d 1282, 1293 (2003) (plaintiffs who altered their behavior, incurred expense and inconvenience to avoid passing by a religious monument depicting the Ten Commandments suffered injuries in fact sufficient to trigger standing); *Am. Civil Liberties Union of Georgia v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1106 (11th Cir. 1983) (plaintiffs demonstrated a particular and personalized noneconomic injury sufficient to trigger standing where they were forced to change their behavior by no longer camping in the state park).

The Establishment Clause can be violated by a range of government misbehaviors. It prohibits the government from treating a religious entity with favoritism, *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 8-9 (1989) (invalidating religious exemption from state sales tax of publications), from application of the law for a predominant purpose of benefitting a religious entity, *McCreary*

*County v. Am. Civil Liberties Union*, 545 U.S. 844 (2005) (prohibiting the posting of the Ten Commandments in a courthouse); *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (laying out the elements of the *Lemon* test); and from crafting the law to specifically fit a particular religious entity. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 706 (1994) (drawing a school district according to where one set of believers lived).

If the Establishment Clause violation forces someone to make a change in their behavior, that is a noneconomic injury. "The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally. . . ." *Valley Forge Christian Coll.*, 454 U.S. at 477.

As the preceding discussion shows, the Establishment Clause is not a duplicate of the Free Exercise Clause but rather establishes distinct and other obligations on the government. The decision below misinterpreted the Establishment Clause by treating it as though it is nothing but a replication of the Free Exercise Clause. "Plaintiffs have not alleged that they have been subject to unwelcome religious exercise. . . .Indeed, Plaintiffs have no alleged any injury concerning religious activity" (Doc 76 – Pg. 14). Appellants have not

alleged that their free exercise of religion is at risk, but rather that the government has improperly lent its power to the Intervenor solely for the benefit of this religious entity resulting in economic and noneconomic injury to the Appellants. The decision below mistakenly trivialized the alleged injuries caused by the approval of the Intervenor's intense project, rather than taking the allegations as true.

The first amended complaint alleges direct harm to the Appellants, including "inevitable" flooding that affects them from "even the slightest of storms" (Doc 46 – Pg. 7 ¶ 27). Their safety will be directly and negatively affected by impediments to emergency vehicles and services, which are located on the mainland (Doc 46 – Pg. 9 ¶ 35) and there will be traffic intrusion into the neighborhood and impediments to ingress and egress from the neighborhood (Doc 46 – Pg. 19 ¶ 72). The project will also alter the beach-oriented, relaxed, and low-intensity character of the Seaside Village, which is a primary reason for Appellants' home ownership in the Seaside Village (Doc 46 – Pg. 19 ¶ 72). Further, Appellants will be forced to assume the special burden of altering the vehicular and pedestrian access to their residences on a regular and daily basis to avoid the injury created by the Intervenor's religious complex and the physical and metaphysical impact of avoiding the complex by the need to utilize other, significantly less convenient, public roadways.

The complaint also alleges classic Establishment Clause injuries including favoritism of a religious entity to the Appellants' detriment, *Texas Monthly*, 489 U.S. at 40, and neighborhood line-drawing determined by the needs of a religious entity rather than the common good. *Board of Educ. of Kiryas Joel Village School Dist.*, 512 U.S. at 688. The City's furtive favoritism of the Chabad and its abandonment of its land use law to the Chabad's benefit further endorses religion, making the Appellants feel disenfranchised and like "outsiders." *Glassroth*, 335 F.3d at 1288, 1297 (2003) (concluding that statute containing Ten Commandments outside courthouse would lead a reasonable observer to "feel as though the State of Alabama is advancing of endorsing, favoring or preferring, Christianity" and caused plaintiffs to feel like "outsiders"); *Lee v. Weisman*, 505 U.S. 577, 593 (1992); *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

The court below made the mistake of assuming that because numerous people may be affected in the same way by the City's decision that two specific neighbors cannot allege sufficiently particularized injuries for purposes of standing to assert constitutional claims (Doc 76 – Pg. 10-11). The court states that the Appellants asserted "a list of conjectural injuries to the whole of the area surrounding the proposed Chabad site, and potentially beyond" (Doc 76 – Pg. 10). *See also* (Doc 76 – Pg. 11) (rejecting "alleged injuries, impacting vast

swaths of the surrounding population … 'suffer[ed] in some indefinite way in common with people generally"). This makes no sense. A government action can harm many citizens, but not every citizen must bring a claim in order for the government to be found to be in violation of the Constitution. *Flast v. Cohen*, 392 U.S. 83 (1968) (concluding that individual litigants have standing to represent the public interest … if Congress has appropriately authorized such suits).

Moreover, the fact that others will be harmed as well should be treated as evidence of the severity of the harm caused by the City, not a reason to dismiss the harm done to these two particular nearby homeowners. The Appellants are pleading their own specific injuries that are derived by their ownership of property close to the illegally approved structure. They are not purporting to represent the interests of any others who might also be injured by the unconstitutional jerry-rigging of local land use law to benefit of this singular religious entity.

The court further states that even if the injuries were particular to the Appellants, the "type of injuries alleged are wholly conjectural in nature" (Doc 76 – Pg. 11). Yet, "inevitable" flooding, based on federal requirements and measurements, as the amended complaint alleges, is not "wholly conjectural"

(Doc 46 – Pg. 7 ¶¶ 26-27). Nor is the effect on emergency services to the barrier island purely conjectural (Doc 46 – Pg. 9 ¶ 35).

In supporting its order to dismiss, the court mistakenly relied on the decision in *Buena Vista East Historic Neighborhood Ass'n v. City of Miami*, No. 07-20192-CIV, 2008 WL 1848389 (S.D. Fla. 2008) as that case is distinguishable from this one. First, *Buena Vista* involved plaintiffs' suit alleging due process violation for lack of notice in the City's issuance of permits to develop, not full-scale approvals of an illegal project, including a change in zoning for the primary benefit of a religious landowner. Second, the court found that the plaintiffs lacked standing because the damages they alleged were mere "threats" to their property interests, and as such were too speculative to show evidence of an injury different in kind from that of the general public. *Id.* As the Appellants reside very close to the real property which is the beneficiary of the Defendant's unconstitutional acts (Doc 46 – Pg. 3), they are forced to find convoluted and lengthier exits and will have difficulties in accessing emergency vehicles in the event of personal emergencies (Doc 46 – Pg. 9). These injuries differ from those of the general public, living further away from the affected area or not even residing on the barrier island. While there are projects where a neighbor's concern is made up or conjectural, in this case, the extraordinary scope of the Chabad project on the small lot next to the bridge from the

mainland to the barrier island and within only 100 and 300 yards of the Appellants' homes makes the allegations plausible and sufficient to survive a motion to dismiss (Doc 46 – Pgs. 5, 8, 9 ¶¶ 16, 30, 34).[1] On this theory, a neighbor must wait until a structure approved through unconstitutional means is built and in operation before being able to challenge the permission underlying it.[2]

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[1] The degree to which the court fails to take the allegations as true is further evidenced by its implicitly negative assessment of how far each of the Appellants' homes is from the project, which is a simple matter of measurement. (Doc 76 – Pg. 9).

[2] A federal court can declare a zoning regulation unconstitutional when such regulations are "arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989) (quoting *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)). This case involved the City of Alabaster rejecting the re-zoning application of landowners seeking to develop because the City's local officials found that the proposed ordinance was not in the best interest of the community. *Greenbriar*, 881 F.2d 1570 at 1579. Among some of the local officials' concerns were the effects of the rezoning ordinance on surrounding single-family neighborhoods and potential traffic problems posed by the development. *Id.* at 1580. As such, the court found that the City's refusal of the rezoning request was not arbitrary and capricious, and thus did not violate the plaintiff's substantive due process. *Id.* at 1581. The same principles can be applied to this case, even if the action of the City is reversed. Here, the City approved the Chabad project for rezoning without considering the interests of the residents in the neighborhood. In approving the Chabad's application for rezoning, the City completely disregarded the effects on flooding, safety, and heavy traffic, thereby approving an unreasonable regulation that has "no substantial relation to public health, safety, morals or general welfare." *Greenbriar*, 881 F.2d 1570 at 1577.

The court further addressed prudential standing, stating that the allegations were too "generalized." Yet, the court commits an error of logic in its decision regarding what constitutes a generalized grievance. The Supreme Court has found that some plaintiffs lacked prudential standing when they asserted interests that are only "generalized" when for example the plaintiff is a trade or nonprofit organization. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The Eleventh Circuit has applied this reasoning to find standing for plaintiffs who are similarly situated to the Appellants in this case. In *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003), the location of a monument displaying the Ten Commandments in the rotunda of the Judicial Building made it impossible for anyone using the stairs, elevators, or restrooms to avoid it. The plaintiffs were attorneys who were required to enter the Judicial Building regularly in order to perform their duties. *Glassroth,* 335 F.3d at 1292. Two of the plaintiffs altered their behavior in order to minimize contact with the monument. *Glassroth,* 335 F.3d at 1292. The court concluded that the two plaintiffs who had altered their behavior had suffered and would continue to suffer injuries in fact sufficient to confer standing. *Glassroth,* 335 F.3d at 1292. In *Saladin v. City of Milledgeville*, 812 F.2d 687, 692 (11th Cir. 1987) the court held that appellants had standing to challenge the constitutionality of the City's use of its seal on official stationary where the seal contained the word

"Christianity." In these types of cases, plaintiffs have standing if they are "directly affected by the laws and practices against [which] their complaints are directed." *Saladin*, 812 F.2d at 692. The appellants in *Saladin* came into direct contact with the offensive conduct through regular correspondence with the City on stationary containing the City's seal. *Saladin*, 812 F.2d at 692. The court concluded that plaintiffs had more than an abstract interest because they are part of the City, and are "directly affronted by the presence of the allegedly offense word on the city seal." *Saladin*, 812 F.2d at 692. In *Am. Civil Liberties Union of Georgia v. Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1106 (11th Cir. 1983), plaintiffs were state residents who were denied the use and enjoyment of public land as a result of the erection of large lighted cross located on state park property. *Am. Civil Liberties Union of Georgia*, 698 F.2d at 1105. The court held that Appellants had demonstrated a particular and personalized noneconomic injury that provided them with a "personal stake in the controversy" sufficient to constitute a cognizable injury in fact and trigger standing. *Am. Civil Liberties Union of Georgia*, 698 F.2d at 1102. The Court has not held, however, that because many people could be affected by a government action that a subset of those with particularized and immediate injuries must be denied standing.

"The test for 'zone of interest' requires only that the relationship between the plaintiff's alleged interest and the purposes in the substantive provision be more than marginal." *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993). Any citizen's interest in preventing violations of rights given under the First Amendment is more than marginally related to the constitutional provision, which protects the public at large as well as the individual plaintiff from government invasion of religious … activity. *Id.* at 1526. Zone of interest in terms of standing may reflect at times aesthetic, conservational, and recreational …value sufficient to give standing, and a person or family may have a spiritual stake in First Amendment values sufficient to give standing to raise issues concerning the Establishment Clause. *Association of Data Processing Service of Organization, Inc. v. Camp*, 397 U.S. 150 (1970). The Appellants' concern for the parking deficiencies, and the change in character of the neighborhood created by the City's project undoubtedly fall within the aesthetic and conservational values sufficient to give standing (Doc 46 – Pg. 16). Furthermore, because the general trend of the courts is to enlarge the class of people who may protest against administrative action (*Id.* at 154) the Appellants are well within the zone of interest needed to trigger a violation of the Establishment Clause.

Furthermore, 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 practice. *Pelphrey v. Cobb County, Ga.,* 547 F.3d 1263, 1280 (11th Cir. 2008). Notably, *Flast v. Cohen*, 392 U.S. 83 (1968) involved a few taxpayers who brought suit seeking to enjoin expenditures of federal funds for purchase of textbooks and other instructional books used in schools supervised by religious organizations. The Court held that so long as the Appellants had a personal stake in the outcome of the controversy, such personal stake was sufficient to establish standing. *Id.* at 102-107. The offensive practice in this case is the direction of the City to paid staff to craft and spearhead a pathway to approvals to the benefit of the Intervenor (Doc 46 – Pgs. 11, 12, 15 ¶¶ 44, 46, 57). The Appellants are residents and taxpayers of the City of Boca Raton and the Federal government (Doc 46 – Pg. 4 ¶ 11).

The court also reasoned that the Appellants are not in the zone of interests of the Establishment Clause on the theory that they have not "suffered the injuries that the Establishment Clause exists to protect against" (Doc 76 – Pg. 14). This conclusory assertion is hard to fathom. The actions taken by the City in this case are precisely why an Establishment Clause is necessary. The City used its government authority to alter the land use code to bend to religious

animus from the Golden Triangle neighborhood and in turn to specifically benefit the Chabad. It then soft-pedaled its ordinary land use law to move the approvals through. This is not an ordinary case involving ordinary neighbors who are unhappy with a zoning decision. This is a case where the government stepped over the line to benefit one religious entity. It just so happens it used the land use process to do so.

The two nearby residential neighbor Appellants are in danger of particularized injuries alleged in the first amended complaint. Those injuries were caused by the City's collusive legal maneuvers for the benefit of the Chabad, and they can be redressed through an injunction barring the project from going forward, attorney's fees, and costs. Therefore, the Appellants have constitutional standing to pursue their Establishment Clause claims, and the decision below should be reversed and this case remanded for further proceedings.

**2. Equal Protection and Due Process Under the Fourteenth Amendment and the Florida Constitution.**

The decision gave short shrift to the other causes of action in the complaint. It did not address constitutional standing for the other three claims. In its prudential standing reasoning on the theories of equal protection and due process, the decision trivializes the Appellants' claims saying that they are

simply "grievances arising from an unfavorable zoning decision, dressed in the cloak of a violation of fundamental, sacrosanct constitutional rights" (Doc 76 – Pg. 15). Going on to concede that adverse zoning decisions can "violate the Constitution's guarantees of equal protection under the law and certain minimums of due process," the court in a conclusory fashion concludes that the Appellants lack prudential standing. *Id.* Without explanation, the court finds that developers might have standing but neighbors would not.

The Court never addressed the claims under the Florida Constitution.

## CONCLUSION

For the foregoing reasons, this Court should reverse the decision below, hold that the Appellants have alleged sufficient facts to establish standing, and remand for further proceedings in the District Court on the constitutional violations committed by the City of Boca Raton.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing brief complies with the type-volume requirements of Fed. R. App. P. 32(a)(7)(B), as modified by the Court's Order of February 8, 2017, because it contains 6029 words. 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 it is prepared in 14-point Times New Roman Word 2010.

/s/ Arthur C. Koski .
ARTHUR C. KOSKI

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the foregoing Brief with the Clerk of Court using the Court's CM/ECF System on this 14th day of June 2017. All parties will be served by the CM/ECF system. A copy of the Brief is also being sent via Email to the following:

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