

IN THE SUPREME COURT OF FLORIDA

CARILLON COMMUNITY
RESIDENTIAL ASSOCIATION,
INC., and KEN HOFER,

Petitioners,

vs.

CASE NO. SC10-_____
DCA Case No. 5D09-3789

SEMINOLE COUNTY, FLORIDA,
AHG GROUP, LLC, and
UNIVERSITY OF CENTRAL
FLORIDA FOUNDATION, INC.,

Respondents.

PETITIONERS' JURISDICTIONAL BRIEF

DAVID A. THERIAQUE, ESQUIRE
Florida Bar No. 832332
S. BRENT SPAIN, ESQUIRE
Florida Bar No. 320810
THERIAQUE & SPAIN
433 North Magnolia Drive
Tallahassee, Florida 32308
Telephone: 850/224-7332
Facsimile: 850/224-7662
E-mail: sbs@theriaquelaw.com

COUNSEL FOR PETITIONERS

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PREFACE iii

INTRODUCTION 1

STATEMENT OF THE CASE AND FACTS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

 A. THE FIFTH DISTRICT’S DECISION EXPRESSLY
 AND DIRECTLY CONFLICTS WITH *JENNINGS V.*
 DADE COUNTY, 589 SO. 2D 1337 (FLA. 3D DCA
 1991)..... 4

 B. THE FIFTH DISTRICT’S DECISION EXPRESSLY
 AND DIRECTLY CONFLICTS WITH OTHER
 DISTRICT COURT DECISIONS 6

 C. THE COURT SHOULD EXERCISE ITS
 DISCRETIONARY JURISDICTION 9

CONCLUSION 10

CERTIFICATE OF SERVICE 11

CERTIFICATE OF COMPLIANCE 12

TABLE OF AUTHORITIES

Florida Cases

<i>Board of County Comm’rs of Brevard County v. Snyder</i> , 627 So. 2d 469 (Fla. 1993).....	9
<i>Board of County Comm’rs of Hillsborough County v. Casa Dev. Ltd., II</i> , 332 So. 2d 651 (Fla. 2d DCA 1976)	8
<i>Connor v. Town of Palm Beach</i> , 398 So. 2d 952 (Fla. 4th DCA 1981)	8
<i>Coral Reef Nurseries, Inc. v. Babcock Co.</i> , 410 So. 2d 648 (Fla. 3d DCA 1982).....	4, 7, 8
<i>Dade County v. Marca, S.A.</i> , 326 So. 2d 183 (Fla. 1976)	9
<i>Florida Power & Light Co. v. City of Dania</i> , 761 So. 2d 1089 (Fla. 2000).....	6
<i>Harris v. Goff</i> , 151 So. 2d 642 (Fla. 1st DCA 1963).....	7, 8
<i>Jennings v. Dade County</i> , 589 So. 2d 1337 (Fla. 3d DCA 1991).....	3, 4, 5, 6
<i>Lee County v. Sunbelt Equities, II, Ltd. P’ship</i> , 619 So. 2d 996 (Fla. 2d DCA 1993).....	5
<i>Renard v. Dade County</i> , 261 So. 2d 832 (Fla. 1972).....	8
<i>Walgreen Co. v. Polk County</i> , 524 So. 2d 1119 (Fla. 2d DCA 1988).....	8

Florida Constitution

Art. V, § 3(b)(3), Fla. Const.....	3
------------------------------------	---

Florida Rules of Appellate Procedure

Fla. R. App. P. 9.030(a)(2)(A)(iv)	3
Fla. R. App. P. 9.210(a)(2).....	12

PREFACE

Petitioners Carillon Community Residential Association, Inc., and Ken Hofer will be referred to collectively as the “Petitioners.”

The Appendix filed with this Jurisdictional Brief contains a conformed copy of the Fifth District’s decision in *Carillon Community Residential v. Seminole County*, Case No. 5D09-3789, ___ So. 3d ___, 2010 WL 2628692 (Fla. 5th DCA July 2, 2010), which will be cited herein as “Slip Op. at ___.”

INTRODUCTION

This case involves the basic due process right of “affected parties” (*i.e.*, those with standing to challenge a zoning decision) to cross-examine witnesses during a quasi-judicial zoning hearing. Prior to the instant case, Florida courts had consistently and uniformly held that affected parties must be allowed to cross-examine witnesses during a quasi-judicial zoning hearing. Relying upon an unpublished trial court decision, however, the Fifth District in the case *sub judice* held that only the developer and the local government have a right to cross-examine witnesses during a quasi-judicial zoning hearing – other affected parties, such as adjoining landowners, whose interests will be directly affected and have standing to challenge the zoning decision, have no such due process right.¹

The Fifth District’s decision is in express and direct conflict with decisions of other district courts which hold that the right of “affected parties” to cross-examine witnesses is a basic requirement of due process in a quasi-judicial zoning hearing. Accordingly, this Court should exercise its discretionary jurisdiction and resolve such conflict.²

¹ In other words, developers and local governments get to cross-examine affected parties and their witnesses but not vice-versa.

² The exceptional importance of the issue presented in this case is exemplified by the fact that ten (10) separate entities have already served notices of intent to file amicus curiae briefs on the merits.

STATEMENT OF THE CASE AND FACTS

In January 2009, the Seminole County Board of County Commissioners (“BOCC”) voted to approve a major amendment to the Carillon Planned Unit Development, which encompasses the Petitioners’ single-family neighborhood. *See Slip Op.* at 2. The amendment authorizes a four (4) story, 600-bed student housing complex to be built at the entrance of the Petitioners’ single-family neighborhood and immediately adjacent to property owned by the Petitioners (“Carillon Major PUD Amendment”). *See id.*

The Petitioners filed a petition for writ of certiorari in circuit court to challenge the BOCC’s decision asserting, *inter alia*, that the BOCC violated the Petitioners’ right to due process by denying the Petitioners’ request to cross-examine witnesses during the quasi-judicial zoning hearing on the Carillon Major PUD Amendment. *See id.* The circuit court denied the petition. *See id.*

On certiorari review, the Fifth District recognized that the parties to a quasi-judicial zoning hearing, by virtue of their direct interests that will be affected by the official action, “must be able to . . . cross-examine witnesses.” *See id.* at 4. Nevertheless, the Fifth District held that the Petitioners did not have a due process right to cross-examine witnesses during the BOCC’s quasi-judicial zoning hearing on the Carillon Major PUD Amendment. *See id.* at 4-7. Relying upon an *unpublished* trial court decision, the Fifth District held that only the developer and

the local government have a right to cross-examine witnesses during a quasi-judicial zoning hearing – other affected parties, such as adjoining landowners, whose legally recognized interests will be directly affected and have standing to challenge the zoning decision, have no similar due process right. *See id.* at 6. Accordingly, the Fifth District denied the Petitioners’ Petition for Writ of Certiorari. *See id.* at 8.

SUMMARY OF THE ARGUMENT

The Fifth District’s holding that adjoining landowners and other affected parties do not have a due process right to cross-examine witnesses during a quasi-judicial zoning hearing is in express and direct conflict with *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), wherein the Third District held that, “[i]n quasi-judicial zoning proceedings, the parties must be able to . . . cross-examine witnesses.” *Jennings*, like the instant case, involved a due process claim filed by an adjoining landowner. The Fifth District’s decision also expressly and directly conflicts with several other district court decisions which hold that the right of “affected” or “interested” parties, such as adjoining landowners, to cross-examine witnesses is a fundamental component of due process in a quasi-judicial zoning hearing. Accordingly, the Court should exercise its discretionary jurisdiction in this case and resolve such conflict. *See* Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

A. THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH *JENNINGS V. DADE COUNTY*, 589 SO. 2D 1337 (FLA. 3D DCA 1991)

In *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), an adjoining landowner filed an action to challenge the county's approval of a zoning variance, asserting that his right to due process had been violated during the approval process due to *ex parte* communications. *See id.* at 1339-40. On certiorari review, the Third District expressly analyzed the *minimum* due process standards necessary for a quasi-judicial zoning hearing:

[W]e note that the quality of due process required in a quasi-judicial hearing is not the same as that to which a party to full judicial hearing is entitled. Quasi-judicial proceedings are not controlled by strict rules of evidence and procedure. Nonetheless, *certain standards of basic fairness must be adhered to in order to afford due process.* Consequently, a quasi-judicial decision based upon the record is not conclusive if minimal standards of due process are denied. A quasi-judicial hearing generally meets basic due process requirements if the parties are provided notice of the hearing and an opportunity to be heard. *In quasi-judicial zoning proceedings, the parties must be able to present evidence, cross-examine witnesses, and be informed of all the facts upon which the commission acts.* *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So.2d 648, 652 (Fla. 3d DCA 1982).

Id. at 1340 (emphasis supplied) (citations omitted). Hence, pursuant to *Jennings*, adjoining landowners, like the Petitioners, whose interests will be directly affected

and have standing to challenge the zoning action, must be able to cross-examine witnesses during the quasi-judicial zoning hearing.³

Contrary to *Jennings*, the Fifth District held that adjoining landowners, like the Petitioners, do not have a due process right to cross-examine witnesses during a quasi-judicial zoning hearing. *See* Slip Op. at 4-7. Relying upon the unpublished trial court decision in *Schopke v. City of Melbourne*, Case No. 92-12637-AP (Fla. 18th Cir. Ct. 1993), the Fifth District concluded that “[t]he ‘parties’ referenced in [*Jennings*] are the applicant and the government agency.” *See* Slip Op. at 6. Thus, pursuant to the Fifth District’s decision, *only* the developer and the local government have a right to cross-examine witnesses during a quasi-judicial zoning hearing – other affected parties, such as adjoining landowners, who have standing to challenge the zoning decision, have no similar due process right.

It is apparent from the face of the *Jennings* decision, however, that Mr. Jennings, like the Petitioners in the instant case, was an adjoining landowner to the proposed development. *See Jennings*, 589 So. 2d at 1339 (“Respondent Schatzman applied for a variance to permit him to operate a quick oil change business on his property adjacent to that of petitioner Jennings.”). Thus, the Fifth

³ Florida district courts and circuit courts have repeatedly cited *Jennings* for the proposition that cross-examination must be permitted in a quasi-judicial zoning hearing. *See, e.g., Lee County v. Sunbelt Equities, II, Ltd. P’ship*, 619 So. 2d 996, 1002 (Fla. 2d DCA 1993).

District’s statement that “[t]he ‘parties’ referenced in [*Jennings*] are the applicant and the government agency” is contrary to the indisputable facts in *Jennings*. Indeed, if the term “parties” as used in *Jennings* only meant the applicant and the local government, as the Fifth District held below, then the Third District would not have concluded that Mr. Jennings, an adjoining landowner, had the right to bring his due process claim in the first place, as it did.⁴

Accordingly, the Fifth District’s holding that adjoining landowners and other affected parties do not have a due process right to cross-examine witnesses during a quasi-judicial zoning hearing expressly and directly conflicts with *Jennings*, wherein the Third District held that, “[i]n quasi-judicial zoning proceedings, the parties must be able to . . . cross-examine witnesses.”⁵ *See id.* at 1340.

B. THE FIFTH DISTRICT’S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER DISTRICT COURT DECISIONS

In addition to conflicting with *Jennings*, the Fifth District’s decision also expressly and directly conflicts with several other district court decisions which hold that the right of “affected” or “interested” parties to cross-examine witnesses

⁴ *See also Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000) (referring to the “party” opposing a quasi-judicial zoning application as “either the agency itself or a third party”) (emphasis supplied).

⁵ The Fifth District’s decision also creates the fundamentally unfair situation in which developers and local governments can cross-examine affected parties and their witnesses but not vice versa. Such disparity violates the basic notion of “fundamental fairness” inherent in due process.

is a fundamental component of due process in quasi-judicial zoning hearings. For instance, in *Harris v. Goff*, 151 So. 2d 642 (Fla. 1st DCA 1963), the First District held that:

before an administrative order may be considered quasi-judicial in character and therefore subject to review by certiorari, the statute authorizing the entry of such an order must also require that the administrative agency give due notice of a hearing to be held on the question to be considered, and provide a fair opportunity to be heard in a proceeding in which the party affected is accorded the basic requirements of due process of law. **Such requirements must afford the affected party the opportunity** of being present in person and by counsel, to present evidence in support of his position and **to cross-examine adverse witnesses** whose testimony is offered at the hearing.

Id. at 644 (emphasis supplied).

Relying on *Harris*, the Third District in *Coral Reef Nurseries, Inc. v. Babcock Co.*, 410 So. 2d 648 (Fla. 3d DCA 1982), held:

The procedural due process which is afforded to **the interested parties** in a hearing on an application for rezoning . . . contains the safeguards of due notice, a fair opportunity to be heard in person and through counsel, the right to present evidence, and **the right to cross-examine adverse witnesses**; and it is the existence of these safeguards which makes the hearing quasi-judicial in character See *Harris v. Goff*, 151 So.2d 642 (Fla.1st DCA 1963).

Id. at 652-53 (footnote omitted) (emphasis supplied).

Consistent with *Harris* and *Coral Reef Nurseries*, the Second and Fourth Districts have also held that the right of “affected parties” to cross-examine witnesses is a basic requirement of due process in a quasi-judicial hearing:

Before an administrative proceeding can be quasi-judicial in character, there must be a requirement for a hearing to be held upon notice at which *the affected parties are given* a fair opportunity to be heard in accord with the basic requirements of due process, including *the right . . . to cross-examine adverse witnesses*

Board of County Comm’rs of Hillsborough County v. Casa Dev. Ltd., II, 332 So. 2d 651, 654 (Fla. 2d DCA 1976) (emphasis supplied); *Connor v. Town of Palm Beach*, 398 So. 2d 952, 954 (Fla. 4th DCA 1981) (holding same).⁶

It is undisputed that the Petitioners had standing to challenge the Carillon Major PUD Amendment, and, thus, by law, are “affected parties.” *See Renard v. Dade County*, 261 So. 2d 832, 836-37 (Fla. 1972). Nonetheless, the Fifth District held that only the developer and the local government have a right to cross-examine witnesses during a quasi-judicial zoning hearing, and that other affected parties, like the Petitioners, have no similar due process right. Such holding expressly and directly conflicts with *Harris*, *Coral Reef Nurseries*, *Casa Development*, *Connor*, and *Walgreen Co.*

⁶ *See also Walgreen Co. v. Polk County*, 524 So. 2d 1119 (Fla. 2d DCA 1988) (“Quasi-judicial hearings require a hearing . . . at which the affected parties are given a fair opportunity to be heard in accord with the basic requirements of due process,” which includes the right “to cross-examine adverse witnesses”).

C. THE COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION

This Court should exercise its discretionary jurisdiction to resolve the conflict in this case because of the substantial adverse impact the Fifth District's holding will have on the ability of adjoining landowners and other affected parties to seek meaningful judicial review of quasi-judicial zoning decisions. As this Court is aware, quasi-judicial zoning decisions are reviewed by filing a petition for writ of certiorari in circuit court. *See Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 474-75 (Fla. 1993). Such review is "appellate" in nature and the circuit court is confined "strictly and solely to the record" made during the quasi-judicial zoning hearing – the parties do not get to conduct discovery, depose witnesses, or present any new testimony in the certiorari proceeding, as they otherwise would in an original action. *See Dade County v. Marca, S.A.*, 326 So. 2d 183, 184 (Fla. 1976). Consequently, the only opportunity affected parties have to create a record and to impugn the credibility, relevancy, and weight of the evidence and expert testimony is during the quasi-judicial zoning hearing itself.

Absent the right of cross-examination during a quasi-judicial zoning hearing, affected parties have no opportunity to demonstrate the incompleteness, untruth, bias, or any other defect in the testimony offered. If the legal right of affected

parties to seek certiorari review of quasi-judicial zoning decisions is to have any meaning and not be illusory, affected parties must be allowed to create a full and complete record, including the right to cross-examine adverse witnesses.⁷

CONCLUSION

In sum, as a result of the decision below, adjoining landowners and other affected parties in the Fifth District will not have a due process right to cross-examine witnesses during quasi-judicial zoning hearings, whereas in the Third District and other districts affected parties will have such a due process right. The Court should exercise its discretionary jurisdiction to resolve such conflict so the due process rights of affected parties are uniform throughout Florida.

RESPECTFULLY SUBMITTED on this 15th day of November 2010.

DAVID A. THERIAQUE, ESQUIRE
Florida Bar No. 832332
S. BRENT SPAIN, ESQUIRE
Florida Bar No. 320810
THERIAQUE & SPAIN
433 North Magnolia Drive
Tallahassee, Florida 32308
Telephone: 850/224-7332
Facsimile: 850/224-7662
COUNSEL FOR PETITIONERS

⁷ Under the Fifth District's decision, a developer and a local government can cross-examine adverse witnesses to bolster the record to support their position on certiorari review, but affected parties are denied this same basic due process right. Due process is not, and should not be, a one-sided concept.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States Mail to:

Robert A. McMillan, Esquire
Kathleen Furey-Tran, Esquire
Seminole County Attorney's Office
1101 East First Street
Sanford, Florida 32771

Janet M. Courtney, Esquire
Michael V. Elsberry, Esquire
Lowndes, Drosdick, Doster, Kantor & Reed, P.A.
P.O. Box 2809
Orlando, Florida 32802-2809

Preston T. Robertson, Esquire
Florida Wildlife Federation
P.O. Box 6870
Tallahassee, Florida 32314

William L. Earl, Esquire
1422 Rancho Drive
Sarasota, Florida 34240

Michael W. Woodward, Esquire
Keyser & Woodward, P.A.
P.O. Box 92
Interlachen, Florida 32148

Nancy C. Stroud, Esquire
Lewis, Stroud & Deutsch, P.L.
1900 Glades Road, Suite 251
Boca Raton, Florida 33431

Ralf Brookes, Esquire
1217 E. Cape Coral Parkway #107
Cape Coral, Florida 33904

Patrick C. Howell, Esquire
Robyn Severs Braun, Esquire
Taylor & Carls, P.A.
105 N. Westmonte Drive
Altamonte Springs, Florida 32714

Robert K. Lincoln, Esquire
Icard, Merrill, Cullis, Timm,
Furen & Ginsburg, P.A.
2033 Main Street, Suite 600
Sarasota, Florida 34237

C. Allen Watts, Esquire
Cobb Cole
351 E. New York Avenue, Suite 200
Deland, Florida 32724-5509

Daniel J. Lobeck, Esquire
Lobeck & Hanson, P.A.
2033 Main Street, Suite 301
Sarasota, Florida 34237

on this 15th day of November 2010.

DAVID A. THERIAQUE, ESQUIRE

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

DAVID A. THERIAQUE, ESQUIRE