



CITY OF TITUSVILLE

BOARD OF ADJUSTMENTS AND APPEALS

AGENDA

Regular Meeting

February 26, 2025 - 6:00 PM

Council Chamber at City Hall

555 South Washington Avenue, Titusville, FL 32796

Any person who decides to appeal any decision of the Board of Adjustments and Appeals, with respect to any matter considered at this meeting, will need a record of the proceedings, and for such purpose, may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

The City desires to accommodate persons with disabilities. Accordingly, any physically handicapped person, pursuant to Chapter 286.26 Florida Statutes, should at least 48 hours prior to the meeting, submit a written request to the chairperson of the meeting that the physically handicapped person desires to attend.

Notice

All persons who anticipate speaking on any Public Hearing item must fill out an Oath Card to be heard on that agenda item and sign the oath contained thereon. These cards are located on the table near the entrance to the Council Chamber or may be obtained from the Recording Secretary. This meeting will be conducted in accordance to the procedures adopted in Resolution No. 24-1997.

Those speaking in favor of a request will be heard first, those opposed will be heard second, and those who wish to make a public comment on the item will speak third. The applicant may make a brief rebuttal if necessary. A representative from either side, for or against, may cross-examine a witness.

Anyone who speaks is considered a witness. If you have photographs, sketches, or documents that you desire for the Commission to consider, they must be submitted into evidence and will be retained by the City. Please submit such exhibits to the Recording Secretary.

Applicants for land use and zoning related items are advised that the resumes of staff members who prepare applicable staff reports are on file in the City Clerk's Office.

1. CALL TO ORDER

2. PLEDGE OF ALLEGIANCE

3. ROLL CALL AND DETERMINATION OF A QUORUM

4. APPROVAL OF MINUTES

A. January 29, 2025 Minutes

Approve Minutes

5. QUASI-JUDICIAL CONFIRMATION PROCEDURES

A. Verify all persons wishing to speak before the committee has signed an Oath Card.

B. Chairman confirms that all agenda items have been properly advertised.

C. Member's statements if they have visited any of the sites or spoken to any members of the public regarding an item to be reviewed today.

6. CONSENT AGENDA

7. OLD BUSINESS

A. Appeal No. 1-2024 Apollo Gardens Site Development Permit

Deny the appeal.

8. NEW BUSINESS

9. PETITIONS AND REQUESTS FROM THE PUBLIC PRESENT

10. REPORTS

11. ADJOURNMENT

City of Titusville
"Gateway to Nature and Space"

REPORT TO COUNCIL

To: Members of the Board of Adjustments and Appeals
From: Brad Parrish, Community Development Director
Subject: **January 29, 2025 Minutes**
Department/Office: Development Services

Recommended Action:

Approve Minutes

Summary Explanation & Background:

Alternatives:

Modify the minutes.

Item Budgeted:

Source/Use of Funds/Budget Book Page:

Strategic Plan:

Strategic Plan Impact:

ATTACHMENTS:

1. BAA 01.29.25

Board of Adjustments and Appeals
Regular Meeting
January 29, 2025

The Board of Adjustments and Appeals (BAA) of the City of Titusville, Florida, met in regular session in Council Chambers, on Wednesday, January 29, 2025.

XXX

Vice-Chairwoman Margaret Van Deven called the meeting to order at 6:00 p.m. and asked the assembly to recite the Pledge of Allegiance to the Flag.

XXX

Present were, Vice-Chairwoman Margaret Van Deven, Richard Wheelus, Member Greene and Alternate Member Carshonda Wright. Chairman Thomas Taylor and Member Gina Beckles were absent. Also, in attendance were Community Development Director Brad Parrish, Assistant City Attorney Chelsea Farrell and Senior Administrative Assistant Laurie Dargie. It was determined that a quorum was present.

XXX

Member Wheelus made a motion to approve the minutes for December 5, 2024. Member Wright seconded. All in attendance voted to approve the minutes.

XXX

Chairwoman Margaret Van Deven confirmed the quasi-judicial procedures verifying that all persons wishing to speak before the board has signed an oath card.

XXX

Brad Parrish confirmed that all agenda items had been properly advertised.

XXX

Vice-Chairwoman Margaret Van Deven called for members' statements if they had visited any of the sites.

Member Greene said he did ride by the site.

XXX

Consent Agenda Items

None

XXX

Old Business

None.

XXX

New Business

Appeal No. 1-2024 Apollo Gardens Site Development Permit

Community Development Director Brad Parrish advised the Board of Adjustments and Appeals Members that the applicant, Vicki Conklin is requesting to table this appeal request until the February 26, 2025 meeting.

Assistant City Attorney Farrell provided a brief explanation regarding tabling items and the need to table to a date certain.

XXX

Member Greene made a motion to table Appeal No. 1-2024 Apollo Gardens Site Development Permit until the February 26, 2025 Board of Adjustments and Appeals meeting per the applicant's request.

Member Wheelus seconded.

Roll call was as follows:

Vice-Chairwoman Van Deven	Yes
Member Greene	Yes
Member Wheelus	Yes
Member Wright	Yes

Motion passed.

XXX

Petitions & Requests from Public Present

Toni Shifalo of Titusville, Florida came and provided a brief history of the Canaveral Heights/West Titusville area.

XXX

Reports

Semi-Annual Report

Member Wheelus made a motion to approve the Semi-Annual report as presented for a written report. Member Greene seconded.

Roll call was as follows:

Member Greene	Yes
Member Wheelus	Yes
Alternate Member Wright	Yes
Vice Chairwoman Van Deven	Yes

Motion passed.

XXX

Staff – None

Chairman – None

City Attorney – None

Members – None.

Adjournment was at 6:15 p.m.

City of Titusville
"Gateway to Nature and Space"

REPORT TO COUNCIL

To: Members of the Board of Adjustments and Appeals
From: Brad Parrish, Community Development Director
Subject: **Appeal No. 1-2024 Apollo Gardens Site Development Permit**
Department/Office: Community Development

Recommended Action:

Deny the appeal.

Summary Explanation & Background:

The Apollo Gardens Apartments site plan was approved on September 19, 2023. On November 11, 2024, Site Development Permit No. PSDP24-000205 for Project No. J22-5424, the Apollo Gardens apartments, was issued authorizing on-site construction. On December 5, 2024, Vickie J. Conklin (Appellant) submitted an application to appeal the approval and issuance of the site development permit.

At the January 29, 2025 BAA meeting, the Board tabled this item to the February 26, 2025, regular meeting at the request of the appellant.

Prior to consideration of the appeal, the Board must determine whether the appellant is an affected property owner as required per Section 34-249 of the Land Development Regulations.

Alternatives:

Concur with the appeal.

Item Budgeted:

Source/Use of Funds/Budget Book Page:

Strategic Plan:

Strategic Plan Impact:

ATTACHMENTS:

1 Notice of Appeal and Exhibits

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2 Appeal 1-2024 Staff Report

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3 HDR vs Collector Arterial - Complete

.

4 HDR vs Collector & Arterial - Complete with Aerials

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5 Appeal 1-2024 LEGAL MEMO

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6 Resolution No. 24-1997

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7 DIVISION_2.___APPEALS_TO_THE_BOARD_OF_ADJUSTMENT___APPEAL_OF_A
. DMINISTRATOR_

8 2025.01.28 Letter to BOAA Enclosing Materials for 1_29_25 Hearing(29366763.1)

.



Received

DEC 05 2024

City of Titusville
Planning Department

To be completed by City staff:

Case No. _____

Date: _____

Fee Paid: _____

Signed: _____

City Staff

CITY OF TITUSVILLE, FLORIDA
NOTICE OF APPEAL
(Chapter 31, Article IV, Land Development Regulations)

Notice of Appeal
(Must be filed within thirty (30) days of date decision rendered.)

The Board of Adjustments & Appeals
City of Titusville
Titusville, Florida

The undersigned hereby appeals a decision of an administrative official of the City of Titusville, based on:

___ Code of Ordinance Vol. I

___ Building Codes

☒ Code of Ordinance Vol. II/Land Development Regulations

___ Life Safety Code

☒ Other Comprehensive Plan

Exhibits A-E
attached

Order and/or Ruling appealed:

Site Development Permit PSDP24-000205

Apollo Gardens LLP

Project J22-5424

Date of Ruling: 11-11-2024

Order and/or Ruling appealed: _____

Date of Ruling: _____

Grounds for appeal: Proposed development is not a conventional MF development, and is NOT consistent with Strategy 1.13.11 and Policies 1.14.5 and 1.14.16 of Titusville Comprehensive Plan. See attached letter dated 7-17-2024

Legal description of property: PT of SW 1/4 of NW 1/4 AS DES in ORB 1526 pg 532 (see attached)

Affected Property Owner:

Apollo Gardens LLP (Carroll)

Name (print or type)

1398 SW 1st St FL 12

Street Address

Miami FL 33135

City and State

Appellant:

VICKIE J CONKLIN

Name (print or type)

2920 Royal Oak Drive

Street Address

Titusville FL 32780

City and State

314-614-0999

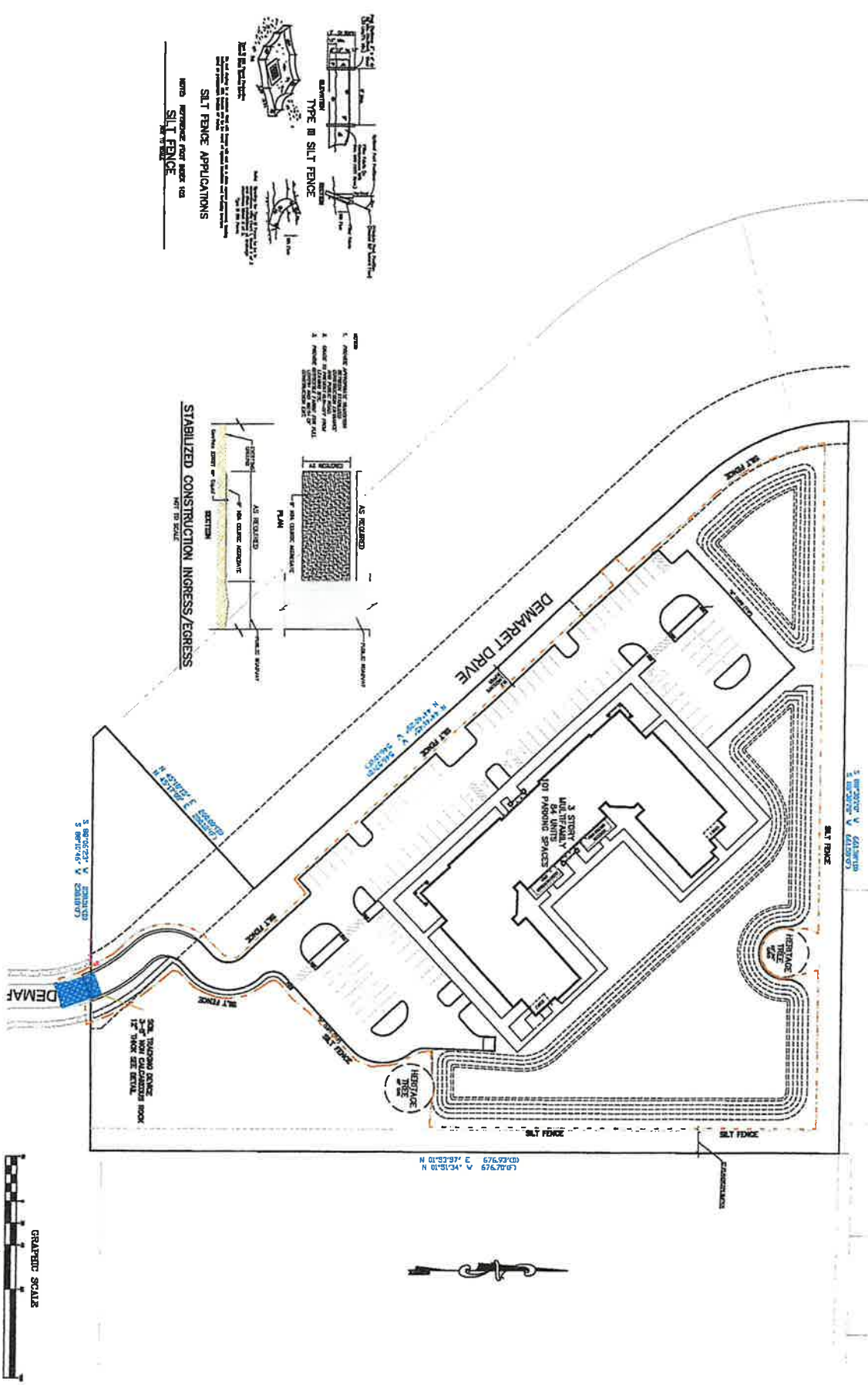
Telephone Number

Vickie J Conklin

Signature of Appellant

INSTRUCTIONS TO APPLICANT:

1. Use one application for each request.
2. File with City staff (one copy will be returned to appellant along with decision of the board).
3. Filing fee of \$475.00 due at time of filing (Should board sustain the appeal, fee will be refunded).



City of Titusville Preliminary Concurrency Assessment

Project Name: Apollo Garden Apartments

Date: March 3, 2023

Project Description: Multifamily - 84 units - 1 building

Residential Density (dwelling units): 84

Non-Residential Intensity (1,000 s.f.): -

Total Water Capacity*

5.429 MGD

Less Current Demand**

4.477 MGD

Less Future Commitments (FDEP/Water Supply Allocation permits)

0.313 MGD

Remaining Capacity***

0.639 MGD

Estimated Unit Based Water Demand****

84.00

0.0252 MGD

*Total Water Capacity permitted flow is 6.01 MGD minus 10% reservation

**12 Month Rolling Average

***Remaining capacity subject to change without notice - This is neither a commitment nor a reservation of this capacity.

****Based on 100 gallons/capita/day or 250 gallons/unit/day in accordance with Section 10 of the City's Concurrency Technical Manual
Water is reserved for this project only upon issuance of a Water Supply Capacity Allocation Permit in accordance with City Code Section 21-50.

Wastewater

Total Wastewater Capacity*

6.750 MGD

Less Current Demand**

4.689 MGD

Less Future Commitments (FDEP Permits)

0.601 MGD

Remaining Capacity***

1.460 MGD

Estimated Unit Based Wastewater Demand****

84.00

0.0189 MGD

*Total Wastewater Capacity based on Design capacity of Blue Heron and Osprey Treatment Facilities

**12 Month Rolling Average

***Remaining capacity subject to change without notice - This is neither a commitment nor a reservation of this capacity.

****Based on 75 gallons/capita/day or 225 gallons/unit/day in accordance with Section 10 of the City's Concurrency Technical Manual

Traffic Circulation

Primary Access

Street Name: Barna Avenue

Adopted LOS:

Max Capacity:

15,600 ADT

Current Conditions

Roadway Segment: Country Club - Harrison

2021 E+C Count:

9,300 ADT

Volume/Count Ratio:

0.60

Future Conditions

Roadway Segment:

Existing + New Count:

9,914 ADT

Volume/Count Ratio:

0.64

Secondary Access

Street Name: Aguinaldo Ave

Adopted LOS:

Max Capacity:

ADT

Current Conditions

Roadway Segment:

2019 E+C Count:

ADT

Volume/Count Ratio:

Future Conditions

Roadway Segment:

Existing + New Count:

ADT

Volume/Count Ratio:

Institute of Transportation Engineers (ITE) Index Number*:

220 Index

Average Vehicle Trips per Unit on a Weekday:

6.74 ADT

Total Average Vehicle Trips for this Development on a Weekday:

614 ADT

*Institute of Transportation Engineers Trip Generation rates or Latest Edition, [Sec. 10.3.1.2 of the Transportation Technical Manual]

Recreation/Open Space

City Population:

50,200

Required Recreation/Open Space:

401.60 AC

Adopted LOS (acres/1,000 population):

8

Current Recreation/Open Space:

566.60 AC

Existing Available Recreation/Open Space Capacity:

165.00 AC

Project Population:

187

Required Recreation/Open Space:

1.50 AC

Remaining Recreation/Open Space Capacity:

163.50 AC

Staff Comments

Traffic Study is required

Evaluated By: JM, KB, AS

Evaluation Expiration Date: 8/30/2023

CONCURRENCY

OVER, 5/31/2024 11:24:26 AM

POINT OF COMMENCEMENT
EASEMENT FOR DRAINAGE AND UTILITIES
(O.R.B. 2087, PG. 1986)
NORTHWEST CORNER OF THE NORTHEAST 1/4
OF SECTION 16, TOWNSHIP 22 SOUTH, RANGE 35 EAST

Exhibit B



NONE

Wrong exemption? Maybe this is why...



Property Use:

9908 - VACANT RESIDENTIAL LAND (MULTI-FAMILY, UNPLATTED)



Total Acres:

7.03



Site Code:

0001 - NO OTHER CODE APPL.



Plat Book/Page:

0000/0000



Subdivision Name:

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Land Description:

PT OF SW 1/4 OF NW 1/4 OF NE 1/4 AS DES IN
ORB 1526 PG 532

Value

Category

2024



Market Value:

\$175,750



Agricultural Classified Use Value:

\$0



Assessed Value Non-School:

\$175,750



Assessed Value School:

\$175,750



Homestead Exemption:

\$0



Additional Homestead:

\$0



Other Exemptions:

\$0

Top



RALF BROOKES, ATTORNEY

Board Certified in City, County and Local Government Law

Richard C. Broome
City Attorney
City of Titusville
555 S Washington Avenue
Titusville, FL 32796

July 17, 2024

**SUBJECT: OBJECTIONS TO MULTIFAMILY DEVELOPMENT BY CARRFOUR
SUPPORTIVE HOUSING AT 2727 DEMARET DRIVE, TITUSVILLE FLORIDA**

Mr. Broome:

On behalf of my client group, Royal Oak Neighbors LLC, Vickie Conklin, Agent, I am writing to you per Florida Bar rules to express my clients' objections and opposition to the Apollo Gardens development at 2727 Demaret Drive adjoining the Royal Oaks golf course.

Attached to this letter is the resume of Max Forgey, AICP, an expert land use planner who has also been retained by the client group and offers the following justifications for denial of the multifamily development by Carrfour Supportive Housing at 2727 DEMARET DRIVE Titusville, Florida.

My clients request denial of the above-referenced Apollo Gardens project based upon the above strategy and policies.

Justifications for denial. Notwithstanding the FLUM designation and zoning on the parcel, this proposed development is not a conventional multifamily development. Ingress/ egress is on Demaret Drive, which is deeded to Spanish Oaks HOA which has not granted access.

The proposed development is NOT consistent with Strategy 1.13.11 and Policies 1.14.5 and 1.14.16 of the Titusville Comprehensive Plan which are stated verbatim below:

Strategy 1.13.1.1

The US 1 Corridor Neighborhoods Land Use District shall protect the interior established single-family areas of the neighborhoods by preventing commercial and multi-family encroachment, unless appropriate areas for commercial and multi-family uses are identified by a Neighborhood Plan.

Policy 1.14.5:

Medium density residential uses (maximum 10 units per acre) shall consider existing and proposed land uses to ensure compatibility. Further, such densities shall be located adjacent to at least a collector street, unless the property is located along the following

local road, which already has a multi-family development pattern and is capable of supporting higher density: Rock Pit Road (from Tropic Street to South Street).

Policy 1.14.6:

High density residential uses (maximum 15 units per acre) or mobile homes shall consider existing and proposed land uses to ensure compatibility. Further, such densities shall be located adjacent to at least a collector or arterial street unless the property is located along the following local road, which already has a multi-family development pattern and is capable of supporting higher density: Rock Pit Road (from Tropic Street to South Street).

Respectfully yours,

/s/ Ralf Brookes, Attorney
and
/s/ Max Forgey AICP

cc. Vickie Conklin

Max Forgey AICP
d/b/a FORGEY PLANNING LLC
236 SE 45th Street
Cape Coral FL 33904
239.560.5864
max@forgeyplanning.com

Certification

AICP (American Institute of Certified Planners) Certification #051,330 Florida Chapter, APA Member in good standing since 1993. A national professional certification maintained by the American Planning Association. AICPs must first meet educational standards and then pass an examination covering all aspects of professional planning practice, and are expected to maintain their membership through a self-directed program of study that is monitored by the national organization, which includes regular training in law and ethics.

Professional Experience

Forgey Planning

Cape Coral, FL

Owner. 2008-present. A solo planning practice concentrating comprehensive planning work for Lee and Sarasota Counties, the City of North Port, and the Captiva Community Panel. Developed a template for auditing the effectiveness of existing local governments comprehensive plans which has been applied in Sarasota County and the City of North Port. An expert witness since 2013, working on more than 30 cases in 25 Florida counties and municipalities, appearing before planning commissions, city councils, county commissions, hearing examiners, administrative law judges, and circuit court. Qualified as an expert witness in Lee County Hearing Examiner proceedings.

Zoning Technologies

Cape Coral, FL

President. 2011-2017. A start-up subsection 'S' corporation that specialized in restructuring and updating local government comprehensive plans and developing implementation strategies which employ automation to create linked tools (e.g. application forms, automated worksheets, case reports, and adopting resolutions). The Zoning Technologies expert system prototype products were marketed statewide and were demonstrated at the American Planning Association (APA) national conference in Atlanta in 2014.

Osceola County, Florida

Kissimmee, FL

Planning Coordinator. 2005-2008. Authored key elements of the Osceola County Comprehensive Plan and most of the County's 2008 Evaluation and Appraisal Report.

Clay County, Florida

Green Cove Springs, FL

Senior Planner. 2003-2005. Authored the county's Interlocal Service Delivery Agreement Report (ISDAR) mandated by the Florida legislature, identifying all service overlaps between and among all local governments within Clay County.

Lake County, Florida

Tavares, FL

Planning Director. 2001-2003. Staff liaison to the Environmental Lands Management Advisory Committee, a citizen organization created by the Board of County Commissioners to study the creation of an environmental land program. Recommended policies were ratified in November 2002, when Lake County voters approved a one-third mil assessment for the acquisition of environmental lands.

Southwest Florida Regional Planning Council

North Fort Myers, FL

Planner. 1997-1998. Reviewed local government plan amendments throughout the six-county area and authored "The Platted Lands Challenge" report.

Charlotte County, Florida

Port Charlotte, FL

Community Development Director 1995-1997; Planning Director 1990-1995. Early in my tenure, Gulf Development Corporation (GDC), the County's largest land subdivider, declared bankruptcy, shifting responsibility for completion of roads, bridges, drainage works, and utilities, to the public sector and forcing a host of development decisions upon the local government and public agencies. I had three memorable achievements during these seven years:

- Managed the research, preparation, and adoption of the County's Evaluation and Appraisal Report (EAR) and Comprehensive Plan. Aggressively negotiated with the Florida Department of Community Affairs (DCA) to remove the Plan's not-in-compliance finding.
- Led the staff team that rewrote the Charlotte County Comprehensive Plan and was the point person in the successful four-year effort to negotiate a stipulated settlement agreement between the Board of County Commissioners and the Florida Department of Community Affairs to find Charlotte County's Comprehensive Plan in compliance with Florida's Growth Management Act.
- Advocated against the rezoning of 42 parks (illustrated as such on GDC sales maps and the County's Future Land Use Maps) to residential uses. The Company's receivers eventually relented on their policy position and donated 41 parcels to the people of Charlotte County.

City of Cape Coral, Florida

Cape Coral, FL

Deputy Planning Director. 1985-1990. Authored and supervised preparation of key elements of the 1988 Comprehensive Plan (the City's first plan under the 1985 Growth Management Act) and the City's 1989 Land Development Code.

Education**Indiana University**

Bloomington, IN

Master of Public Affairs (MPA) from the O'Neil School of Public and Environmental Affairs, 1982. Concentration in Urban and Regional Planning.

Bachelor of Arts (BA), 1976. Undergraduate degree in English Literature and History.

Important Cases, Continuing Education, Writing & Teaching

- Program chair for APA Florida/ FPZA "Warped Tour '22: (Mostly) Land Use Law & Decision-making for Planners" tentatively planned for Southern Lee County October-November 2022.
- Presenting a panel "Incorporation, Annexation, and Disincorporation" with Joseph M. Mazurkiewicz, Jr., Jim Studiale, AICP, and Luke Lirot, Esq. at APA Florida state conference in Orlando September 7, 2022.
- Co-presented a panel "Legislative and Quasi-judicial: What Every Planner Needs to Know" with Attorney Andrew Dickman, AICP, at annual conference of Florida Planning and Zoning Association on Captiva Island June 3, 2022.
- Program Chair for "The Swamp Peddlers", an APA Florida/ Florida Planning & Zoning Association symposium conducted on August 6, 2021 in Punta Gorda. Keynote speaker Jason Vuic and other presenters explored the legacy of land sales scams in Southwest Florida on the twentieth anniversary of the General Development Corporation bankruptcy.
- Designed and co-presented "Land Use 101", a seminar for planning commissioners, elected officials, and new planners, hosted by the City of Cape Coral on June 16 and July 14, 2021 with co-presenters Vince Cautero, AICP, the City's Community Development Director, and Attorney Ralf Brookes.
- Expert witness for client West Villagers for Responsible Government (WV4RG), a citizen organization which challenged the annexation of the 8730-acre non-contiguous West

Villages subdivisions into the City of North Port. The City Commission rejected the Villagers' challenge by a unanimous vote, but following appeal presented by attorney Luke Lirot, the Twelfth District overturned the City's order denying petition for contraction in *West Villagers for Responsible Government v. City of North Port*.

- Moderated a panel for law credit at the September 9, 2020 Zoom-facilitated American Planning Association's Florida state conference. Co-presenters were attorneys Karen Consalo, Thomas Hawkins, and Andrew Dickman. "The Rules are Very Different Here: How to Reform Florida's Land Use Decision-making Process" surveyed the inconsistencies among local governments' handling of land use decision-making and proposed a new Environmental Land Management Study (ELMS) to improve those processes.
- Attended and participated in American Planning Association Florida chapter's 18th annual Public Policy Workshop at Florida State University, Tallahassee February 2020.
- Drafted update of Town of Fort Myers Beach Sign Ordinance to reflect SCOTUS *Reed v. Gilbert* opinion for Weiler Engineering Fall 2019-Winter 2020.
- Program chair for "*How High is the Water, Ma?: Rising Sea Level on the Florida Gulf Coast and what we can do about it,*" sponsored by Friends of Boca Grande Community Center, March 22, 2019 at the Boca Grande Community Center Auditorium.
- Member, *Faith Presbyterian Affordable Housing Board*, a not-for-profit corporation which aspires to offer quality housing for low- and moderate-income persons in Cape Coral. Appointed 2018; appointment ended December 2020.
- Received 2018 American Planning Association Florida Chapter, Promised Lands section's first-ever *Wayne Daltry Award for Planning Programs* for developing professional education symposia.
- Prepared *policy audit of Town of Fort Myers Beach Comprehensive Plan* for Weiler Engineering, Summer 2018.
- Program chair for American Planning Association symposium "*Warped Tour '18: Land Use Law for Planners*" March 23, 2018 in Punta Gorda.
- Attended and participated in the hurricane-shortened APA Florida chapter annual conference in Daytona Beach September 4-6, 2017. Led panel with Greg Beliveau, AICP and Jane West Esq. entitled "*How to Build a Better Client.*"

- Program chair for Captiva Community Panel/ Florida APA symposium *"Now in My Back Yard: Rising Sea Level on Florida's Gulf Coast and what can be done about it"* January 13, 2017 at South Seas Resort on Captiva Island.
- Co-authored article with Karen Consalo, Esq. *"Best Practices for Local Government Land Use Decision-making"* in Summer 2016 edition of *Florida Planning*.
- Speaker at American Planning Association Florida Chapter Annual Conference in Tampa, September 9, 2016. *"A Pre-tirement Guide for Perplexed Planners: Making the Transition to Solo Practitioner."*
- Attended and participated in CLE International's annual *Land Use Law symposium* in Tampa, August 18-19, 2016, and August 6-7, 2015.
- Speaker at University of Central Florida 2016 Public Administration Research Conference April 8, 2016. Topic: *"What's the Big Idea: New Software that Aids Land Use Decisions."*
- Attended and participated in APA Florida chapter annual conference in Hollywood, Florida September 10-13, 2015.
- Coordinator and presenter for daylong FAPA-sponsored symposium *"Everything You Ever Wanted to Know about Florida Land Use"* in Cape Coral May 16, 2014.

Profile

Max Forgey is an experienced land use planner with more than three decades of professional experience and exceptional success in administration of local government comprehensive planning strategies, land development and regulatory controls, governmental relations, and public policy communications. Primary clients are governmental organizations and private property owners.

His professional knowledge encompasses creating and developing community and small-area plans, urban design and architectural standards, land development entitlements, project management, and expert witness testimony. Max has worked on more than 30 cases across 25 Florida counties and municipalities, appearing before local planning agencies, city and county elected bodies, hearing examiners, administrative law judges, and circuit court proceedings.

Max also actively participates in and leads speaking engagements at professional development conferences and symposia through the Promised Lands section of the American Planning Association Florida chapter, with the American Institute of Certified Planners, with 1000 Friends of Florida and other organizations.

Qualifications

- FORGEY PLANNING. Owner of an urban planning and land-use consulting practice.
- Master of Public Affairs (MPA) in Urban and Regional Planning, Indiana University.
- Member American Institute of Certified Planners (AICP).
- Qualified as an expert witness in Lee County Hearing Examiner proceedings.
- Former Planning and Community Development Director in Charlotte County.
- Former Planning Commissioner (LPA), City of Cape Coral, Florida.

Accomplishments

- Established FORGEY PLANNING, an urban planning and land use consulting practice.
- Developed a template for auditing the effectiveness of existing local governments comprehensive plans and zoning code for internal consistency of plan policy framework.
- Authored “The Platted Lands Challenge” report for the six-county area of Southwest Florida offering policy guidance for platted, scattered-lot properties.
- Development of implementation strategies which employ automation to create linked mixed media tools for restructuring and updating local government planning and zoning regulations.

Jurisdictions Accepting Max Forgey as Expert AICP Planning Witness Opinion

Bonita Springs	Bradenton
Cape Coral (5)	Charlotte County (2)
Collier County (2)	DeSoto County
Fort Myers Beach (2)	Hardee County
Hendry County (C Court)	Hernando County
Highlands County	Hillsborough County (3)
Hillsboro Beach	Lantana
Lee County (8)	Miramar
Monroe Co (ALJ)	North Port
Orange County	Ormond Beach
Pasco County (2)	Palm Beach County (ALJ)
Polk County (C court)	Punta Gorda (2)
St. Johns County (4)	Sarasota County
Suwannee County	Venice

Addendum to Appeal of Site Development Permit PSDP24-000205

December 5, 2024

This project is not a conventional MultiFamily Development. Carrfour, the applicant, has categorized this project as Supportive Housing.

Normal traffic patterns of multifamily housing cannot be applied. This project consists of 84 units, each 1 bedroom, of residents considered as High Utilizers of Behavioral Health Services experiencing severe and persistent mental illness and/or a concurring Substance Use Disorder. Hertitage Park, a sister facility located in Melbourne has 80 units: they experienced 436 police/EMT calls in a 1 year period (all times of the day and night) for felonies, overdose, theft, and altercations. In addition, more traffic would be generated from social service vans transporting residents to Rockledge for substance abuse therapy. The city of Titusville has documented that Demaret Drive is considered a "Local Road."

Foot traffic will be increased as well, due to some residents not having private transportation. Walking to Winn Dixie via Demaret on local roads is a distance of 1 mile, whereas hopping the gate at Spanish Oaks Condominiums and trespassing on private property is 0.4 miles. Which route do you think the residents will take? How many more police calls will result from trespassing violations?

Please refer to the City of Titusville Preliminary Concurrency Assessment (attached) describing traffic circulation with primary access as Barna Avenue and Aguinaldo Ave, neither of which are contiguous to the property location of 2727 Demaret Drive. The traffic study completed by Carrfour does not reflect the true impact of this project.

Eight four (84) single bedroom single bath apartments with health services does not fit the multifamily format, and is not congruent with the area. Land Development regulations of the city of Titusville state "development shall not adversely impact upon existing uses or change the character of the area in which it is located."



City of Titusville Community Development Department

BOARD OF ADJUSTMENTS AND APPEALS

Appeal No. 1-2024

Meeting Date: January 29, 2025
Prepared By: Brad Parrish, Community Development Director
Applicant/Owner: Vickie Conklin, Appellant

BACKGROUND INFORMATION

Location: 2727 Demaret Dr, Titusville, FL. Tax No. 2207868. Parcel I.D. 22-35-16-00-34

Zoning: Multifamily High Density (R-3)

Administrative Interpretation:

The Apollo Gardens site plan was approved on September 19, 2023, consistent with the Land Development Regulations and the Comprehensive Plan. On November 11, 2024, Site Development Permit No. PSDP24-000205 for Project No. J22-5424, the Apollo Gardens apartments, was issued authorizing on-site construction.

Background

On December 5, 2024, the appellant submitted appeal No. 1-2024. Pursuant to Section 34-250, “The notice of appeal shall be filed within thirty (30) days after the decision complained of has been rendered.” The completed appeal application was submitted within the required timeframe.

The Apollo Gardens project is a multifamily apartment building with 84 residential units. The property is zoned Multifamily High Density Residential (R-3). The project is permitted in the R-3 zoning district. The property is designated with the Comprehensive Plan High Density Residential Future Land Use District. The property has frontage on Demaret Drive, which is a public right-of-way.

ANALYSIS

According to the appellant, the Apollo Gardens project is not a conventional multifamily development, and is not consistent with Comprehensive Plan Future Land Use Element Strategy 1.13.11, Policy 1.14.5 and Policy 1.14.6 [The appeal incorrectly cites Policy 1.14.16.].

The comprehensive plan and LDRs do not define a conventional multifamily development. The LDRs defines Multifamily dwellings as a building containing two (2) or more dwelling units [Chapter 37]. The LDRs do not distinguish between an owner-occupied condominium type multifamily development and apartments for rent. Multifamily dwellings such as duplex, triplex, quadraplex, etc. are permitted in the R-3 zoning district [Sec 28-54 Use Table]. The R-3 zoning district is consistent with the High Density Residential Future Land Use District [Sec. 27-21 Land Use/Zoning Consistency Matrix].

Strategy 1.13.11 is not applicable to the Apollo Gardens property. The Strategy describes the US 1 Corridor Future Land Use District, which was specifically created to implement the US 1 Corridor Master Plan, adopted in 2007. The property is not located within the boundaries of the US 1 Corridor Master Plan.

Policy 1.14.5 is also not applicable to the Apollo Gardens property. The Policy describes the Medium Density Residential Future Land Use District. The Apollo Gardens property is not designated Medium Density Residential.

The crux of the appeal is whether Policy 1.14.6 is applicable to the Apollo Gardens property. The Policy describes the High Density Residential Future Land Use District. In 1988, the City Council adopted the Comprehensive Plan. The City Council also designated several properties, including the Apollo Gardens property, with the High Density Residential Land Use District consistent with the Comprehensive Plan. The Policy was cited as Objective 10, Policy 1D and stated,

“High Density Residential uses (9.1 to 15 units per acre) or mobile homes shall consider existing and proposed land uses to ensure compatibility. Further, such densities shall be located adjacent to at least a minor arterial street.”

The City Council determined consistency with the Comprehensive Plan, including the policy statement related to densities located adjacent to at least a minor arterial street. Harrison Street and Barna Avenue are the only adjacent roads that would have qualified as minor arterial streets.

The appeal is based upon the current policy which was amended in 2007, 19 years after City Council had determined consistency with the comprehensive plan and designation of the property as High Density Residential, to state the following:

“High density residential uses (maximum fifteen (15) units per acre) or mobile homes shall consider existing and proposed land uses to ensure compatibility. Further, such densities shall be located adjacent to at least a collector or arterial street unless the property is located along the following local road, which already has a multi-family development pattern and is capable of supporting higher density: Rock Pit Road (from Tropic Street to South Street).”

Harrison Street and Barna Avenue are collector roads according to the City’s LDRs. The property is consistent with the policy statement related to densities located adjacent to a collector.

The permit was issued consistent with the comprehensive plan, including the High Density Residential Future Land Use District Policy.

Enclosed is a map identifying the location of properties with the High Density Residential Future Land Use District.

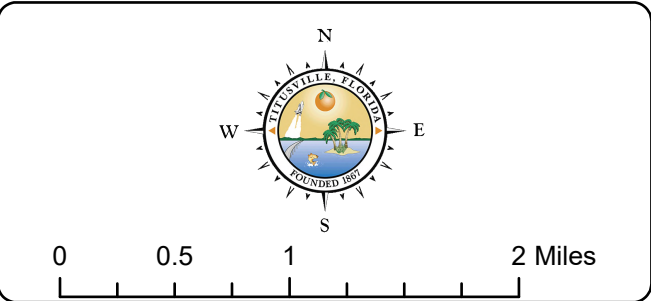
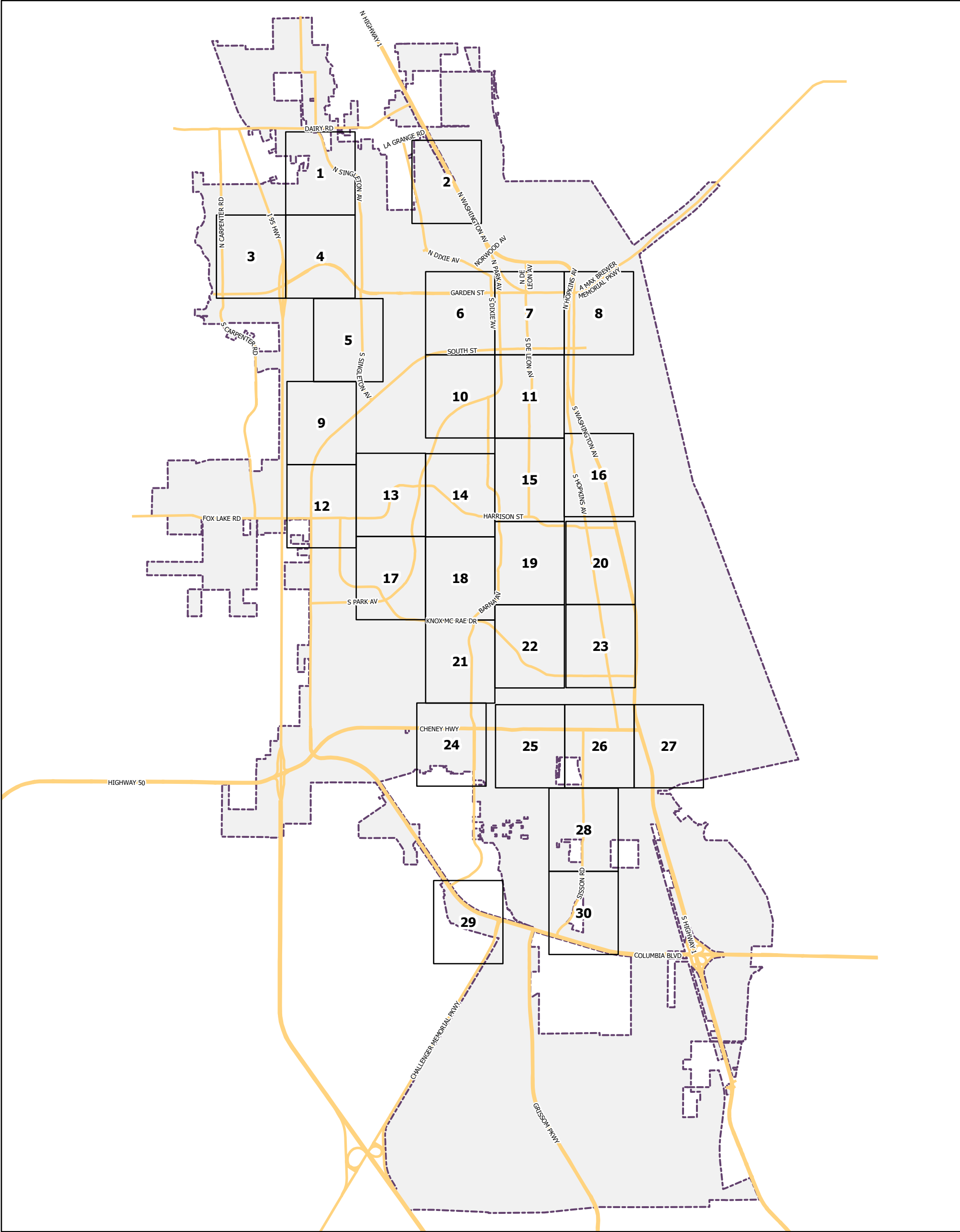
RECOMMENDATION

Concur with the administrative interpretation and deny the appeal.

BOARD OF ADJUSTMENTS & APPEALS ACTION

BAA Action: _____ ☐ Approved ☐ Denied
(date)

HDR - Collector & Arterial Grid Index



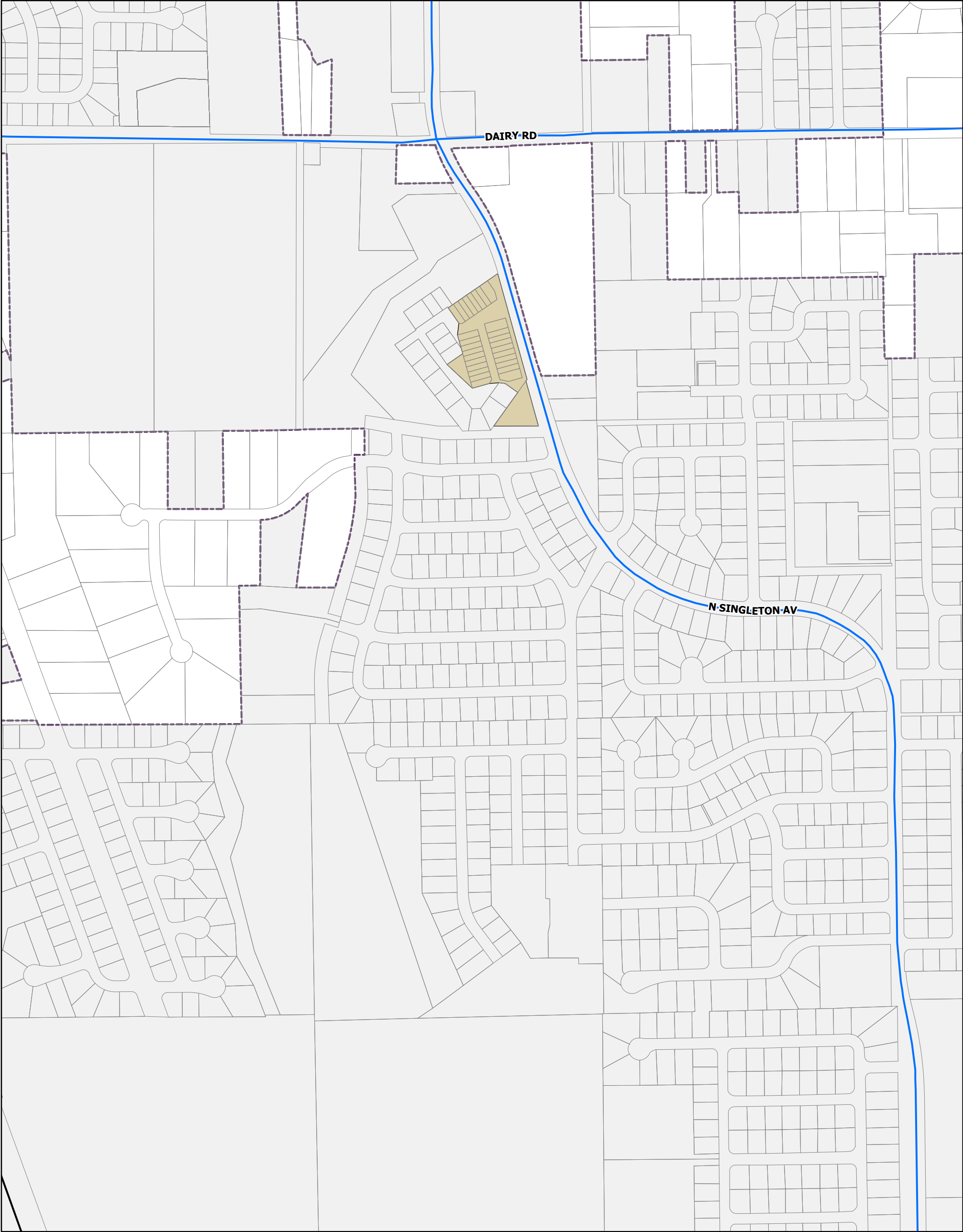
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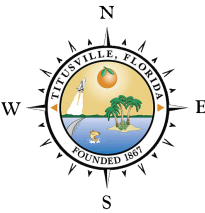
City Limits

City Limits

GridIndexHDR

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

Parcels

Parcels

Street Type

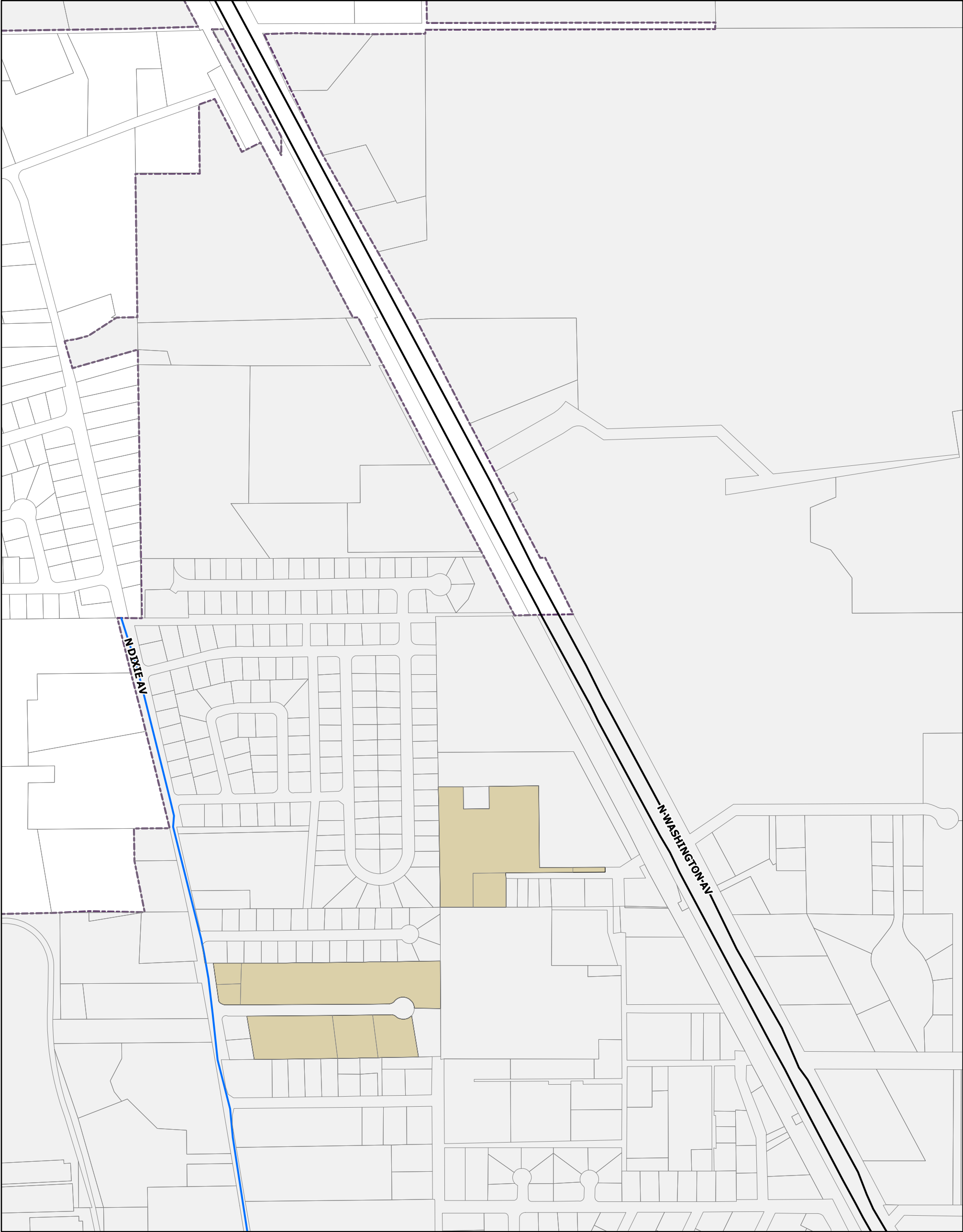
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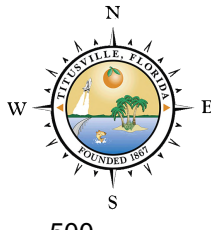
Collector

City Limits

City Limits

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

Street Type

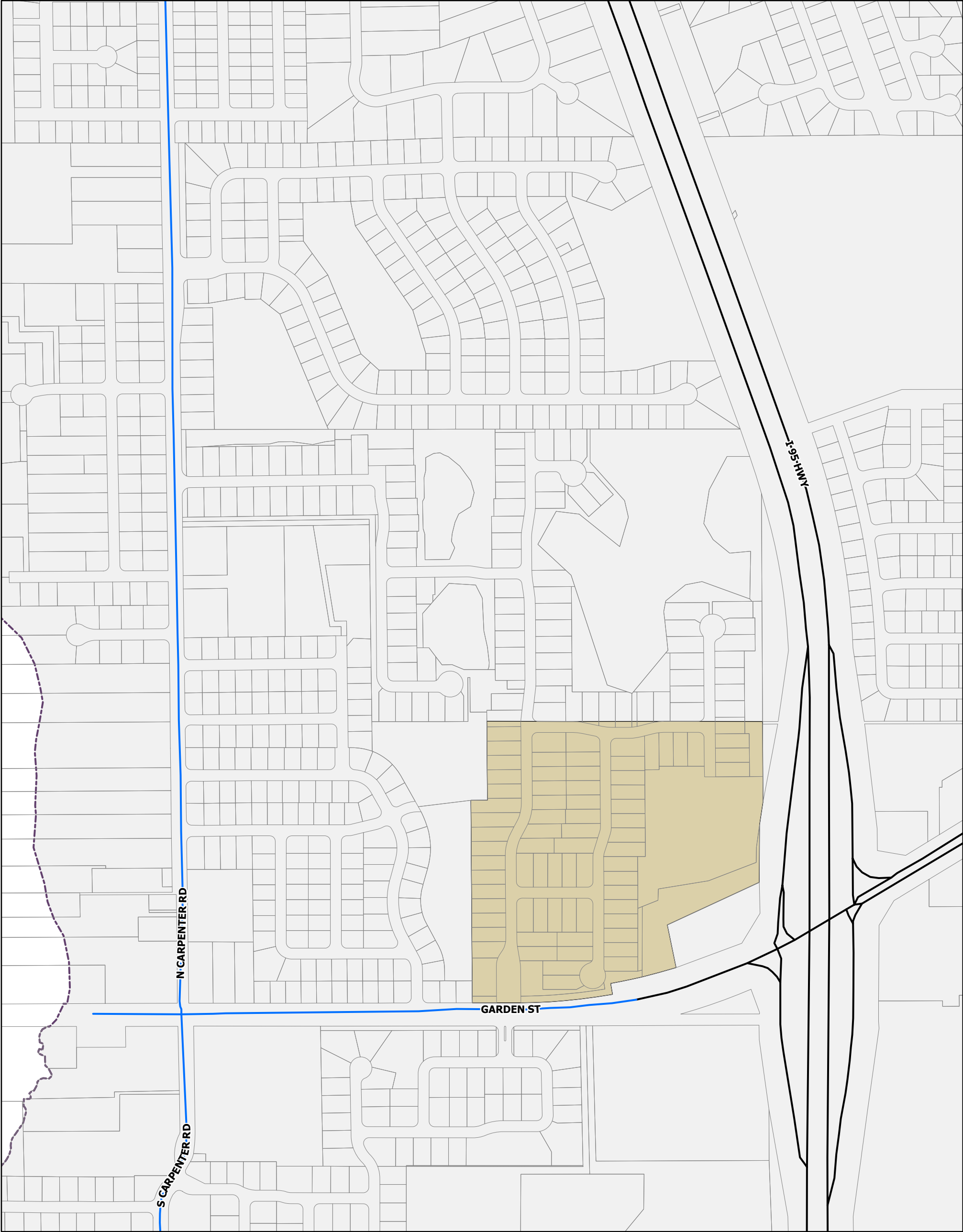
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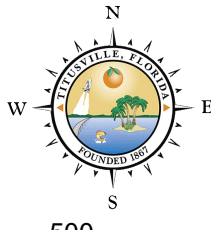
 Collector

City Limits

 City Limits

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

Street Type

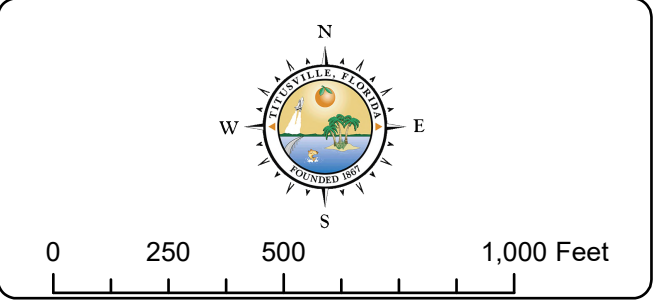
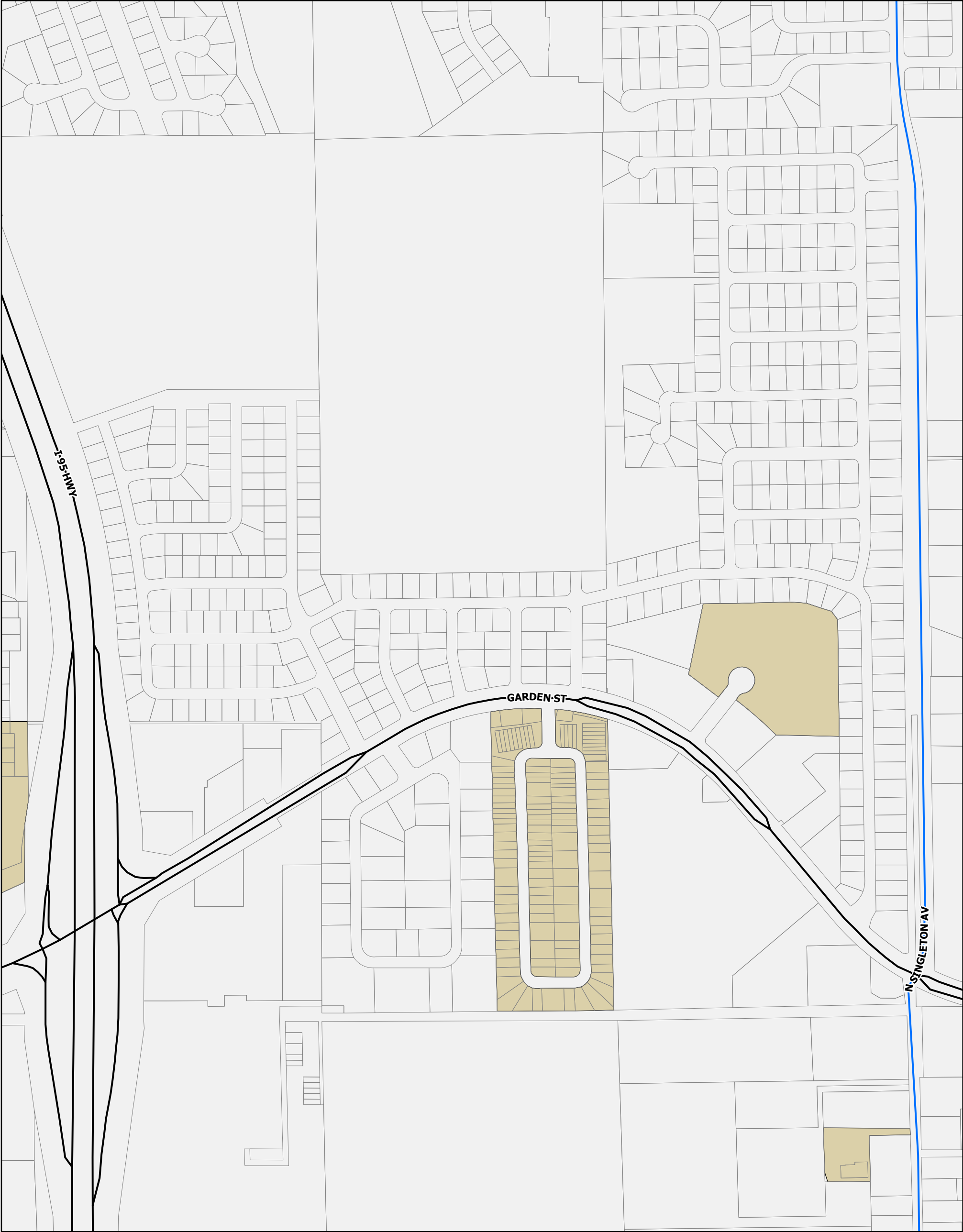
 Arterial

 Collector

City Limits

 City Limits

HDR vs Collector & Arterial



1/21/2025

- Future Land Use

High Density Residential
- Parcels

Parcels
- Street Type

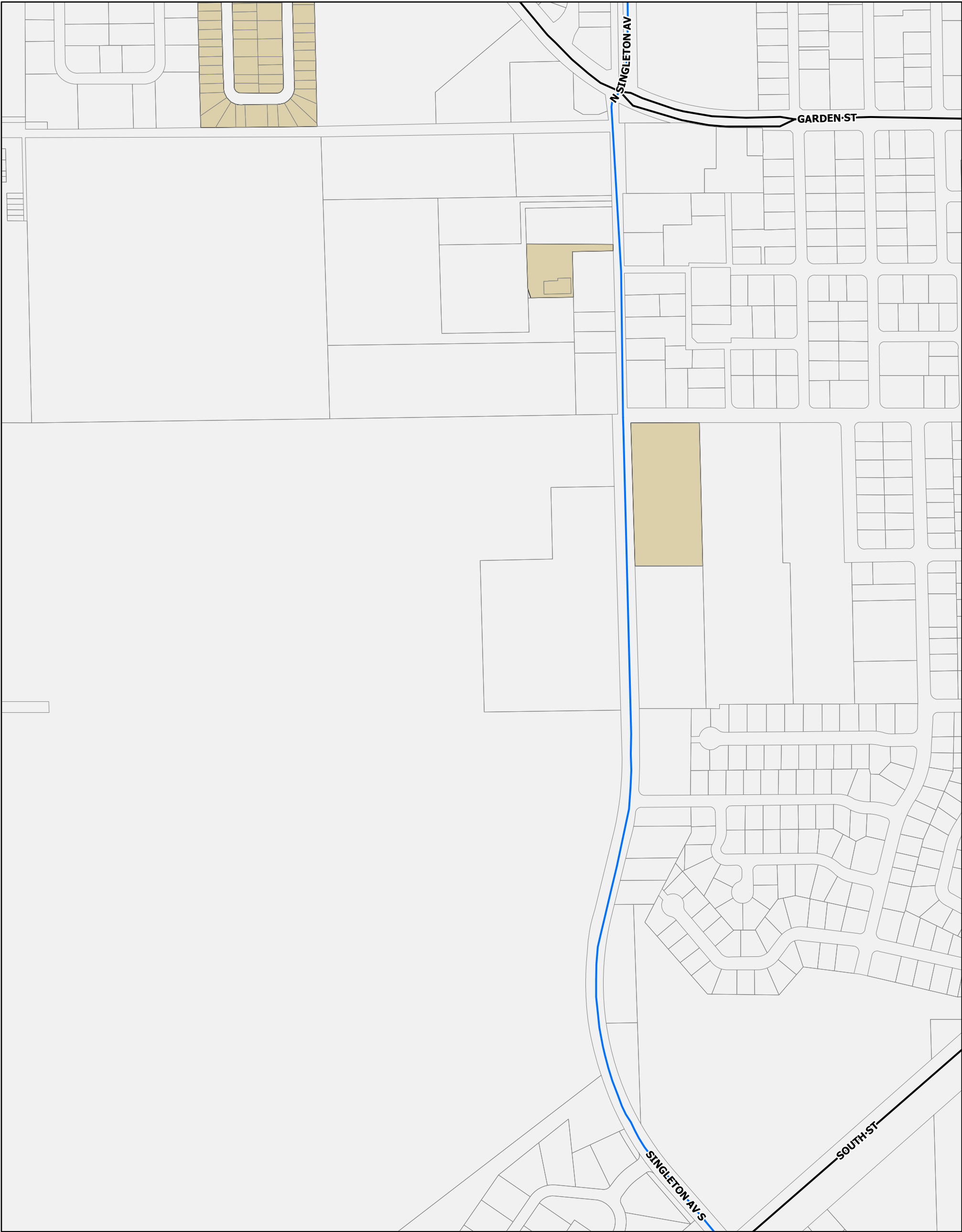
Arterial

Collector

City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

Street Type

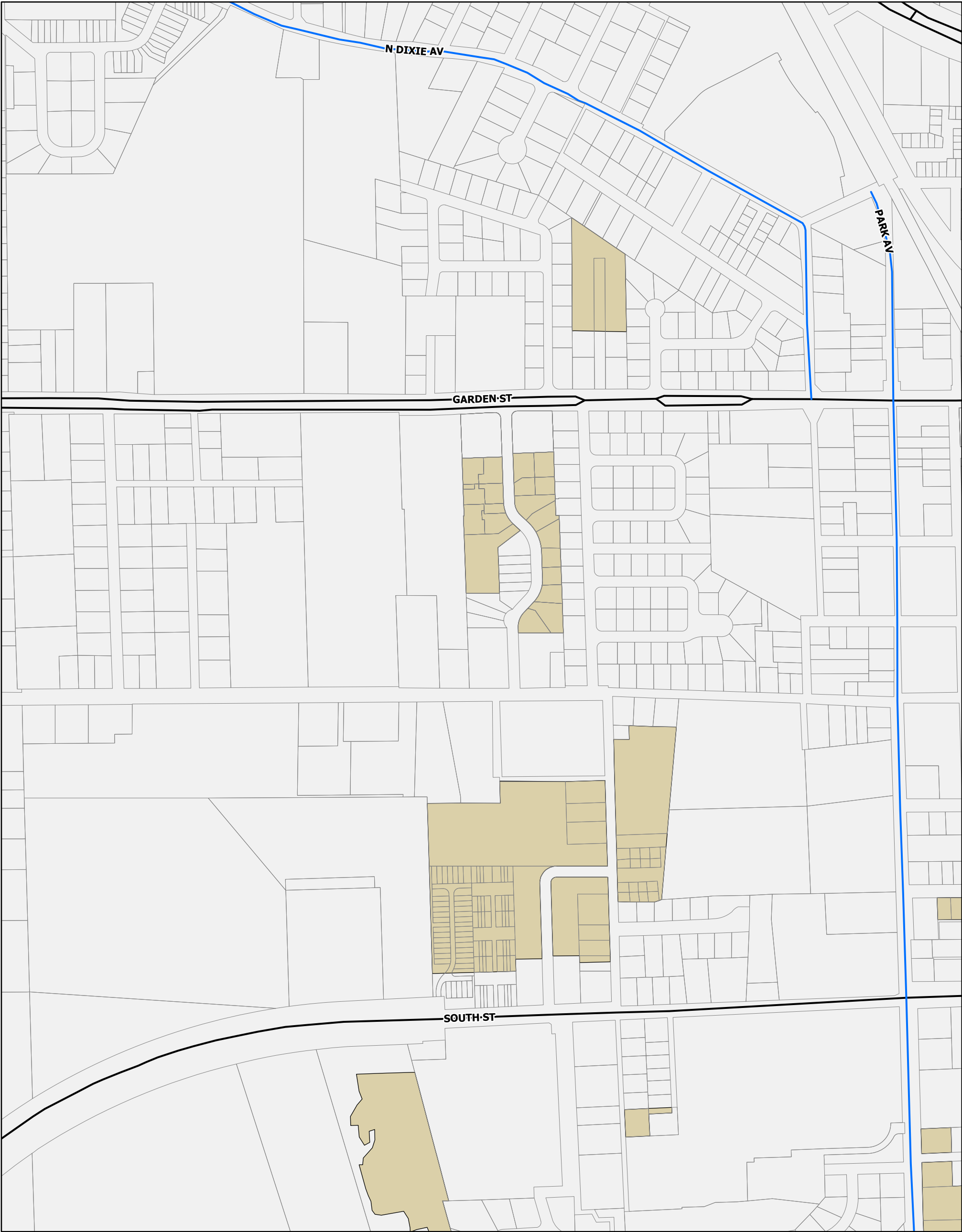
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 Collector

City Limits

 City Limits

HDR vs Collector & Arterial



0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

Parcels

Parcels

Street Type

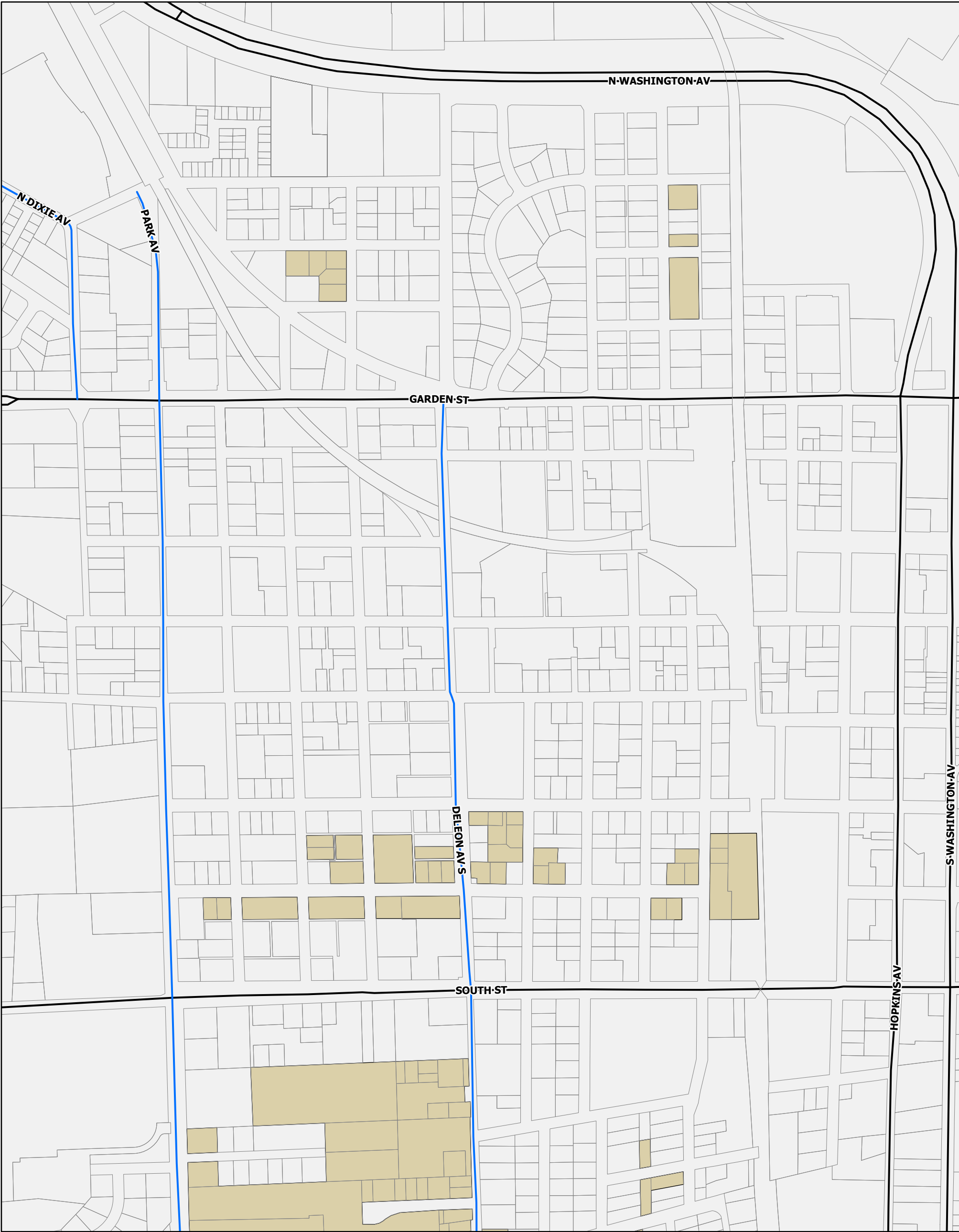
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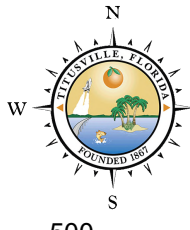
Collector

City Limits

City Limits

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

 High Density Residential

Parcels

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Street Type

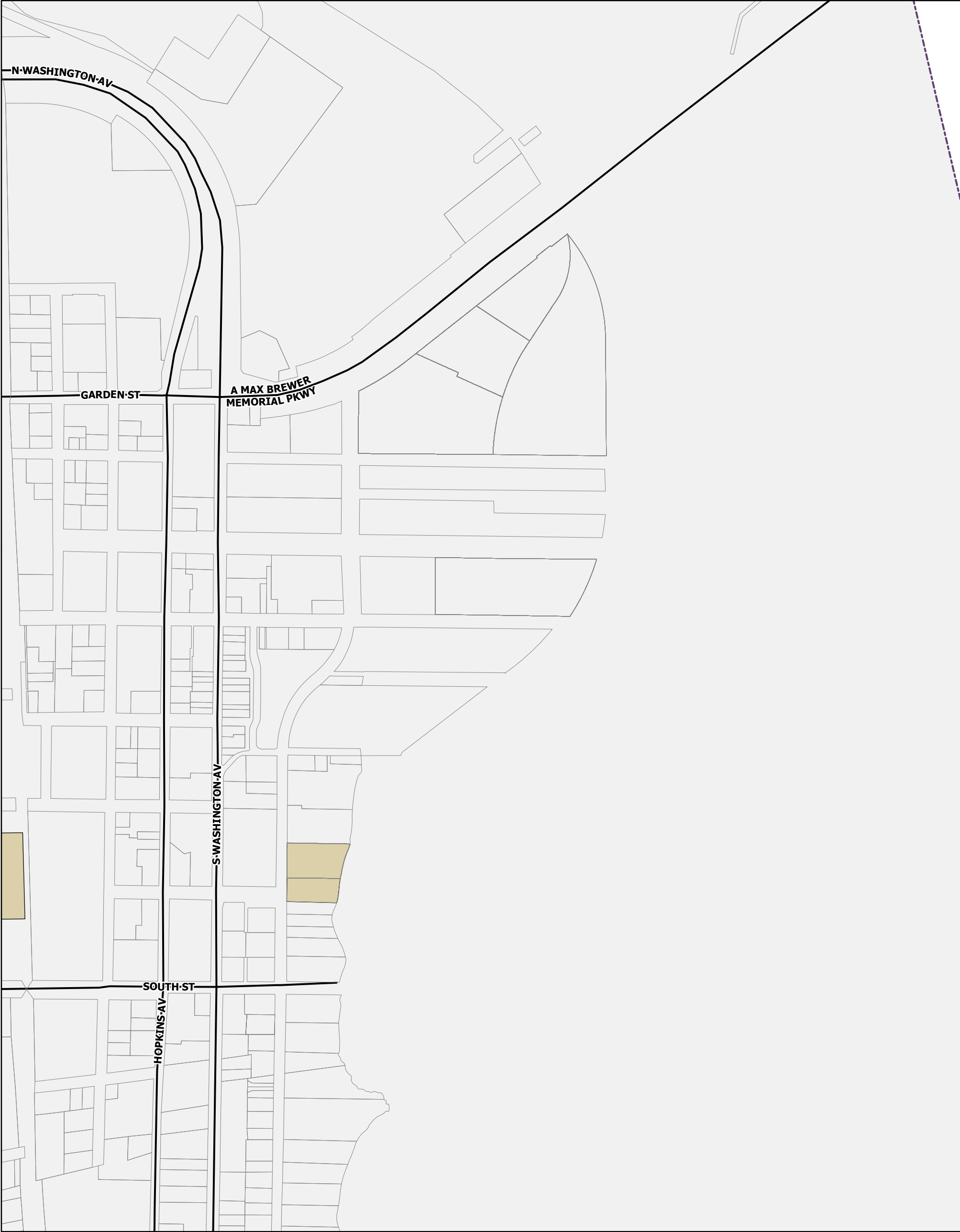
 Arterial

 Collector

City Limits

 City Limits

HDR vs Collector & Arterial





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1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

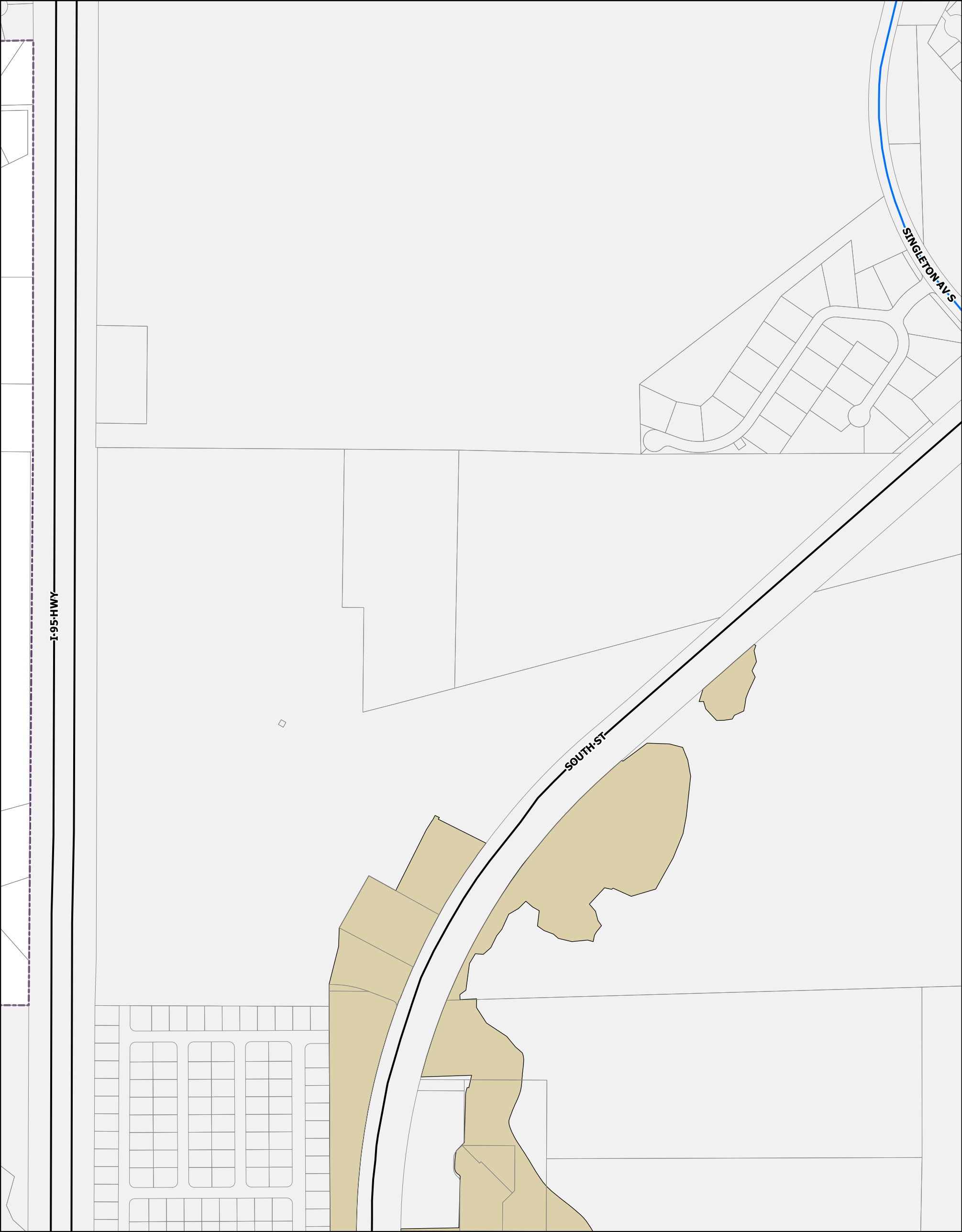
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 Arterial

City Limits

 City Limits

HDR vs Collector & Arterial



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1/21/2025

- Future Land Use

High Density Residential
- Parcels

Parcels
- Street Type

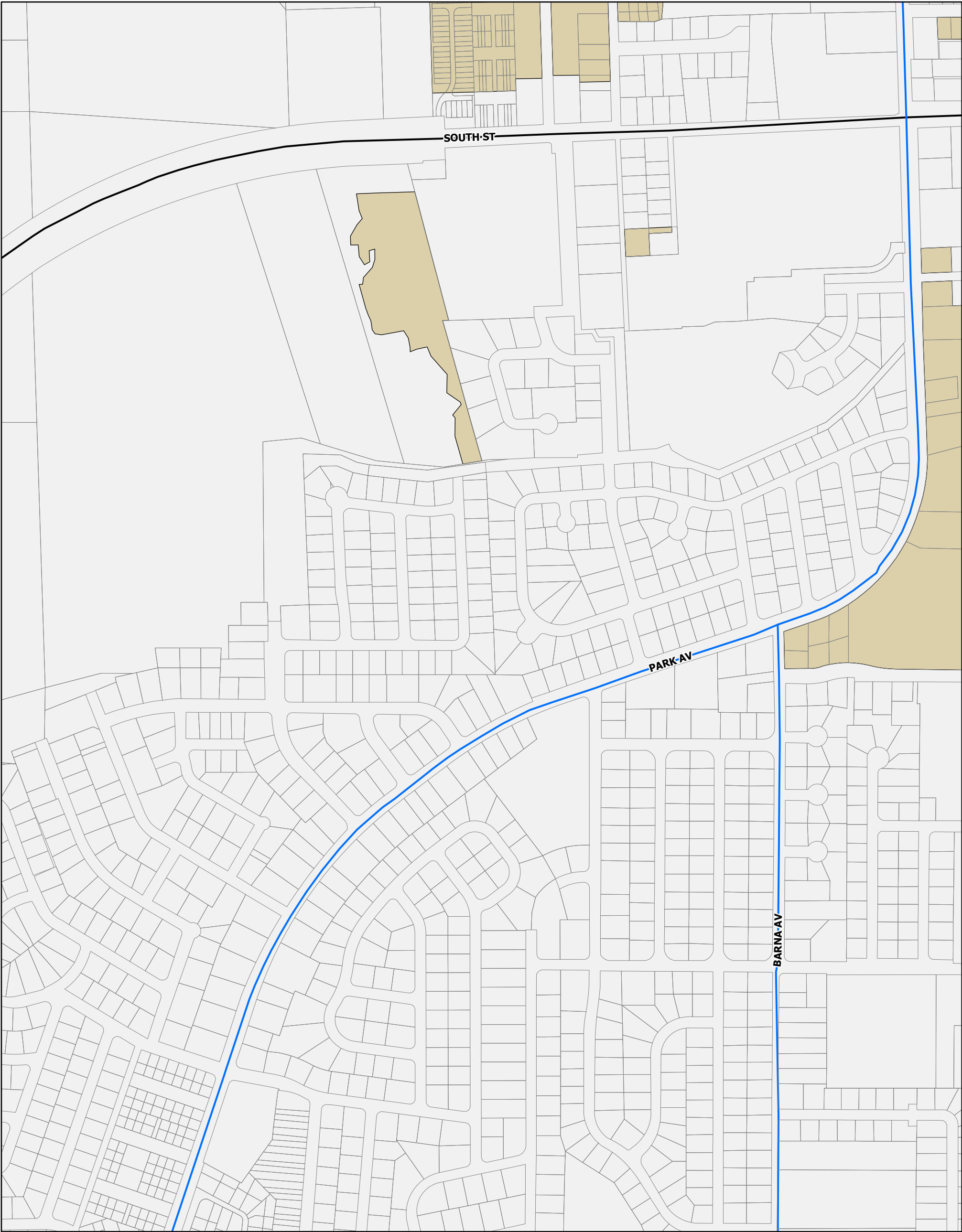
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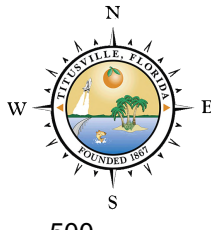
Collector

City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

- Future Land Use

 - High Density Residential

Parcels

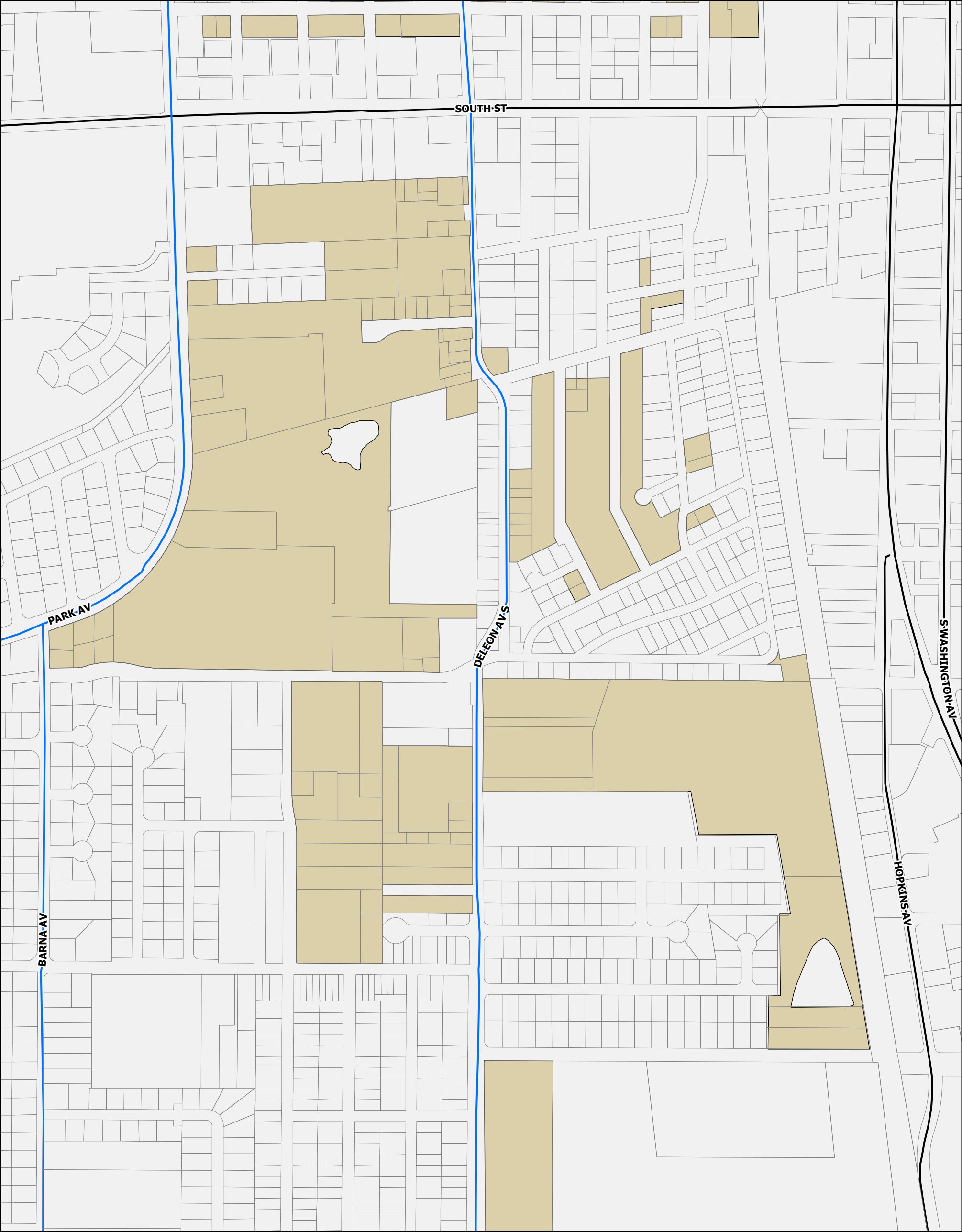
 - Parcels
- Street Type

 - Arterial
 - Collector

City Limits

 - City Limits

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

Parcels

Street Type

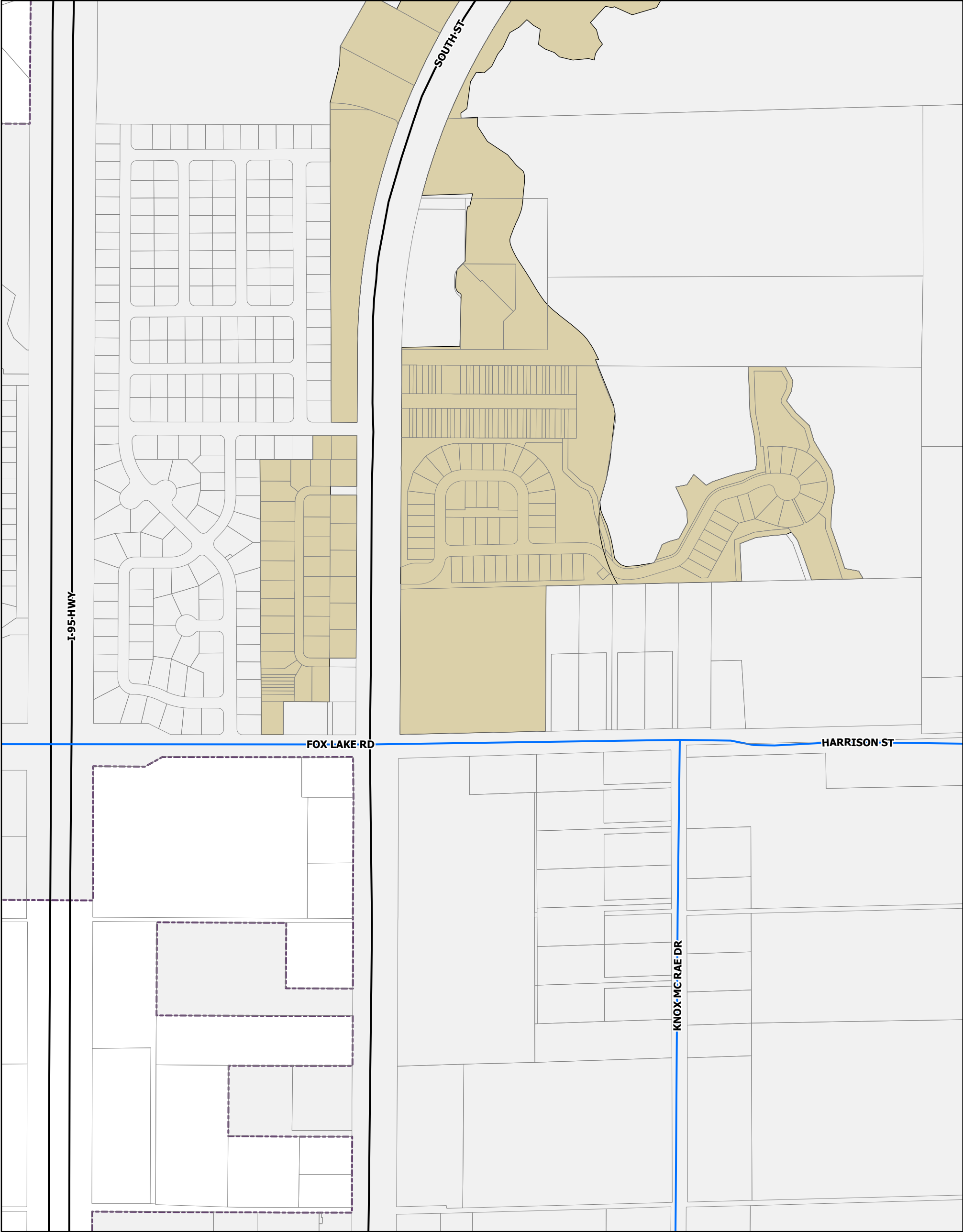
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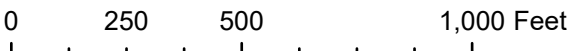
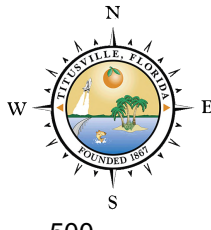
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City Limits

City Limits

HDR vs Collector & Arterial





1/21/2025

- Future Land Use

 -  High Density Residential

Parcels

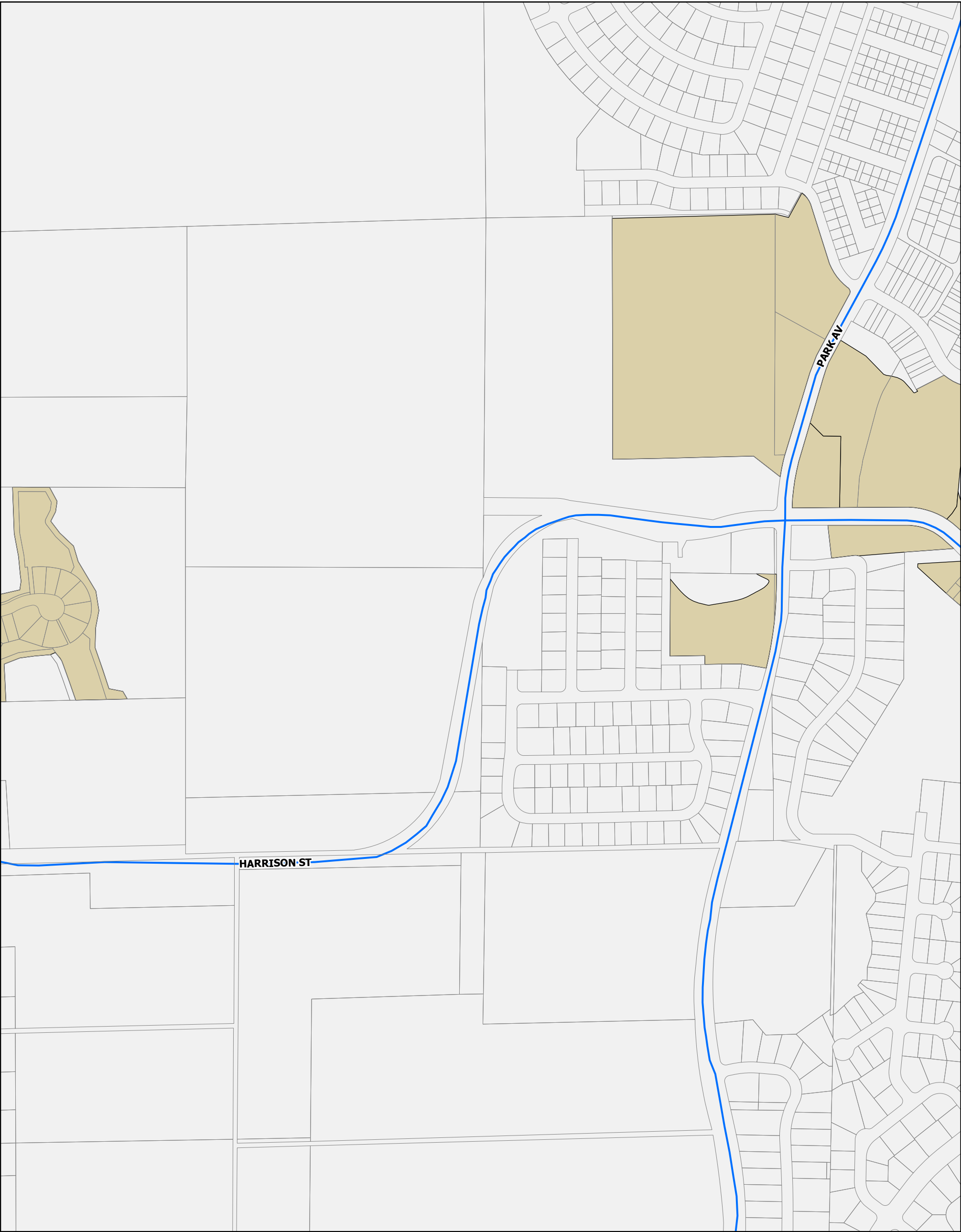
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- Street Type

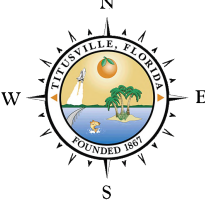
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City Limits

 -  City Limits

HDR vs Collector & Arterial





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1/21/2025

- Future Land Use

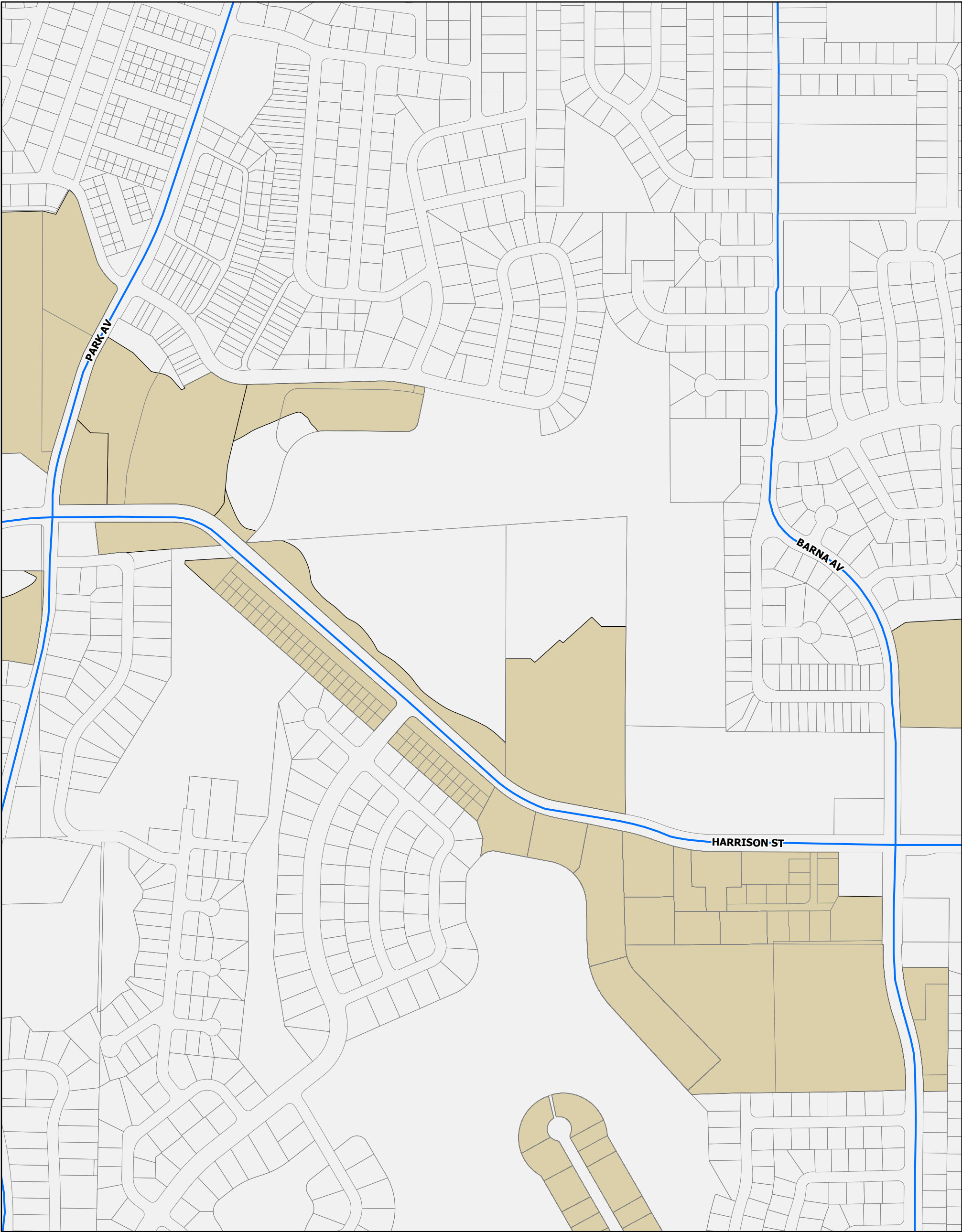
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- Parcels

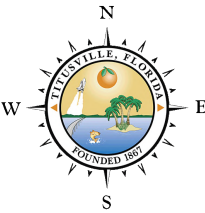
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- Street Type

Collector
- City Limits

City Limits

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

Parcels

Parcels

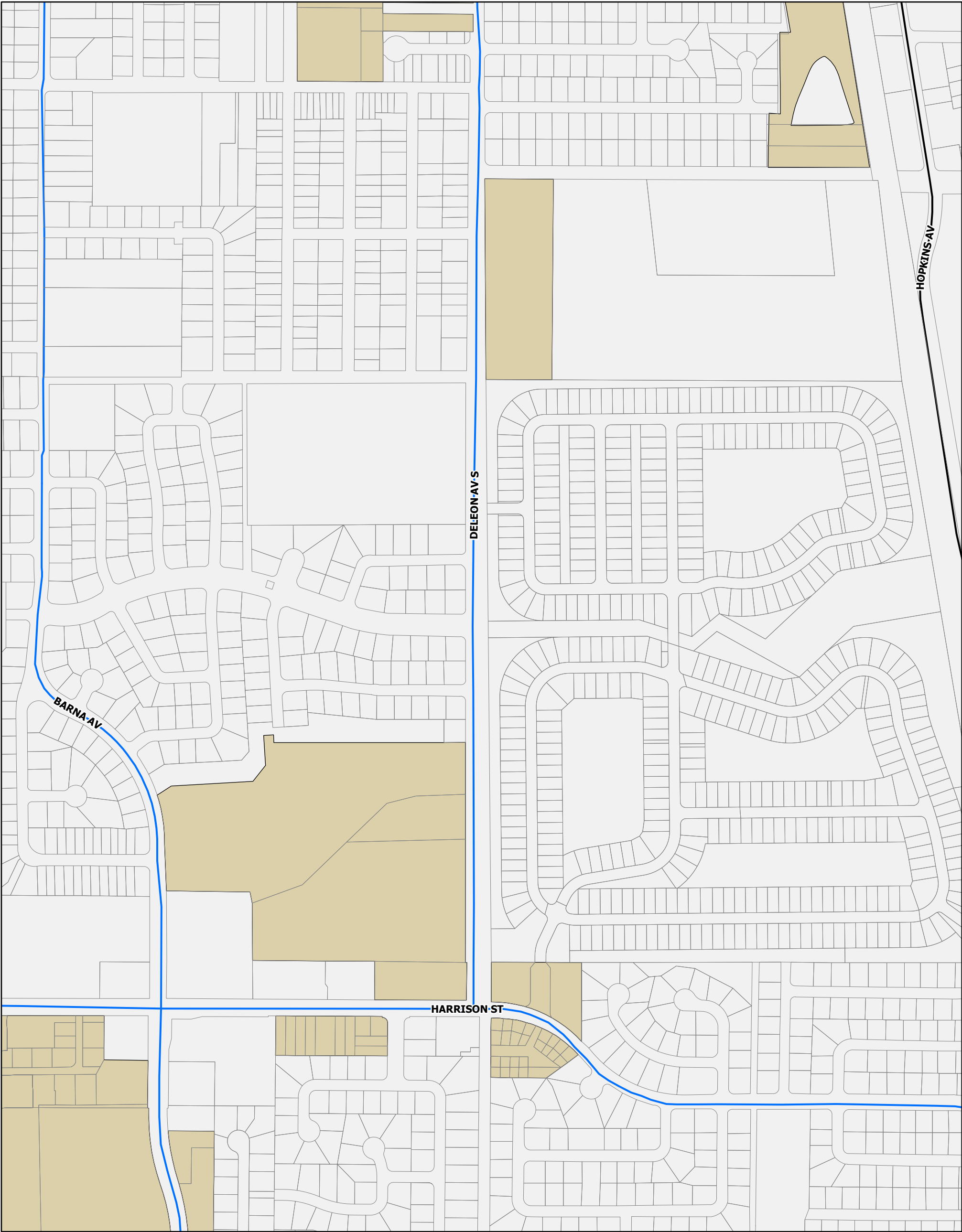
Street Type

Collector

City Limits

City Limits

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

Street Type

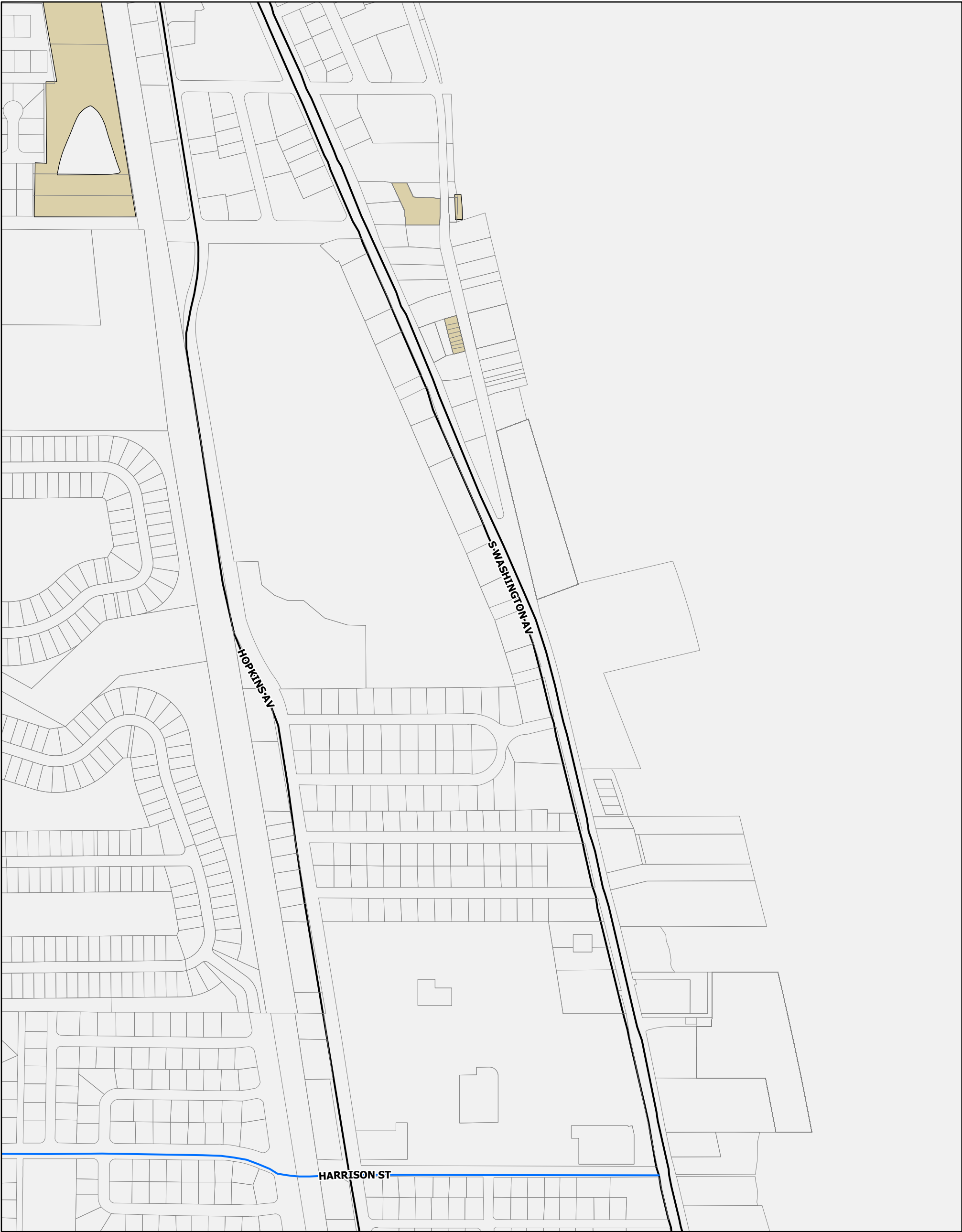
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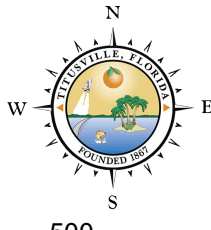
 Collector

City Limits

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HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

Parcels

Parcels

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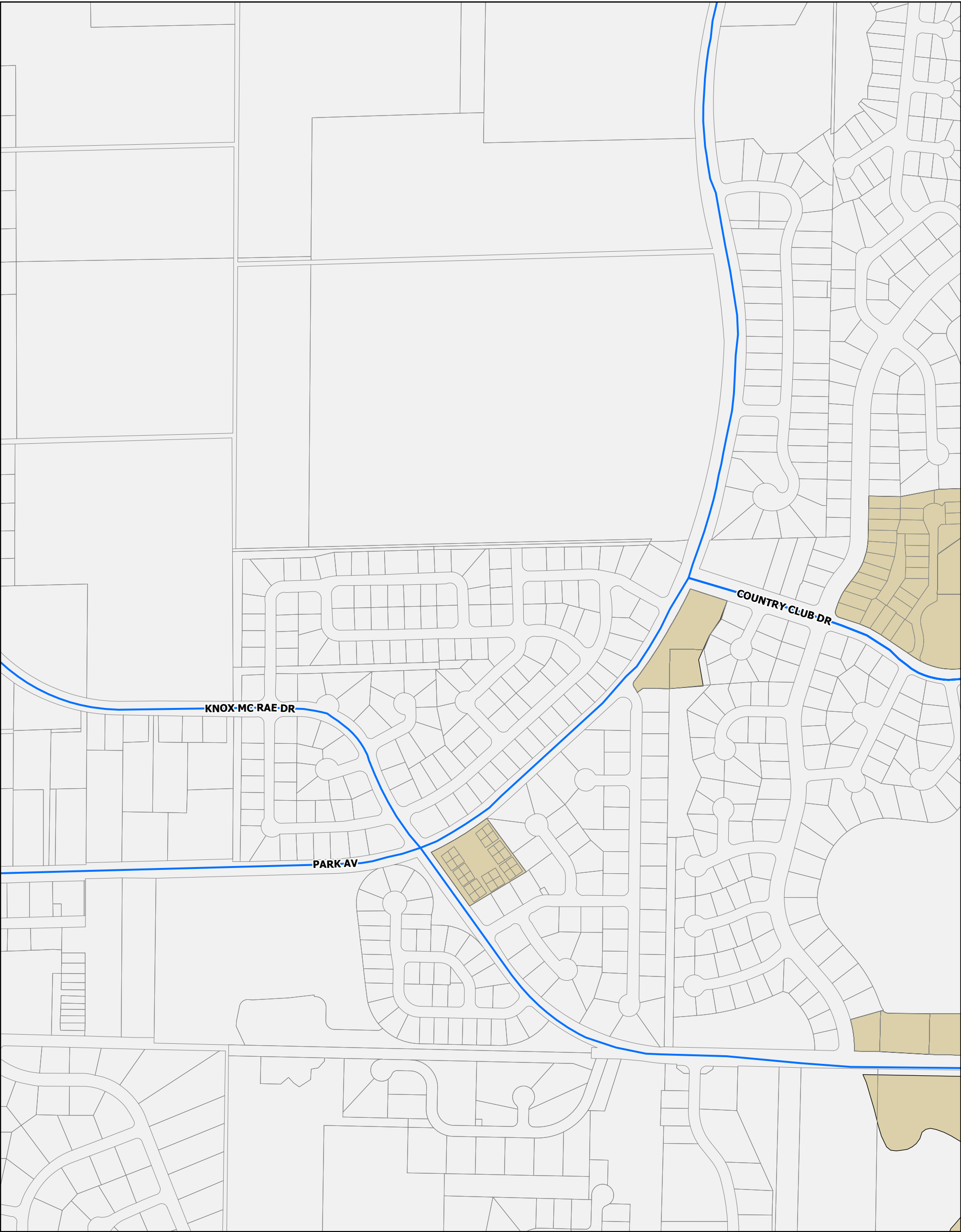
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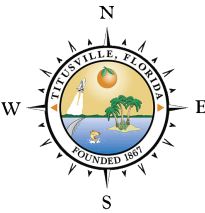
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City Limits

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HDR vs Collector & Arterial





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1/21/2025

Future Land Use

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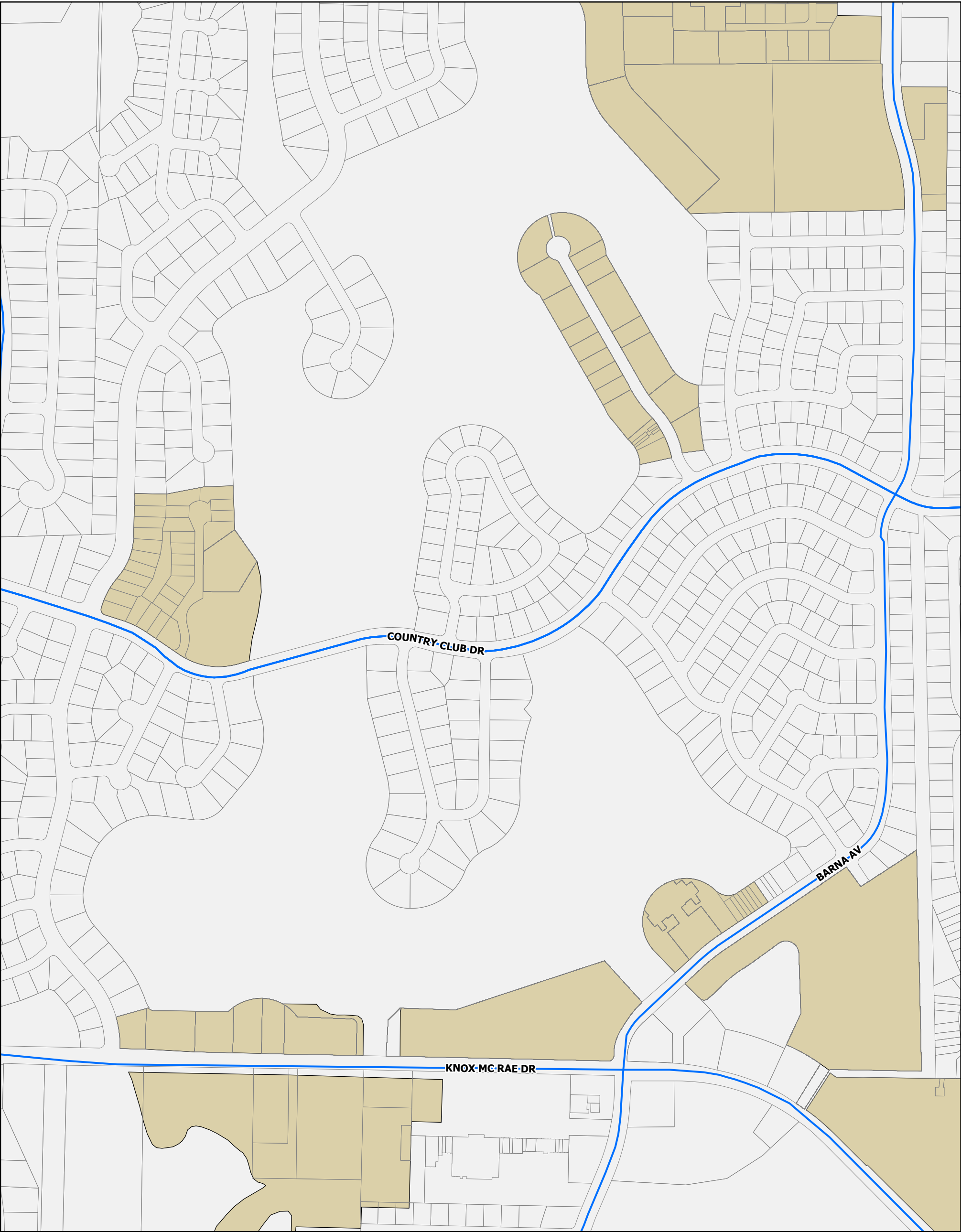
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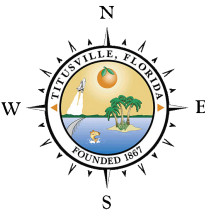
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City Limits

City Limits

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1/21/2025

Future Land Use

High Density Residential

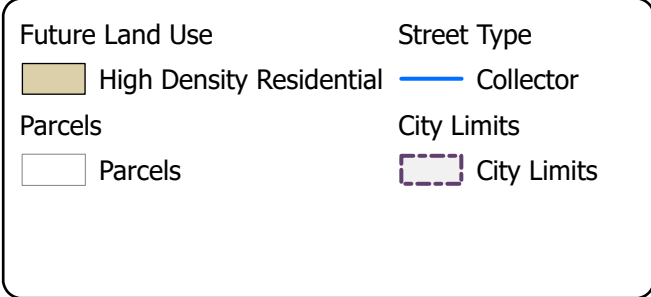
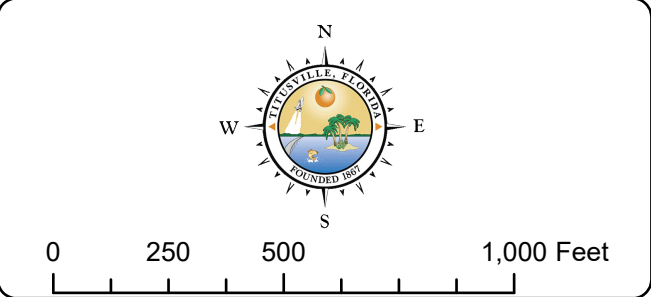
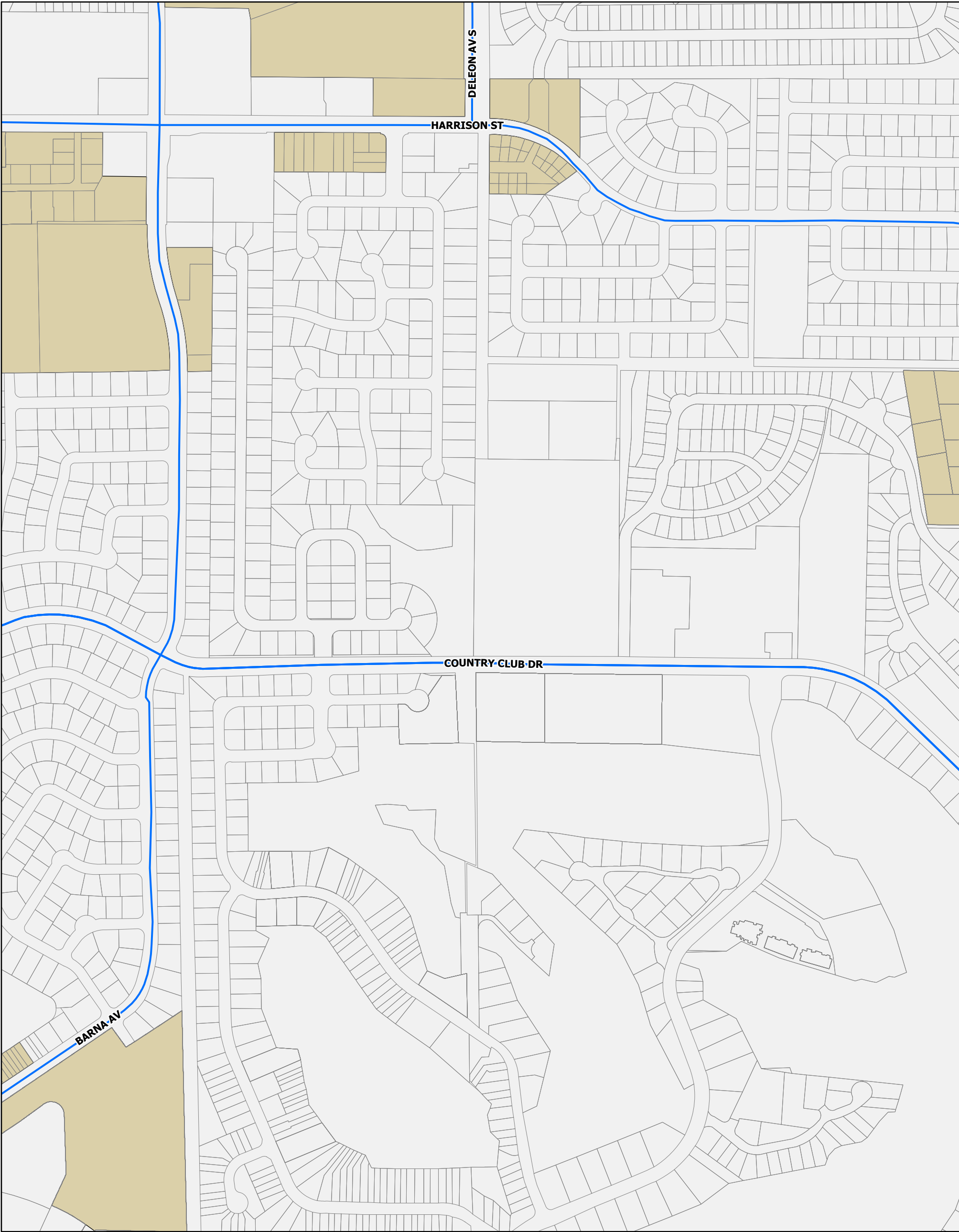
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Street Type

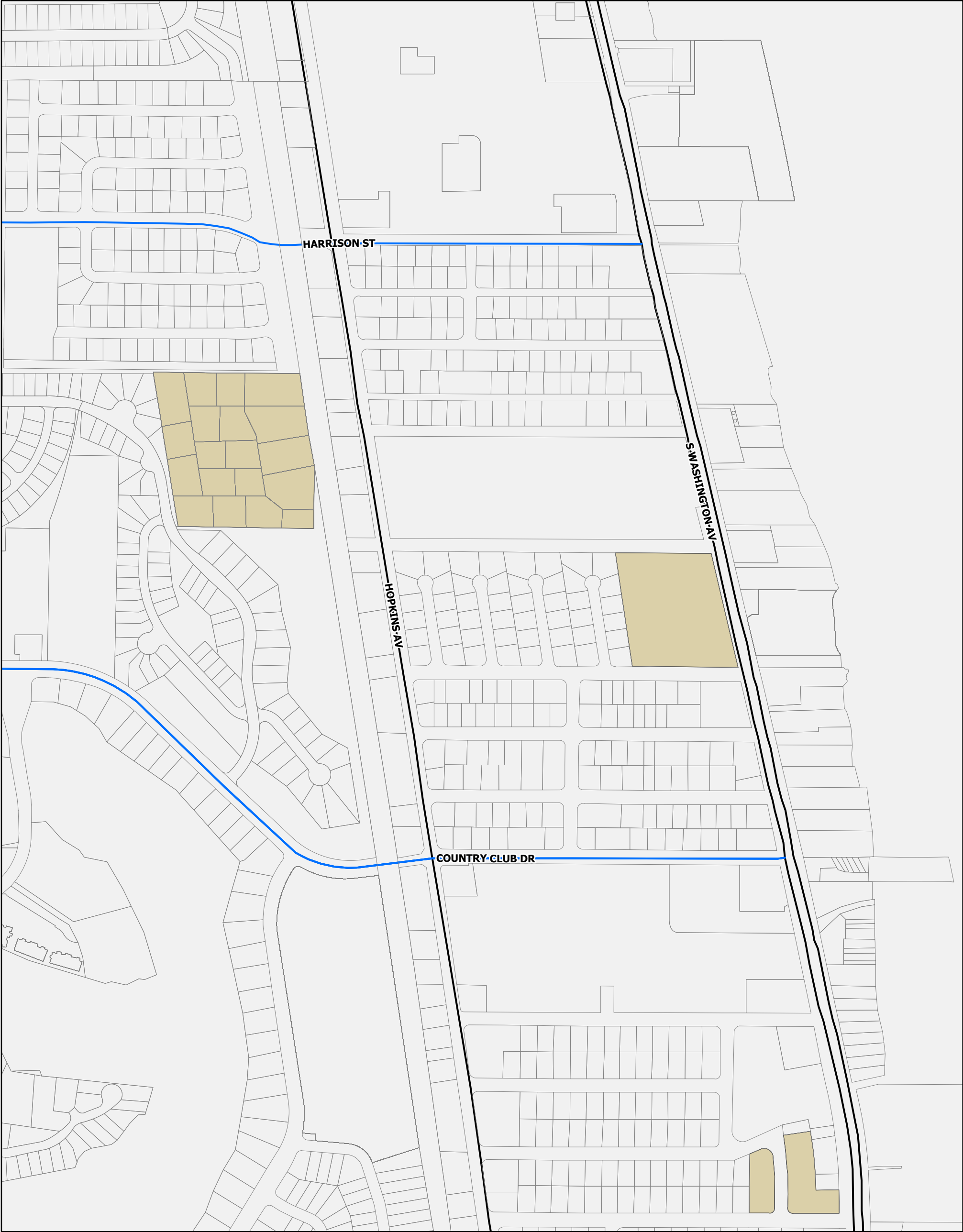
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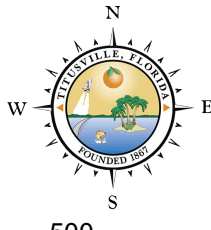
City Limits

HDR vs Collector & Arterial



HDR vs Collector & Arterial





0 250 500 1,000 Feet

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Future Land Use

High Density Residential

Parcels

Parcels

Street Type

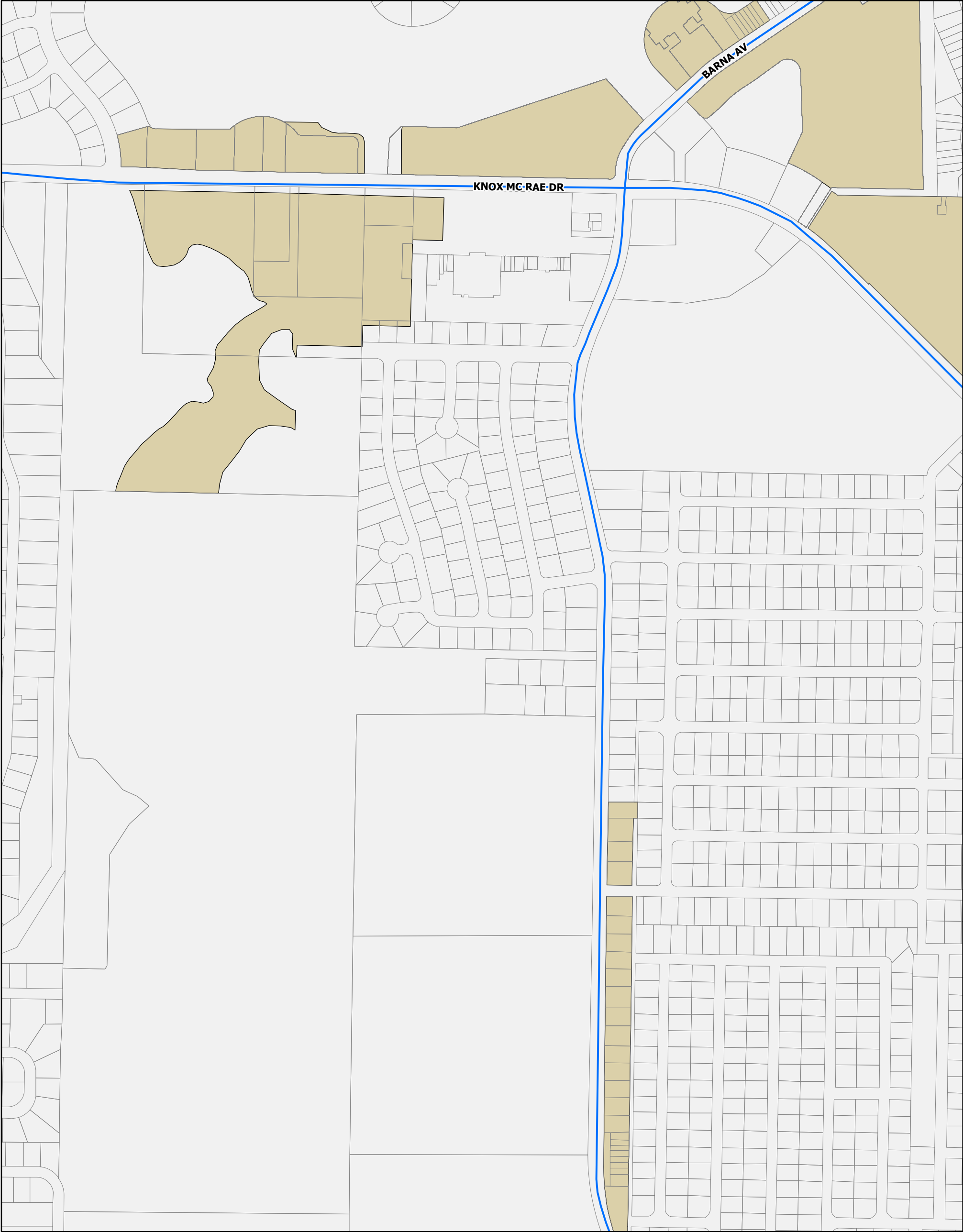
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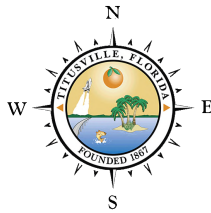
Collector

City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

Future Land Use

High Density Residential

Parcels

Parcels

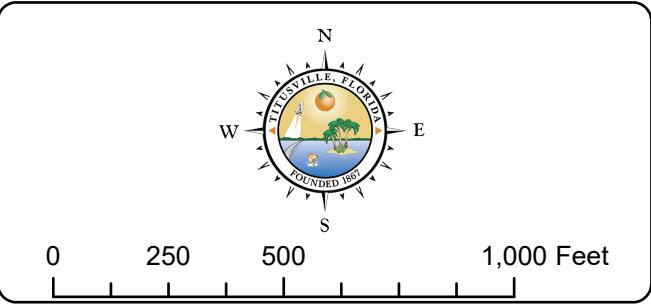
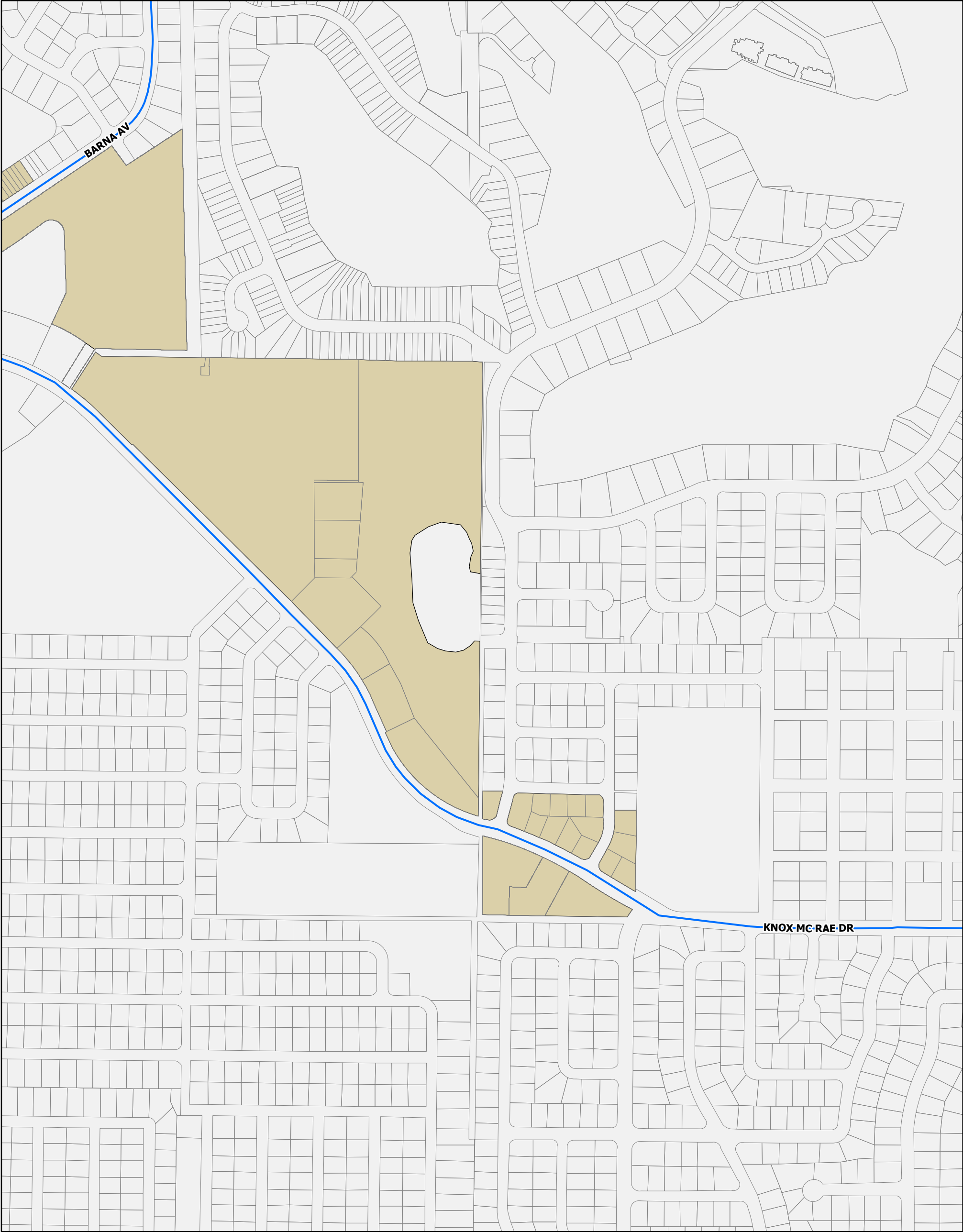
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Collector

City Limits

City Limits

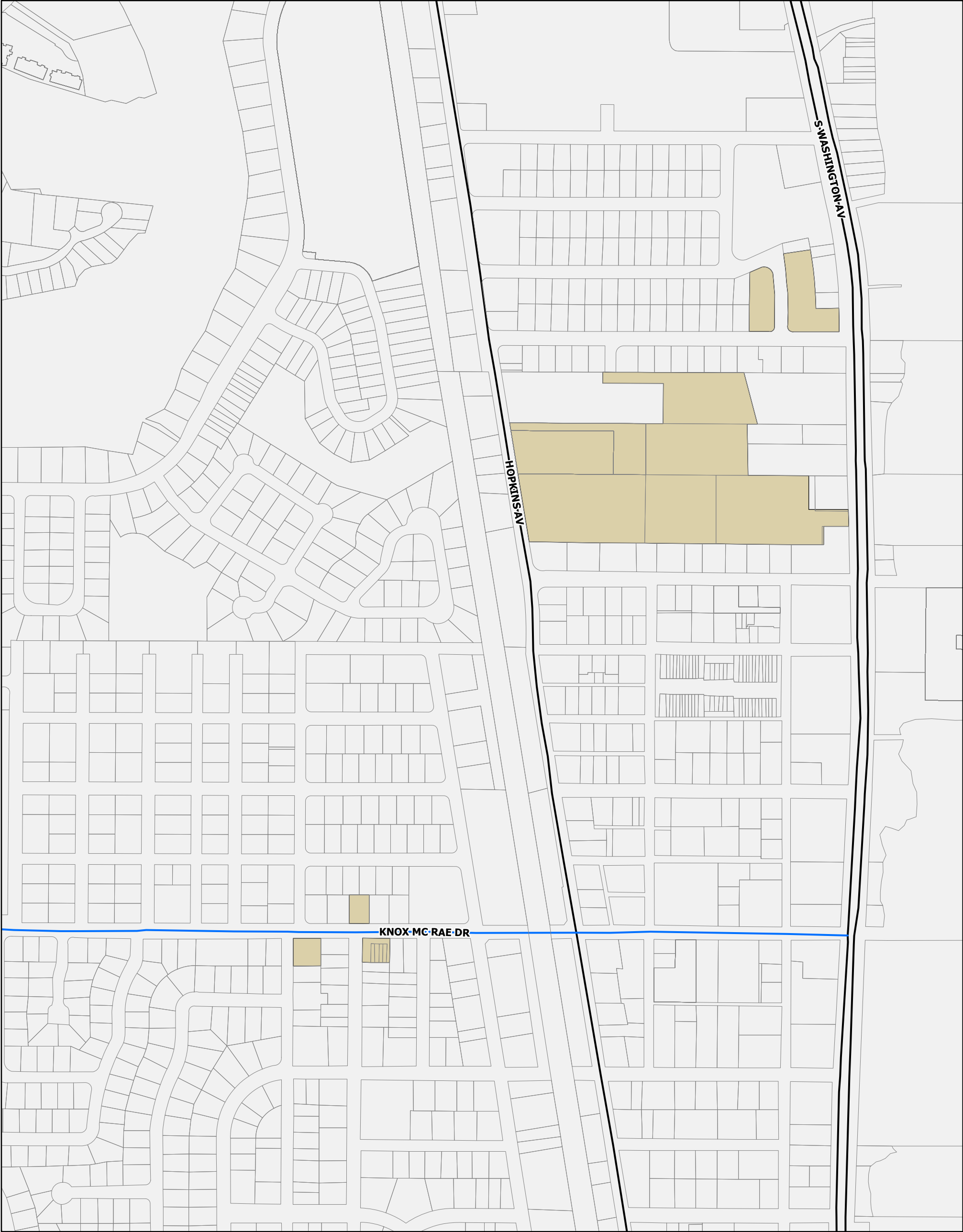
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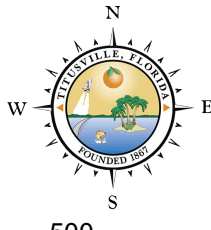


1/21/2025

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|--------------------------|--------------------|
| Future Land Use | Street Type |
| High Density Residential | Collector |
| Parcels | City Limits |
| Parcels | City Limits |

HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

Street Type

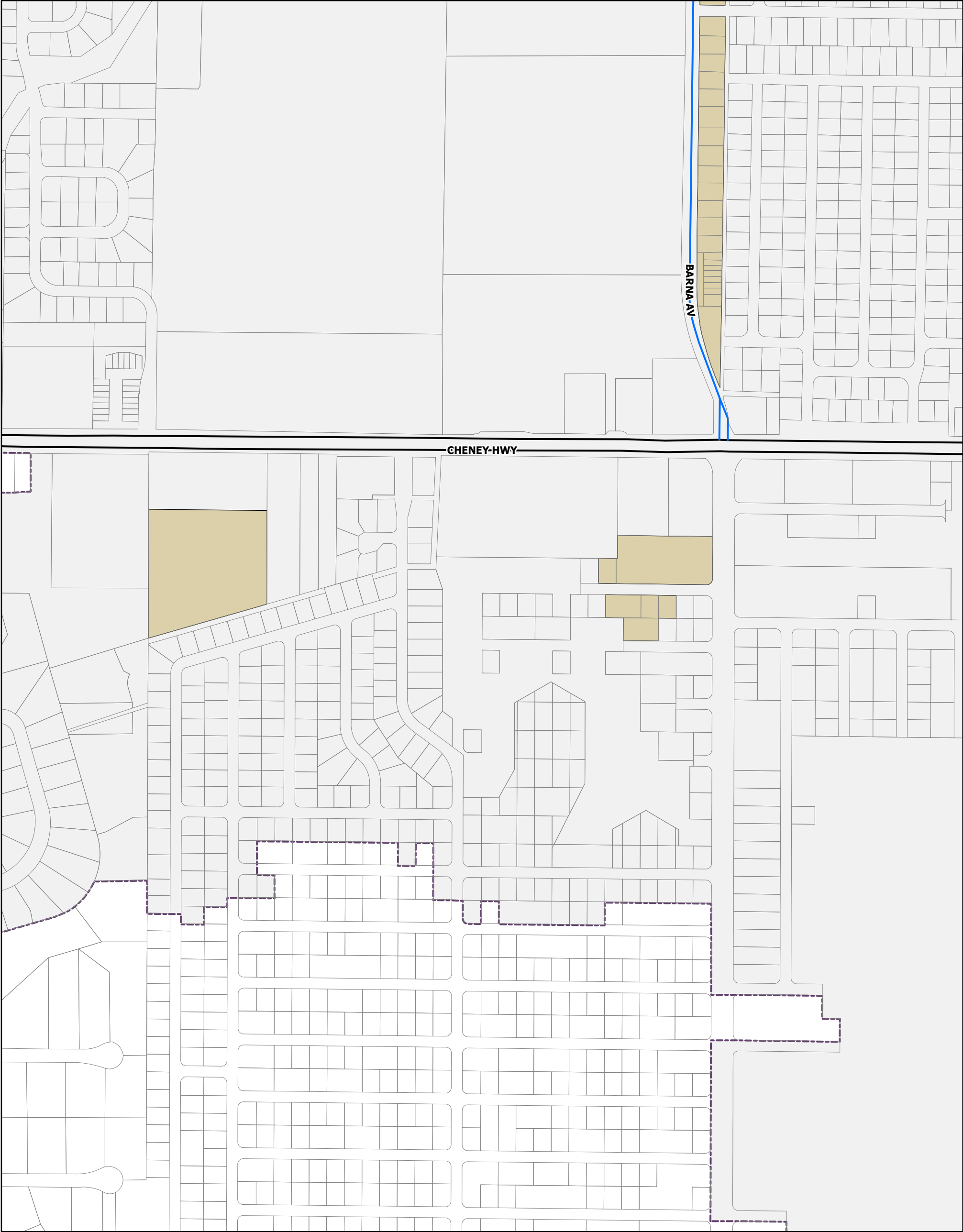
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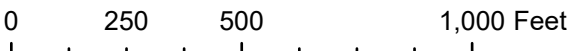
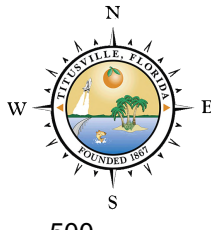
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City Limits

 City Limits

HDR vs Collector & Arterial





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Future Land Use

 High Density Residential

Parcels

 Parcels

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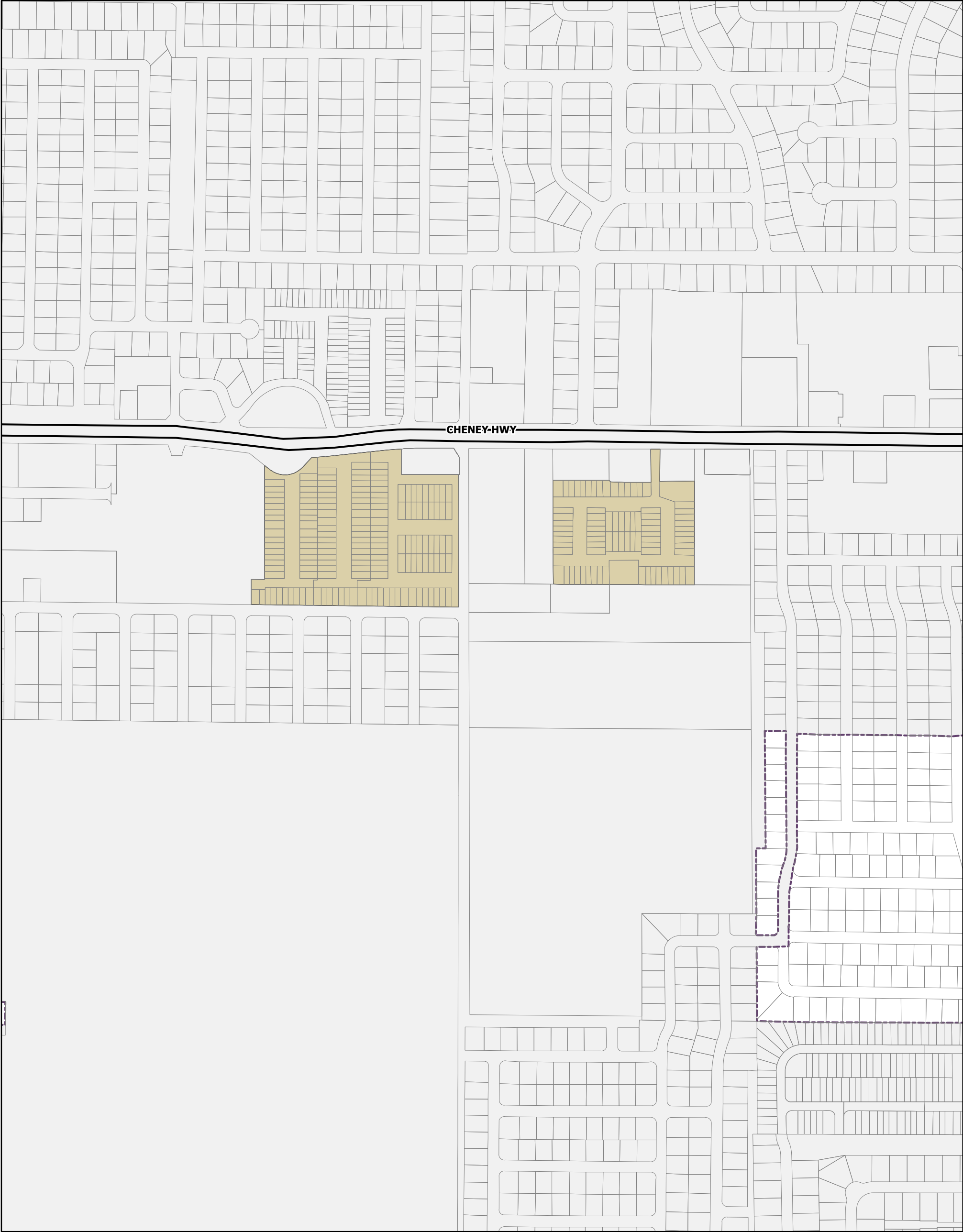
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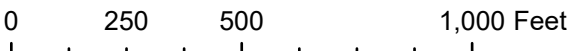
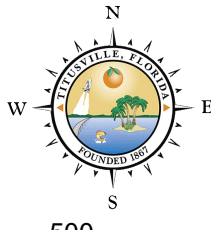
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City Limits

 City Limits

HDR vs Collector & Arterial





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Future Land Use

 High Density Residential

Parcels

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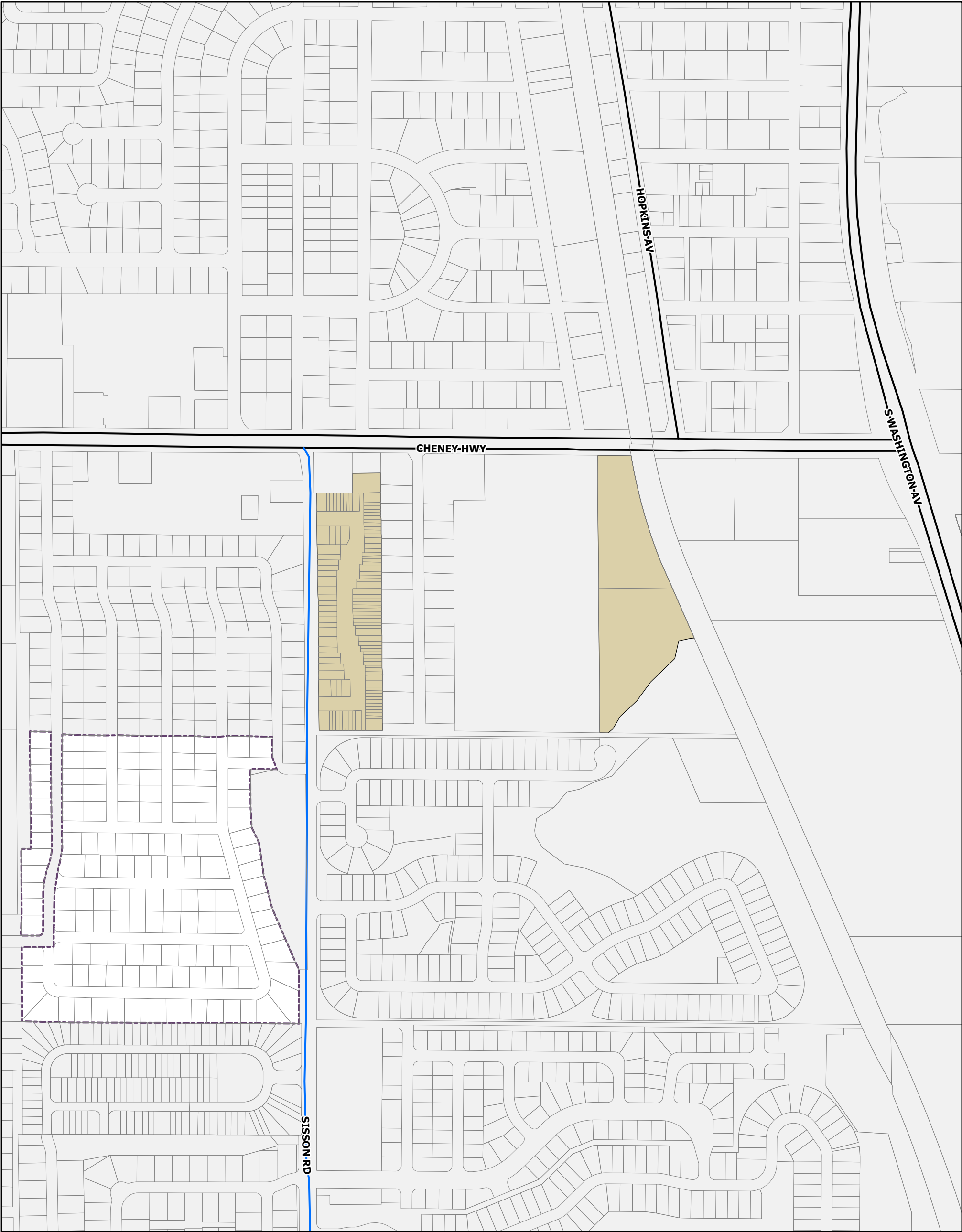
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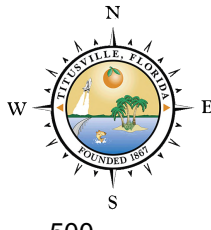
 Arterial

City Limits

 City Limits

HDR vs Collector & Arterial





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1/21/2025

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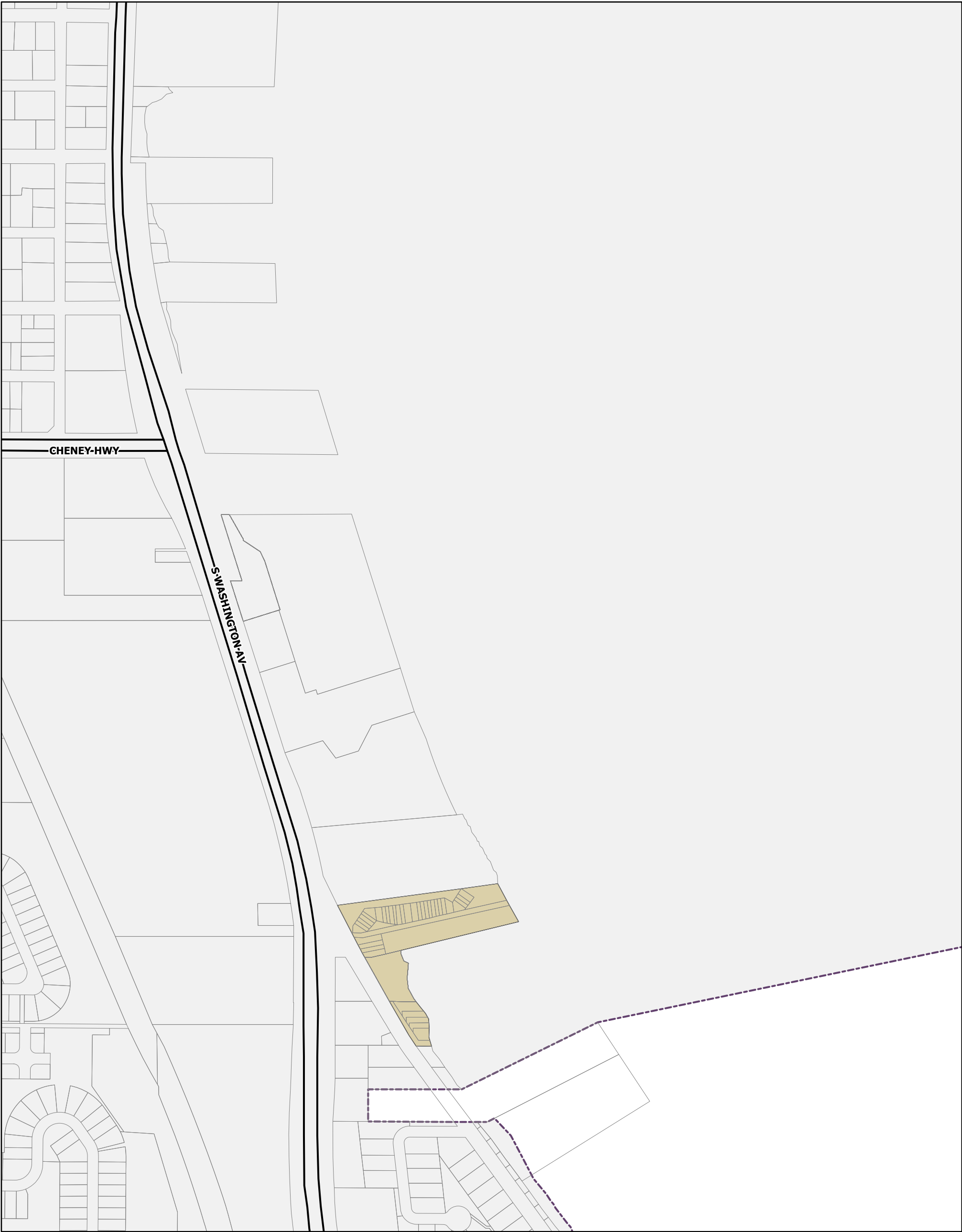
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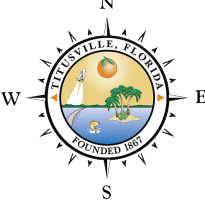
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City Limits

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HDR vs Collector & Arterial





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1/21/2025

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High Density Residential

Parcels

Parcels

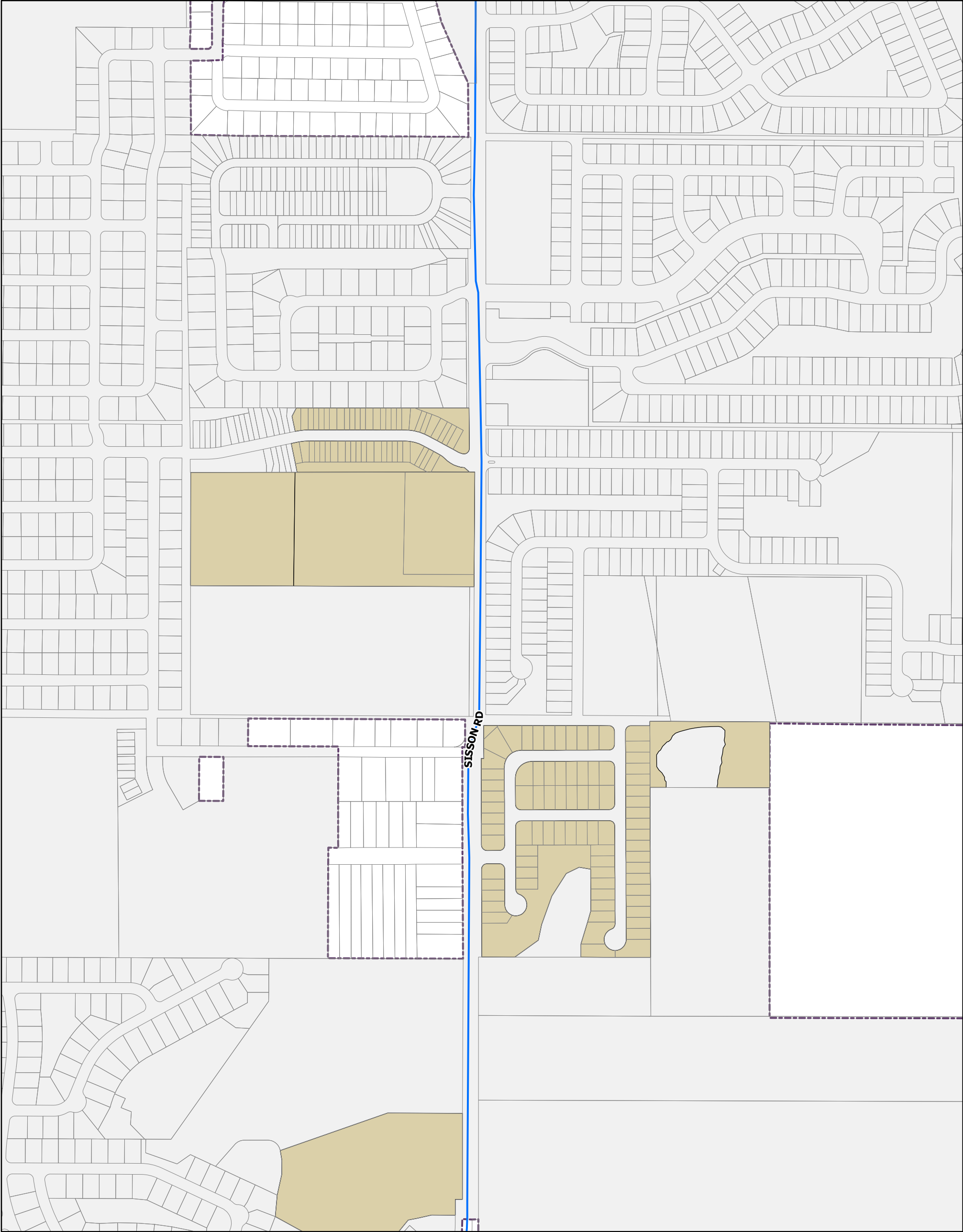
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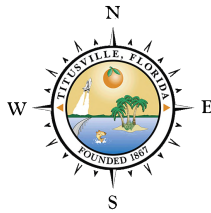
Arterial

City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

- Future Land Use

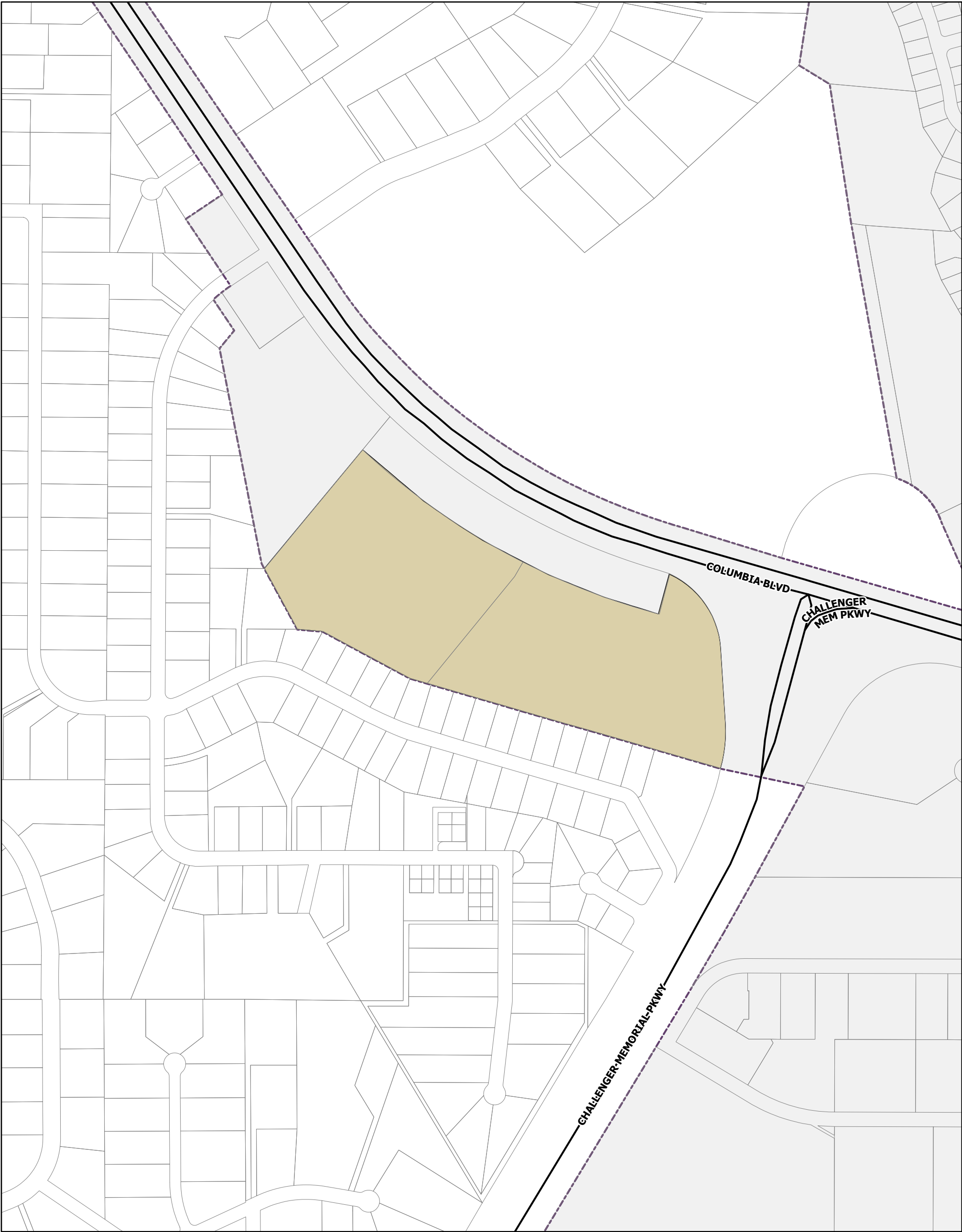
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- Parcels

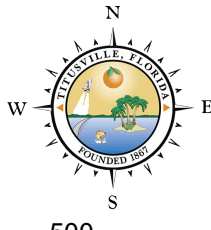
Parcels
- Street Type

Collector
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City Limits

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0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

Parcels

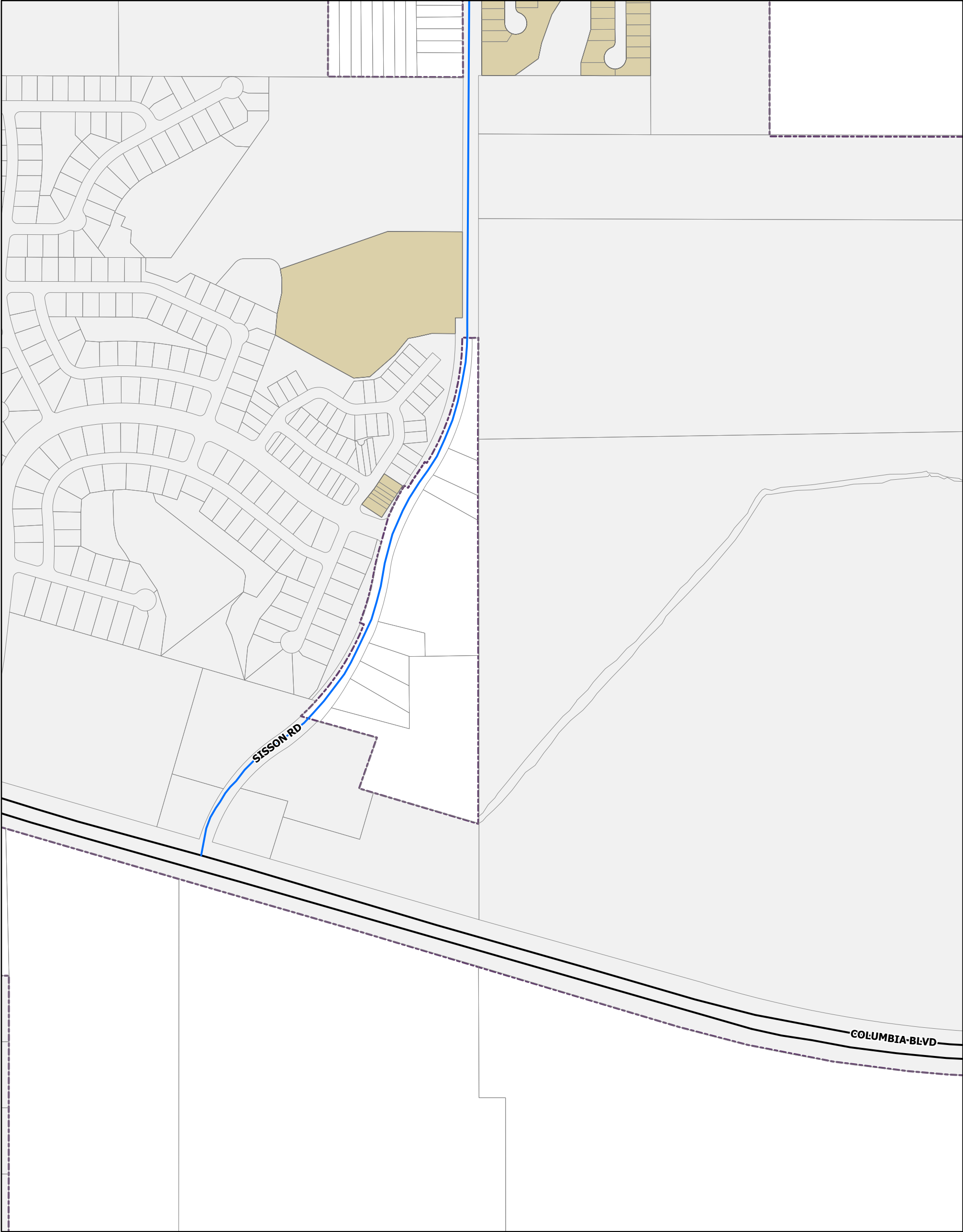
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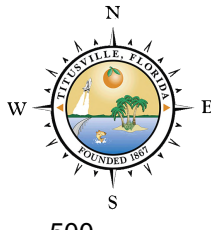
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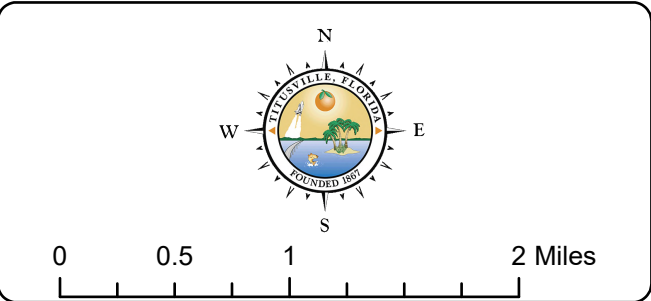
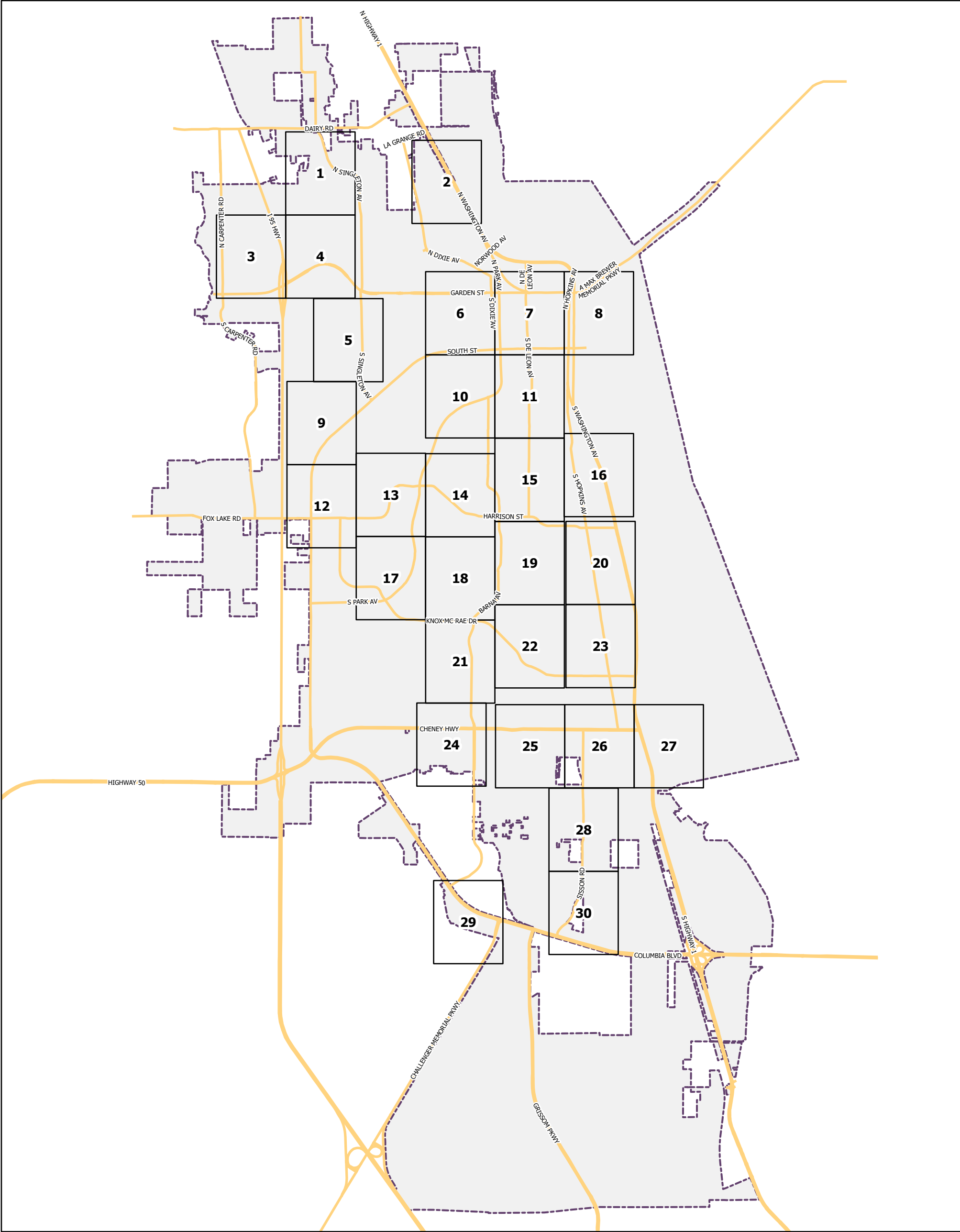
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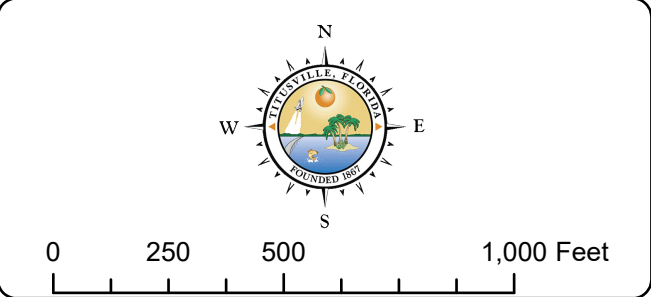
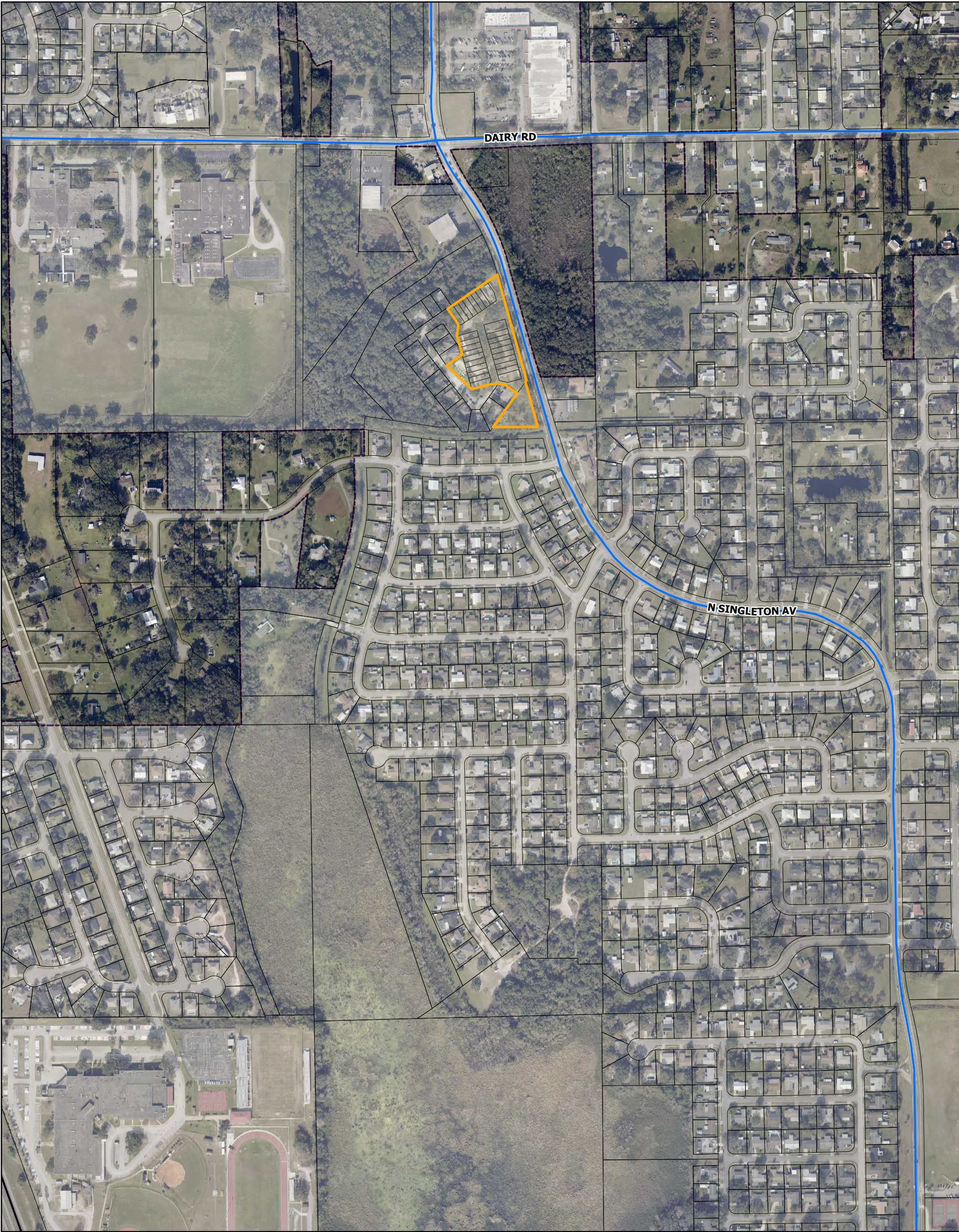
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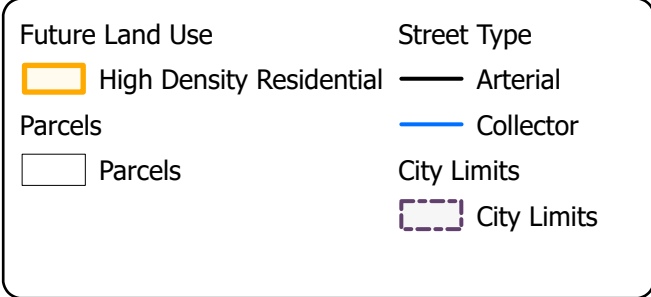
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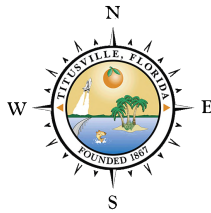


1/21/2025



HDR vs Collector & Arterial





0 250 500 1,000 Feet

1/21/2025

Future Land Use

 High Density Residential

Parcels

 Parcels

Street Type

 Arterial

 Collector

City Limits

 City Limits

HDR vs Collector & Arterial





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1/21/2025

Future Land Use

 High Density Residential

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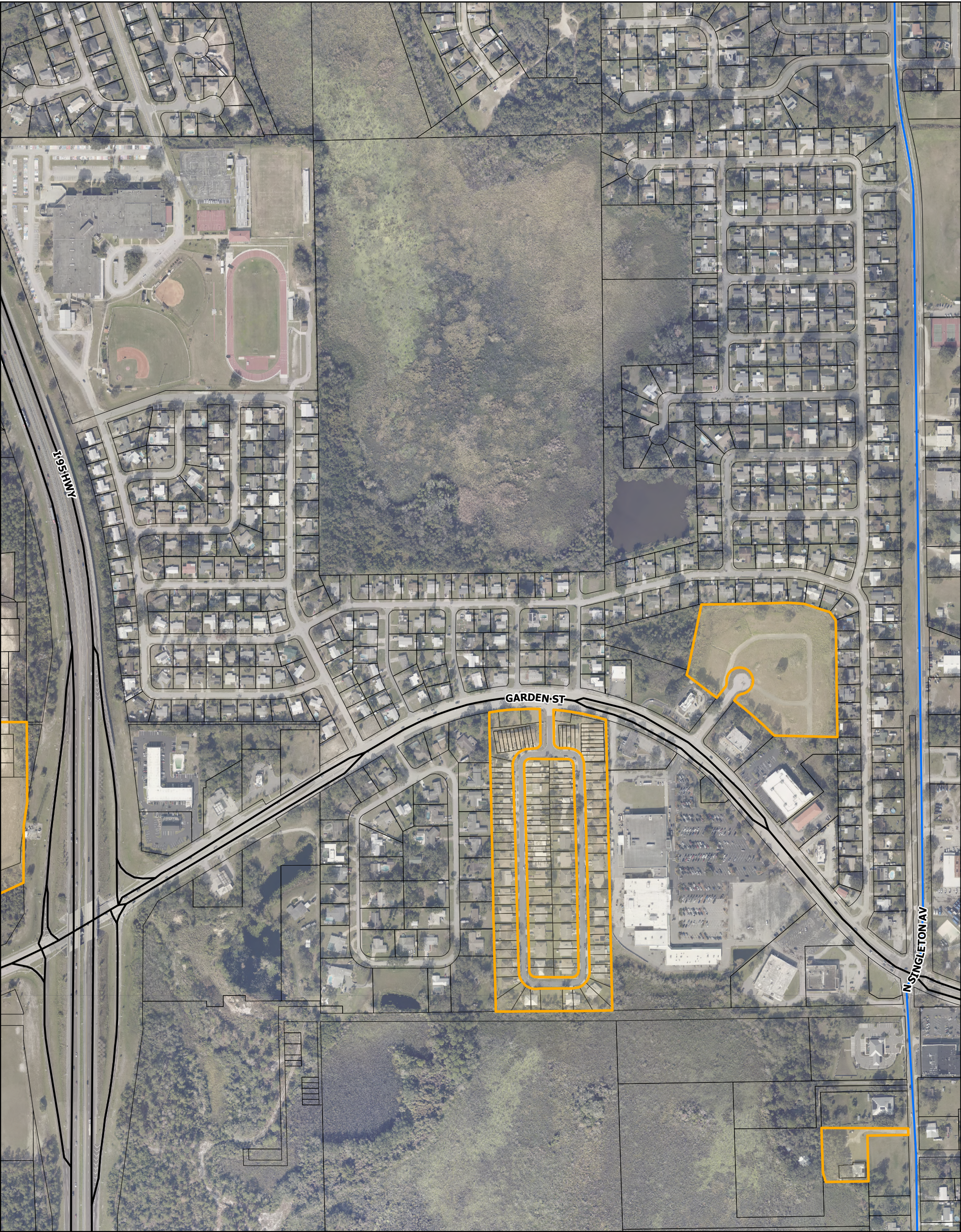
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HDR vs Collector & Arterial





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1/21/2025

Future Land Use

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Parcels

Street Type

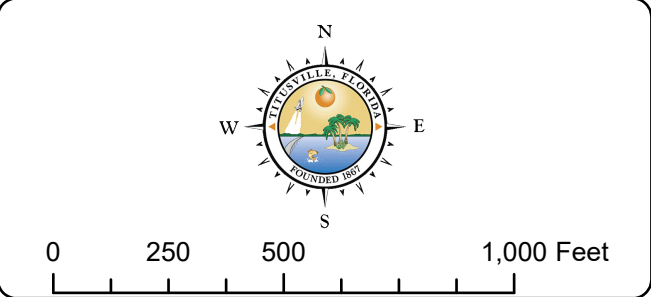
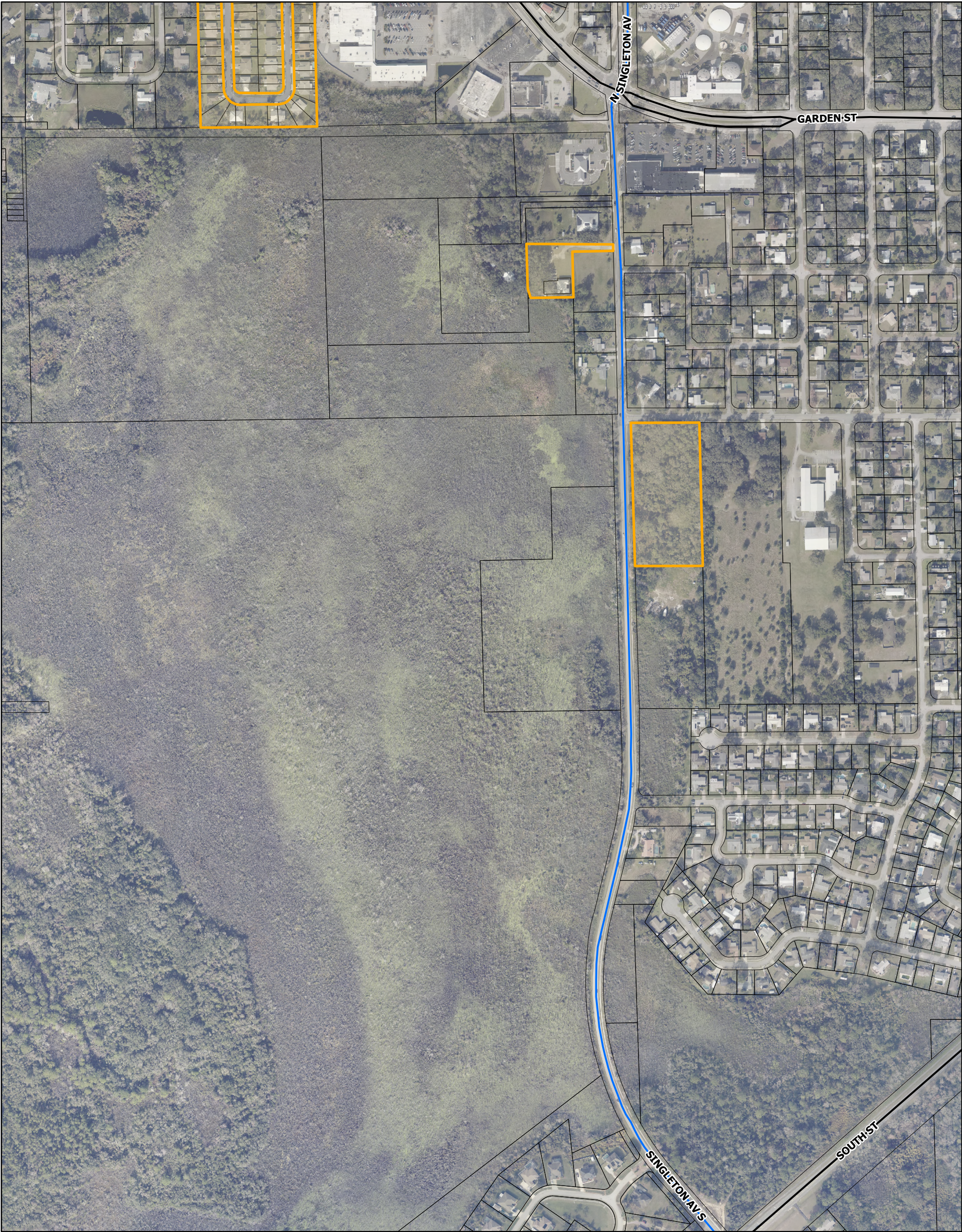
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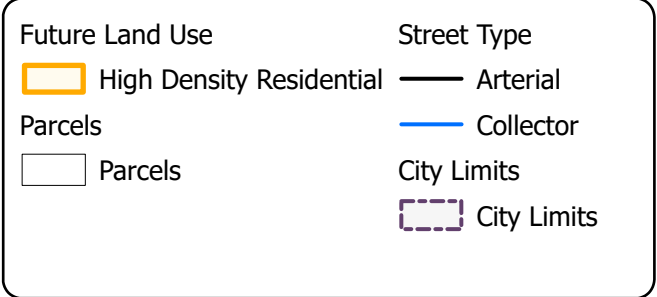
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HDR vs Collector & Arterial



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HDR vs Collector & Arterial



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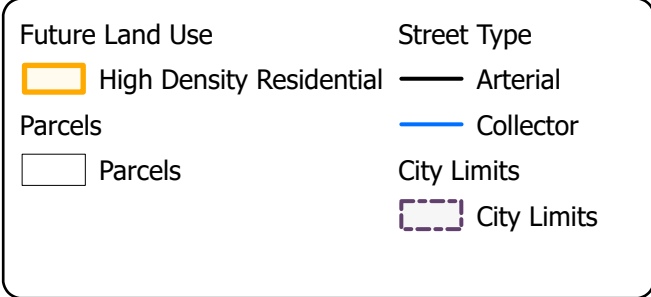
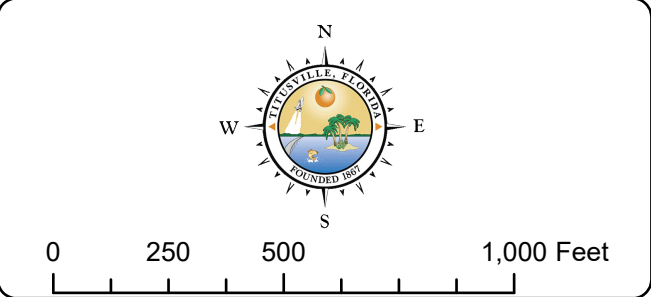
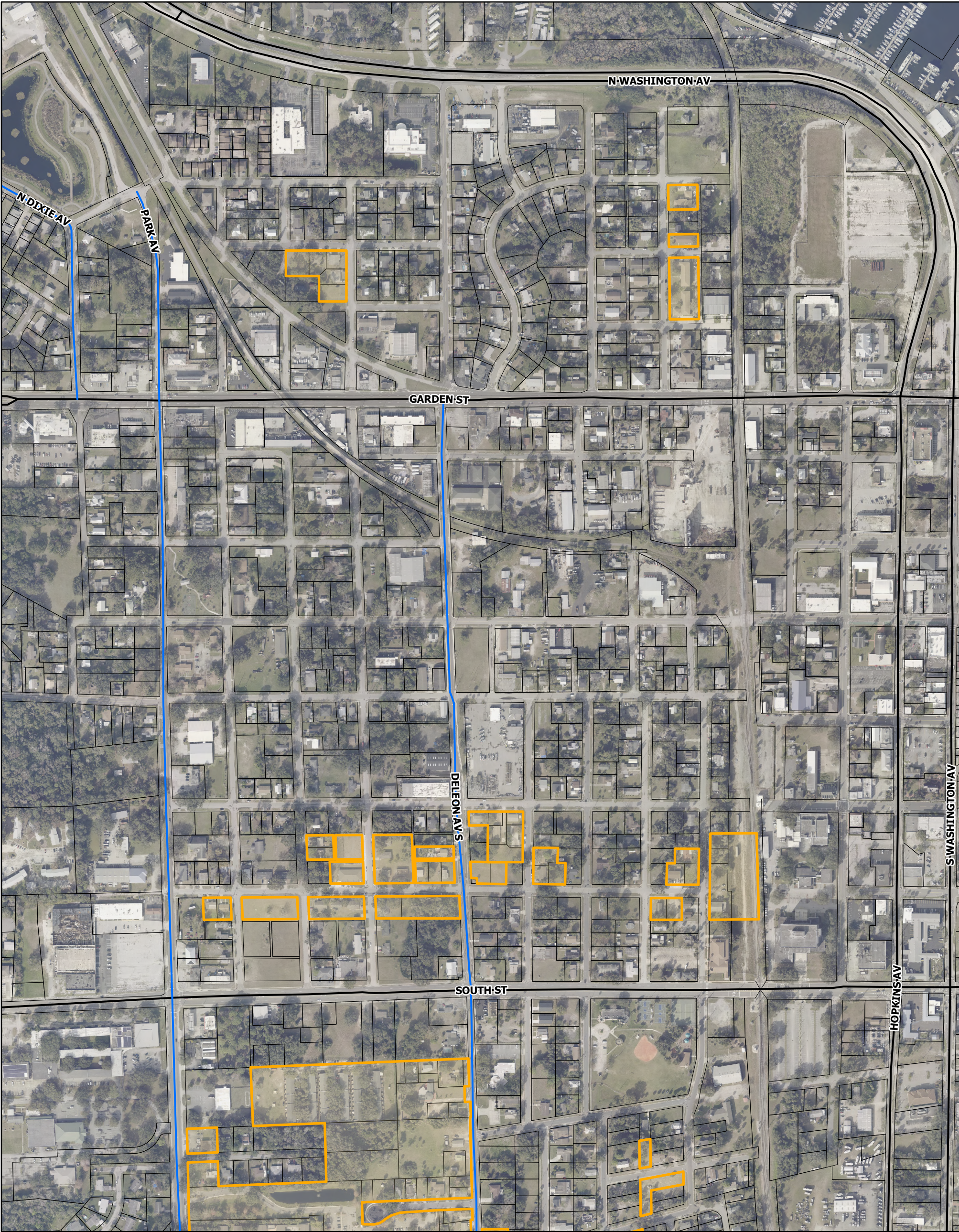
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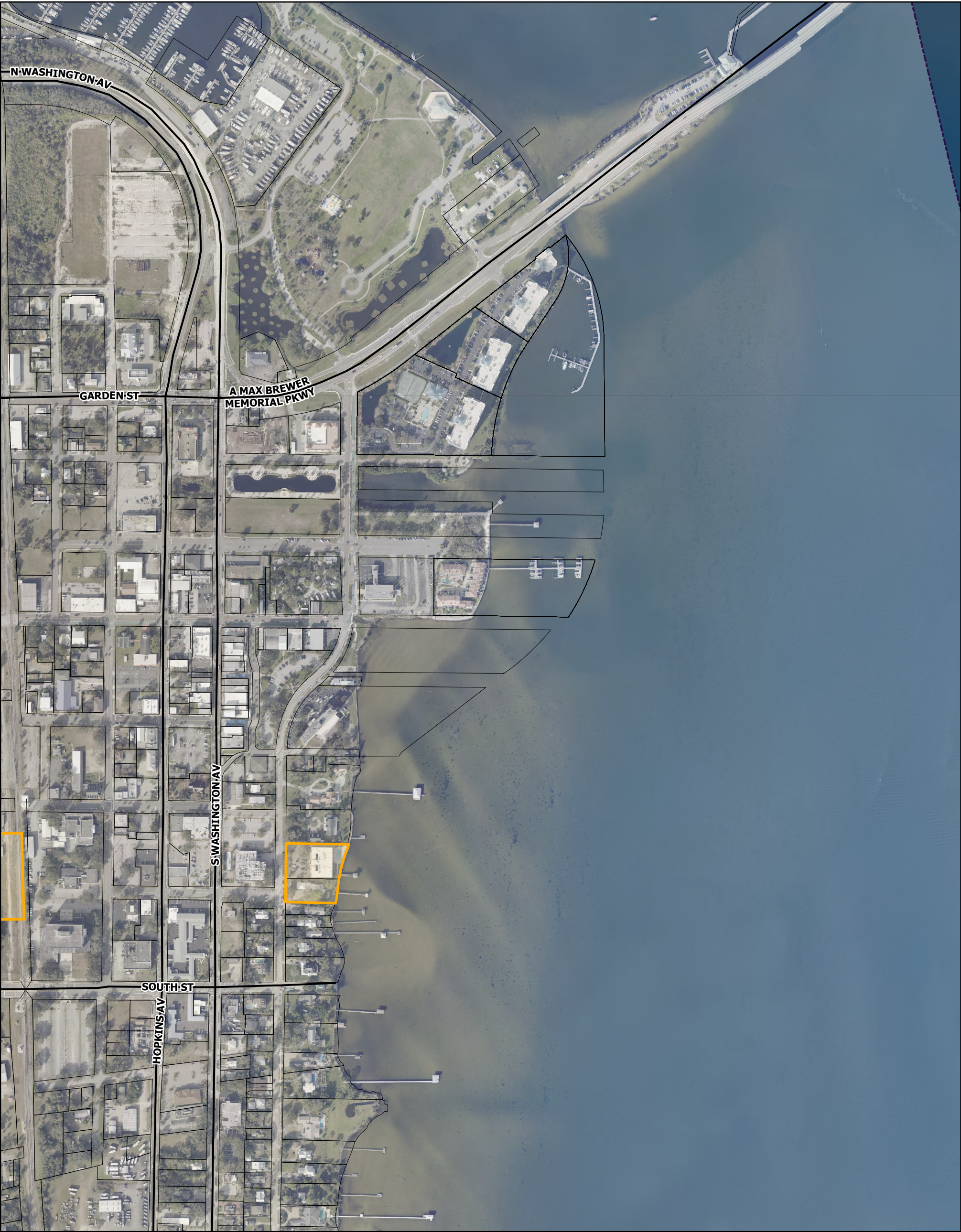
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HDR vs Collector & Arterial



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Future Land Use

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City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

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City Limits

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HDR vs Collector & Arterial





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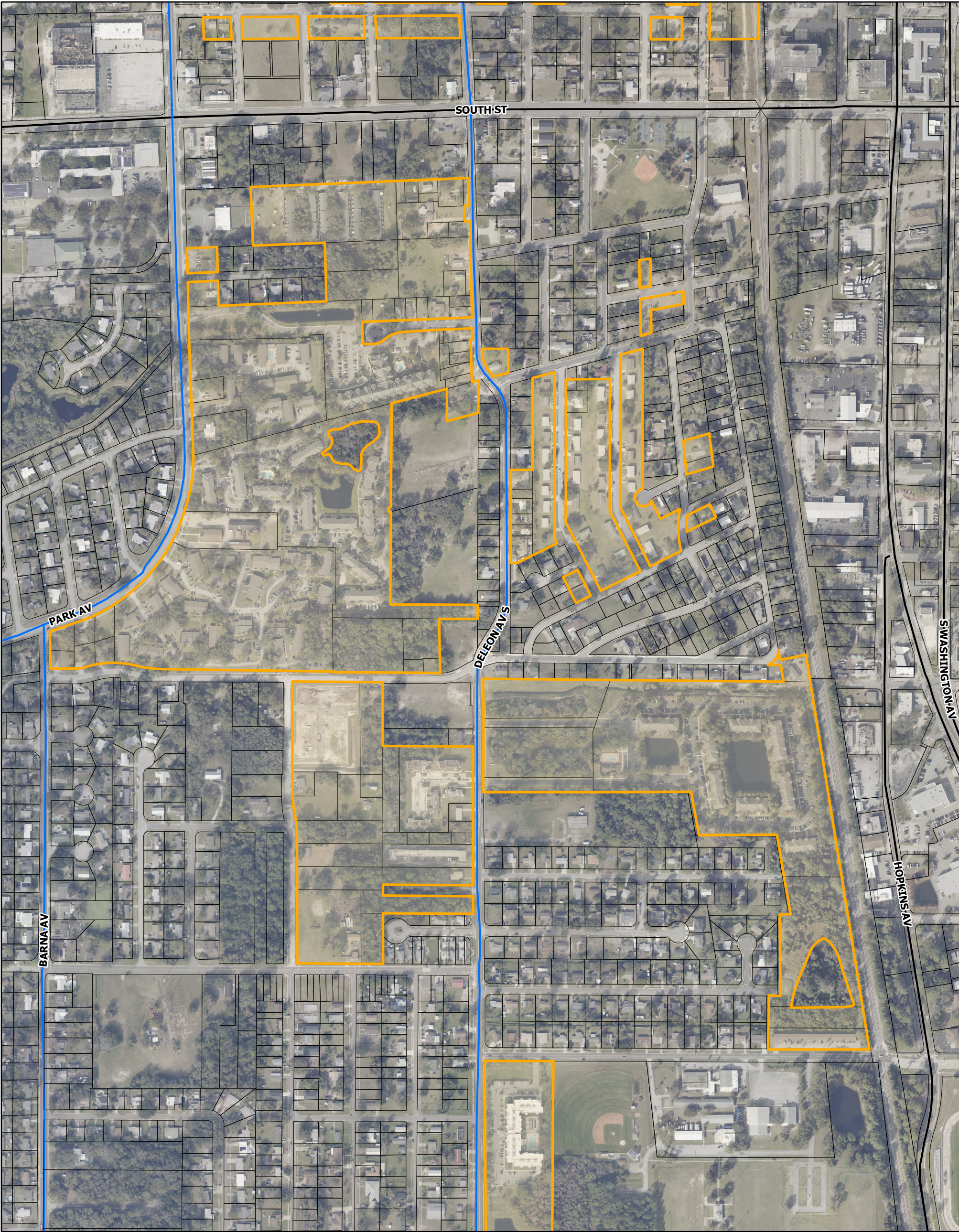
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HDR vs Collector & Arterial





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Future Land Use

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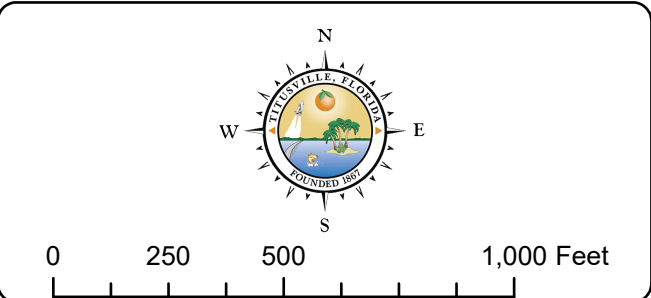
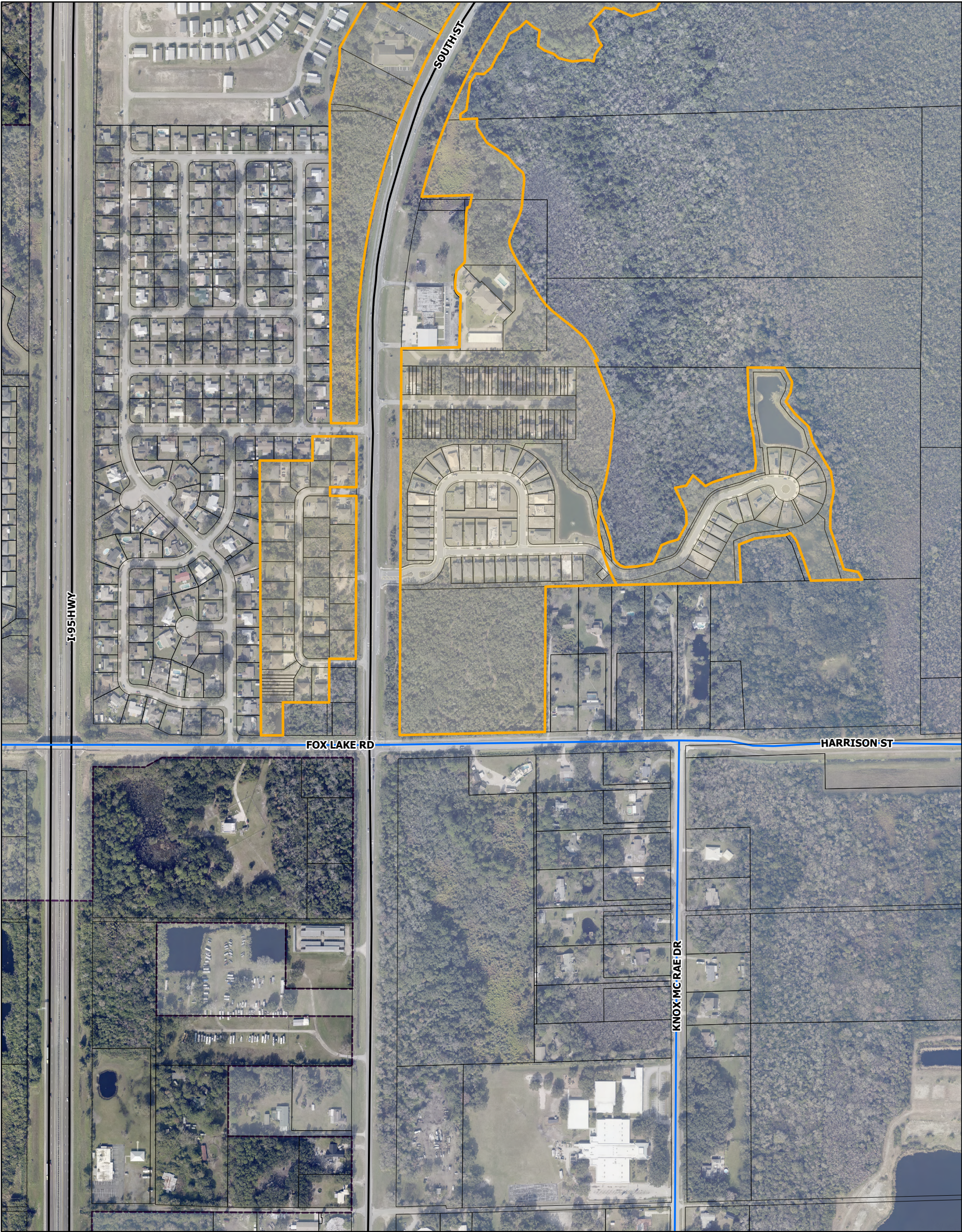
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HDR vs Collector & Arterial



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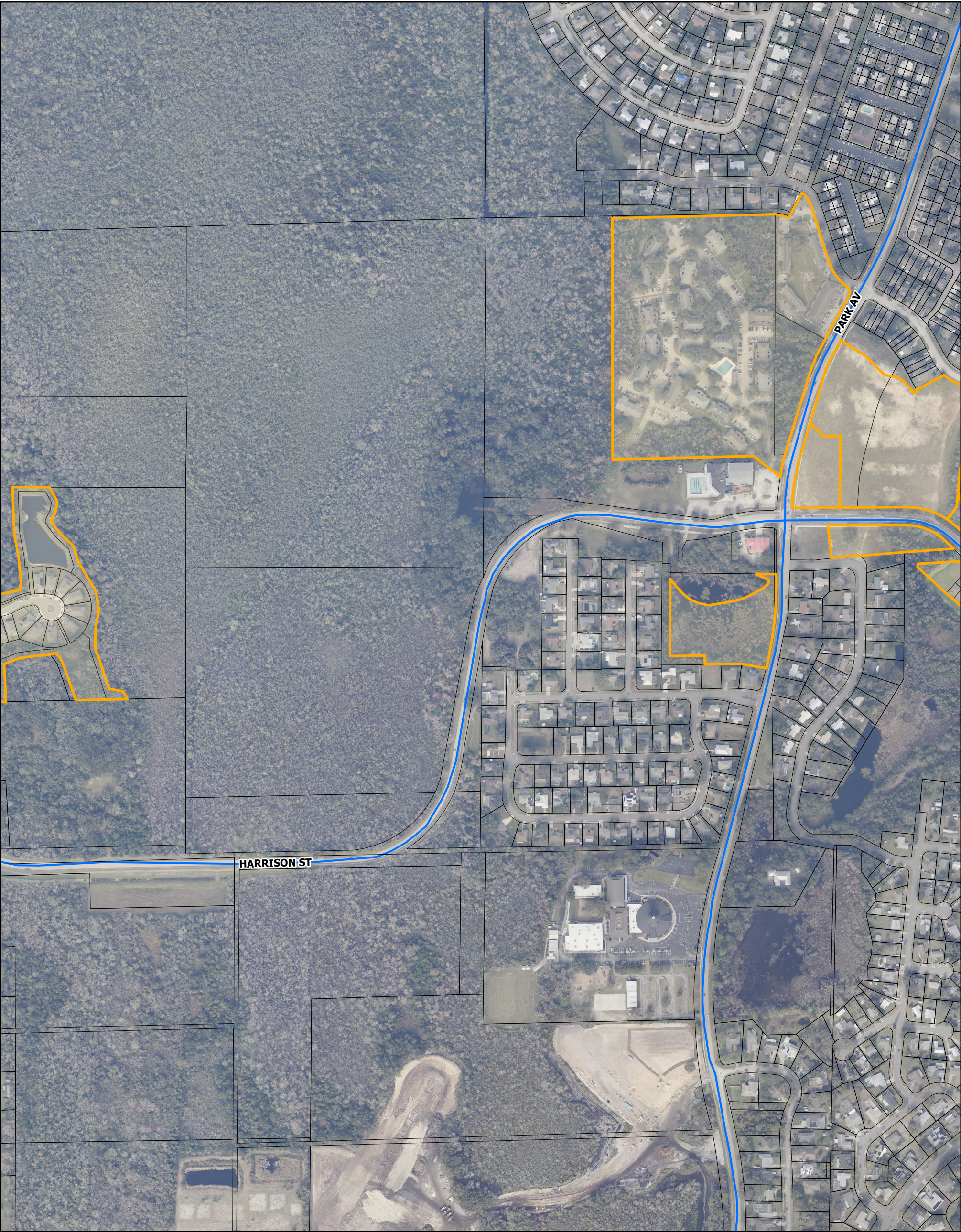
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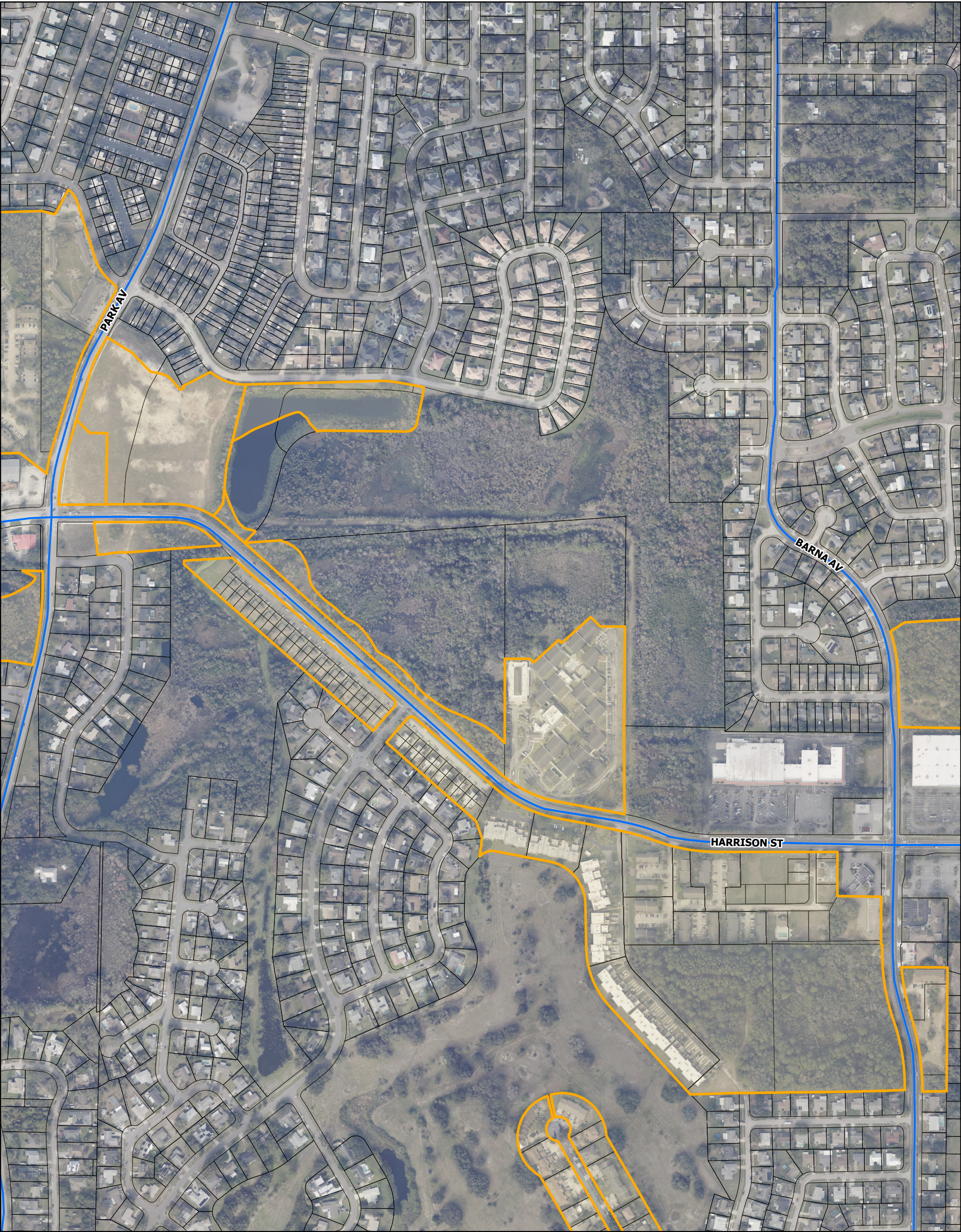
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HDR vs Collector & Arterial





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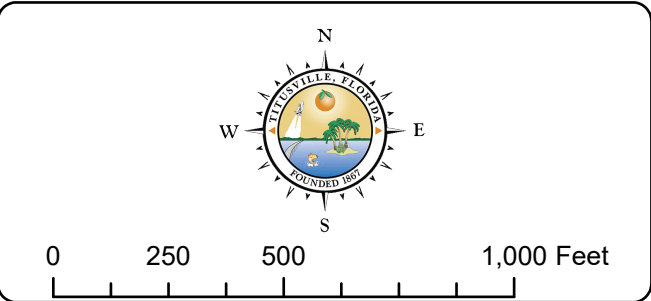
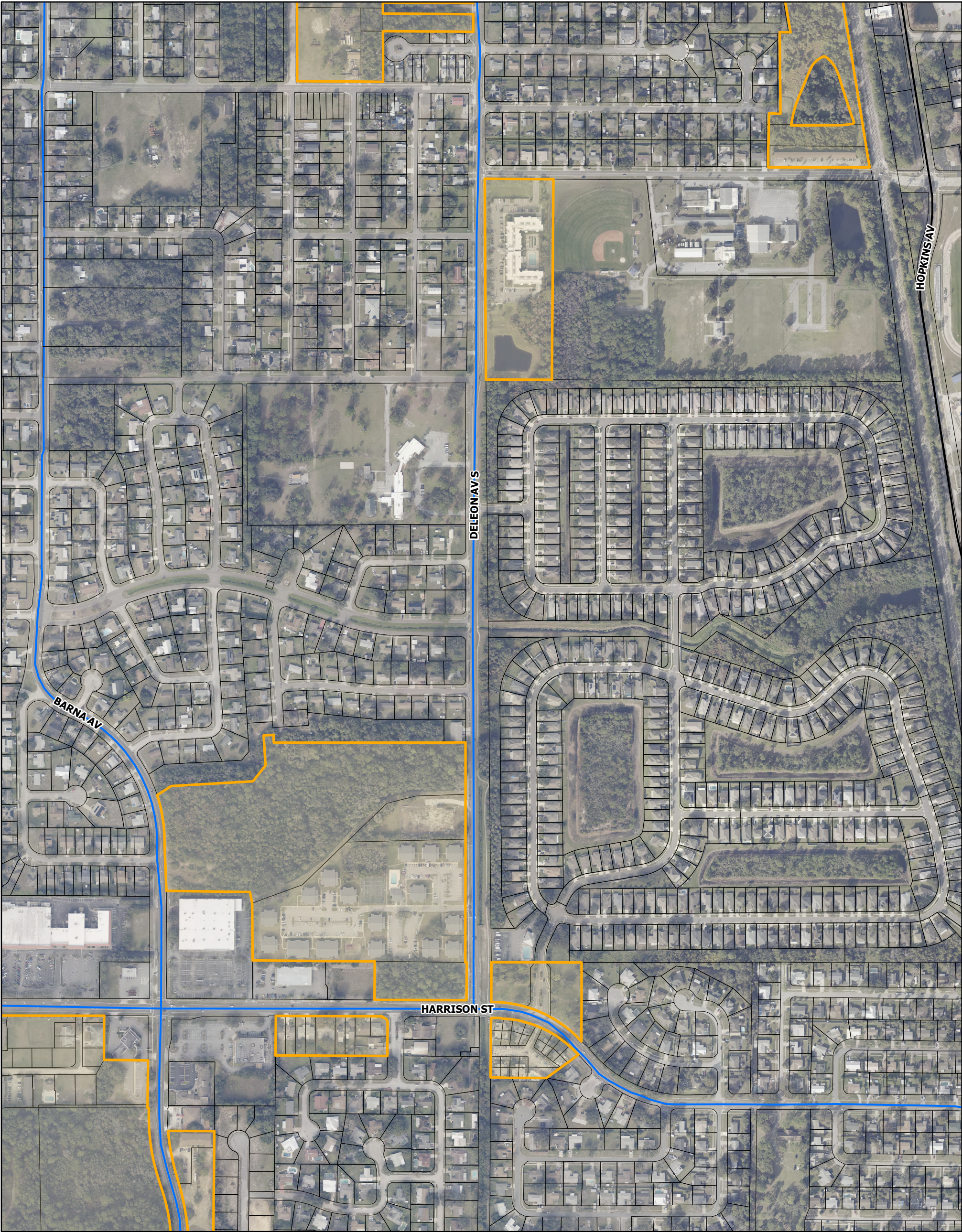
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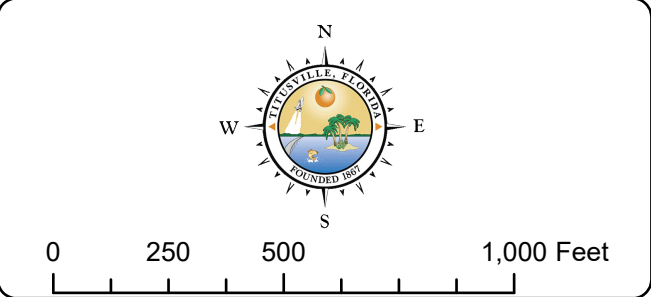
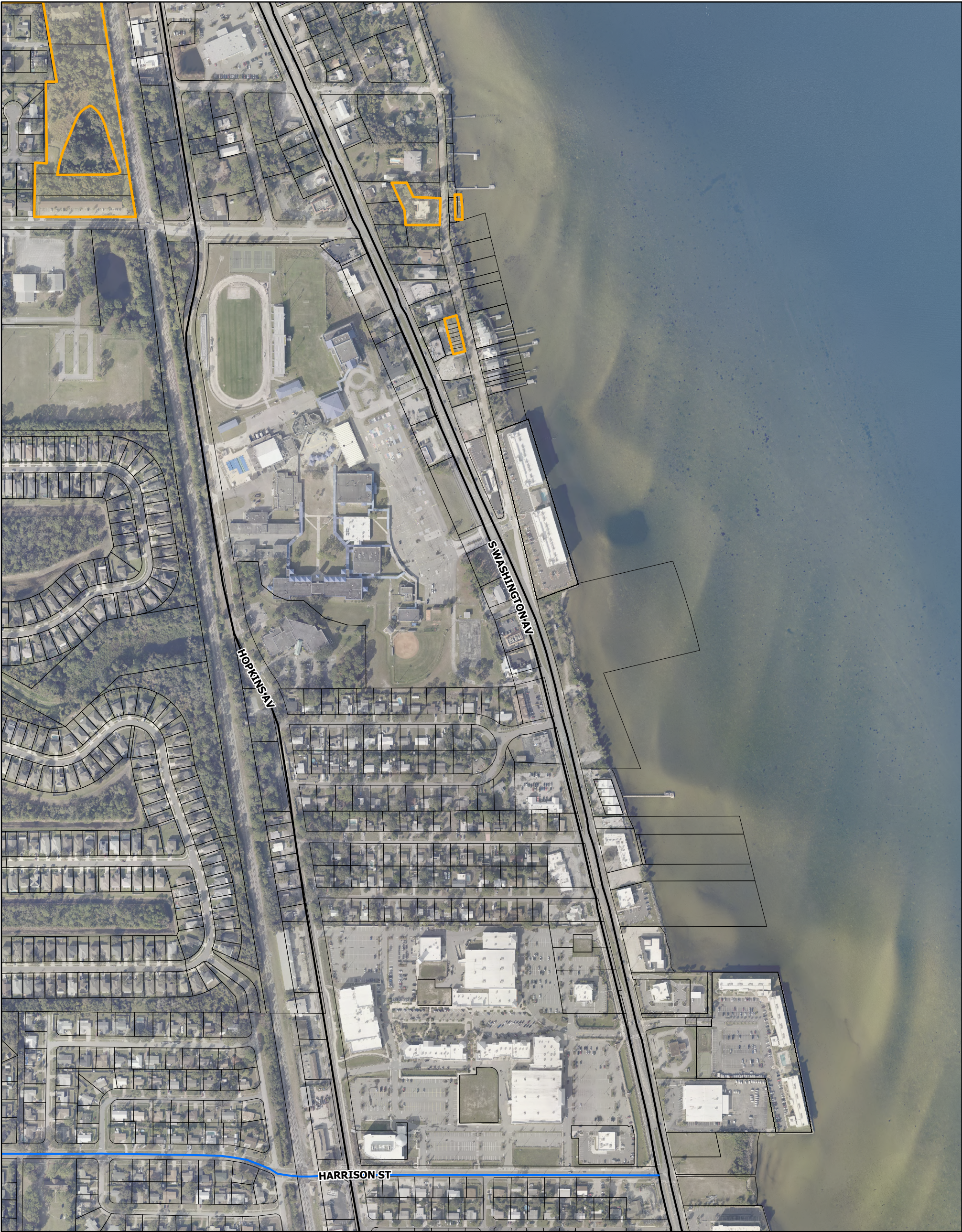
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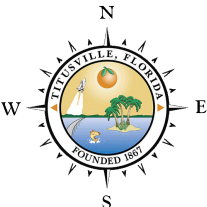
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HDR vs Collector & Arterial



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- Future Land Use

High Density Residential
- Street Type

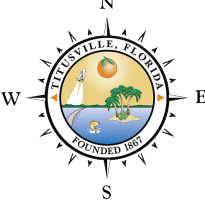
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- Parcels

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- City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

Future Land Use

High Density Residential

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Parcels

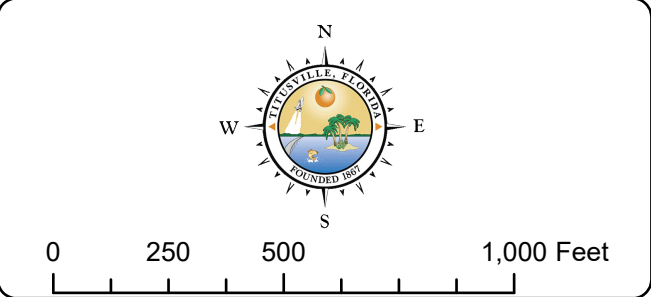
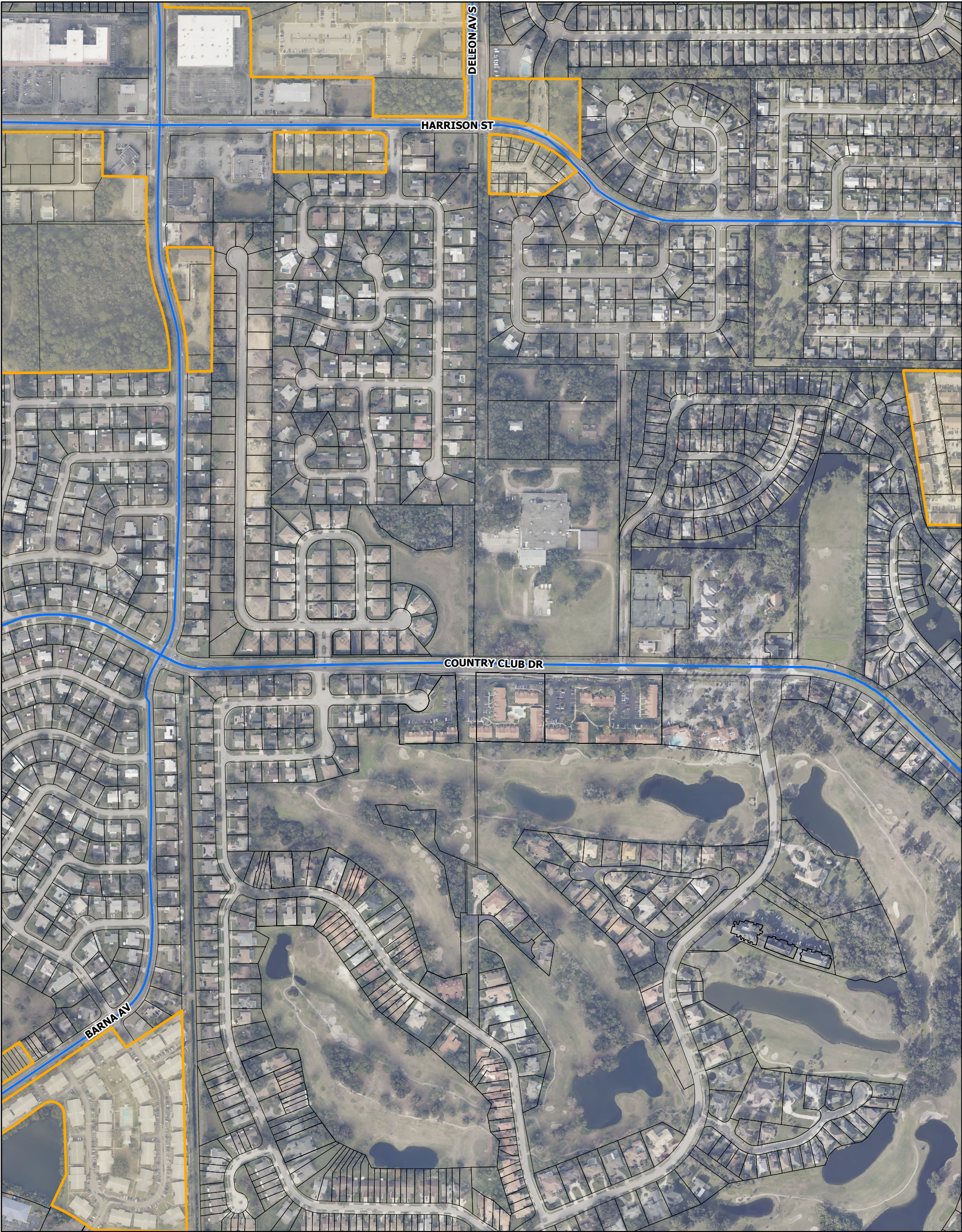
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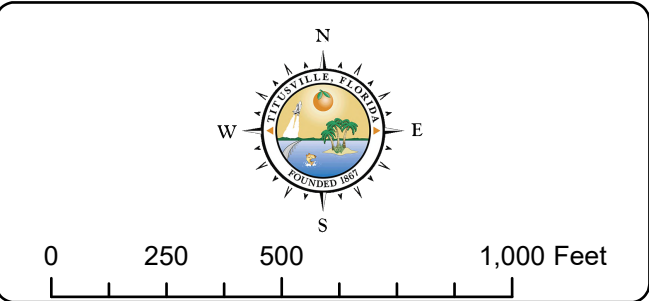
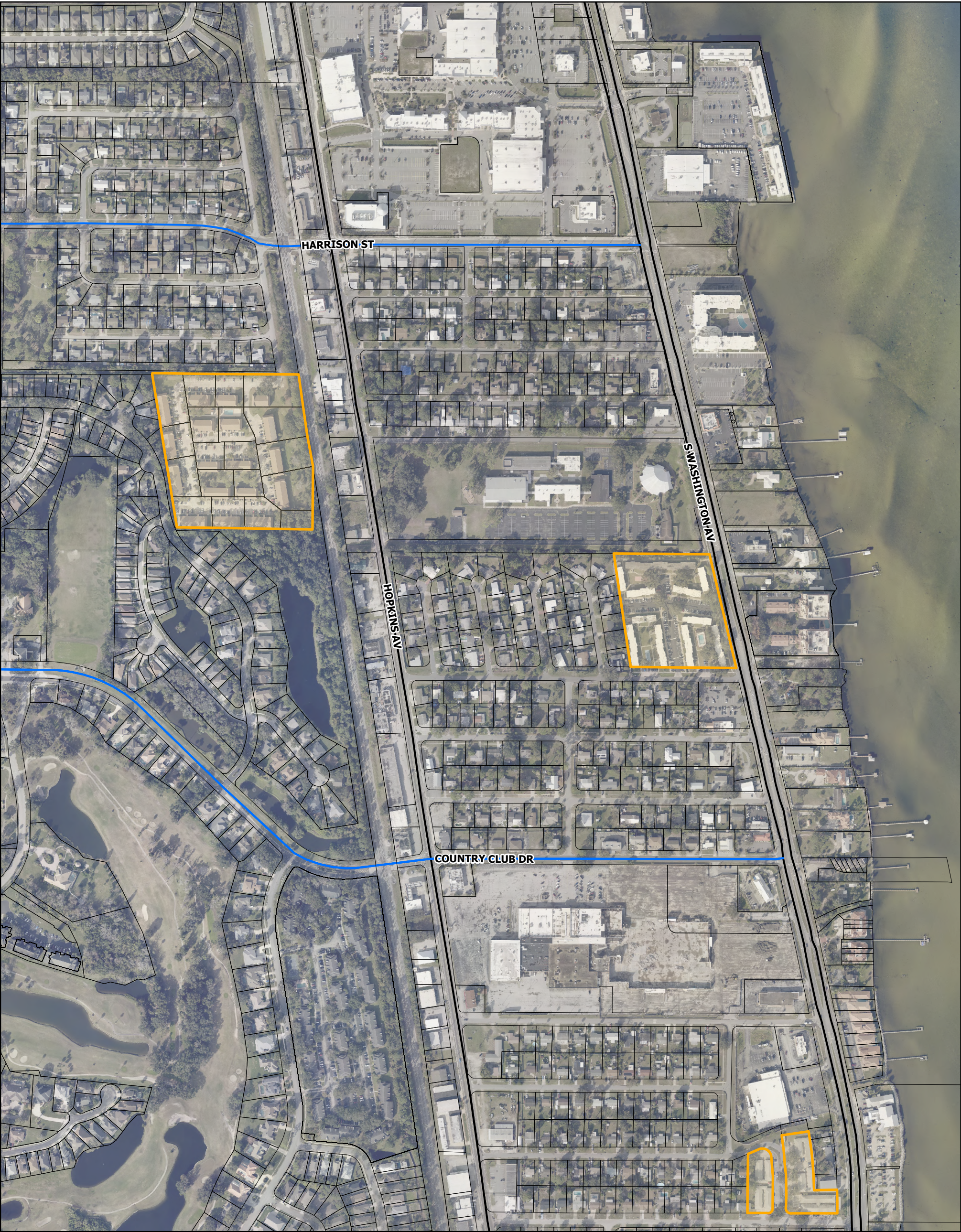
HDR vs Collector & Arterial



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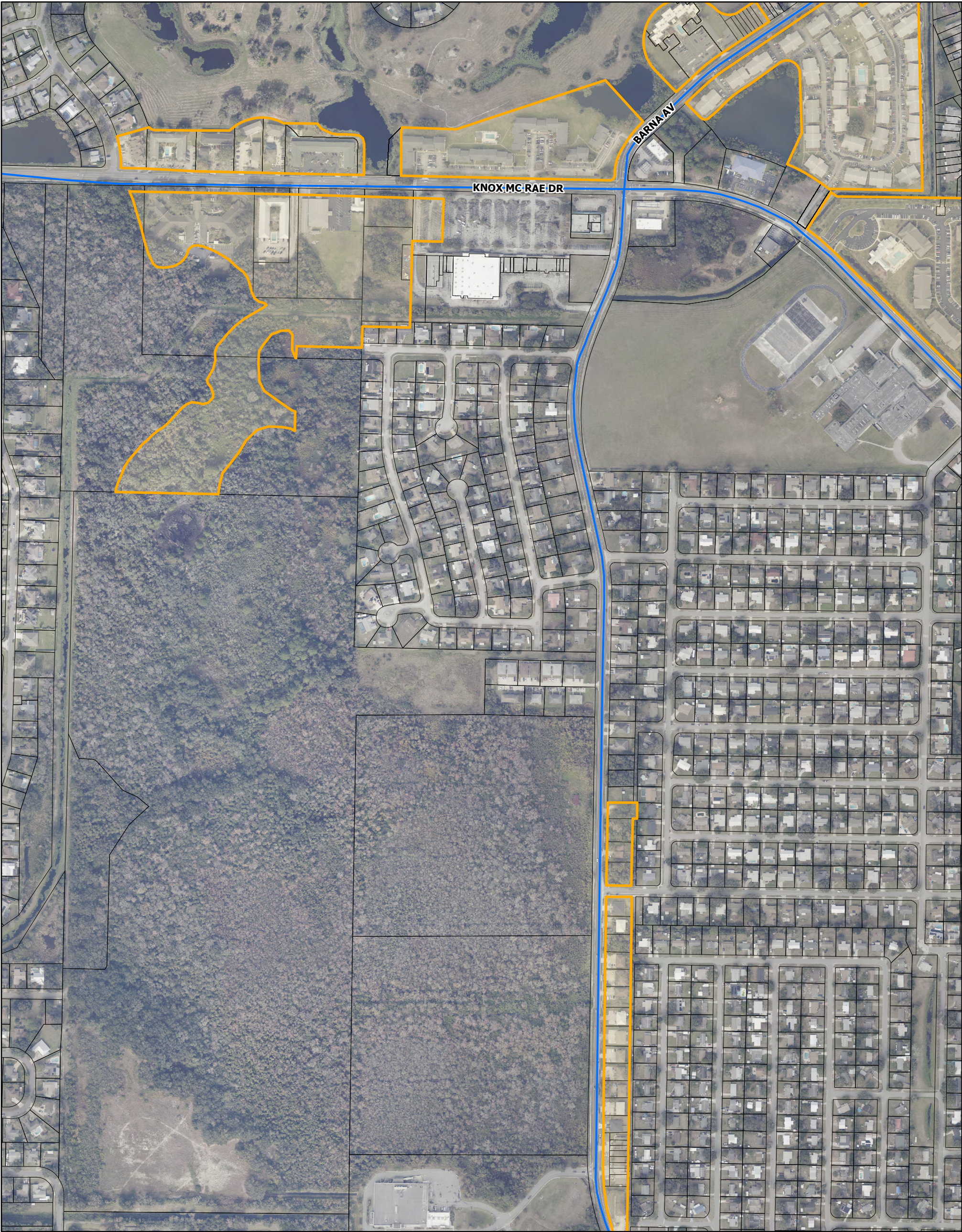
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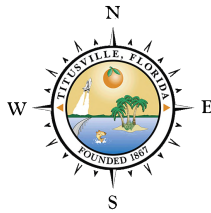


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HDR vs Collector & Arterial





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Future Land Use

High Density Residential

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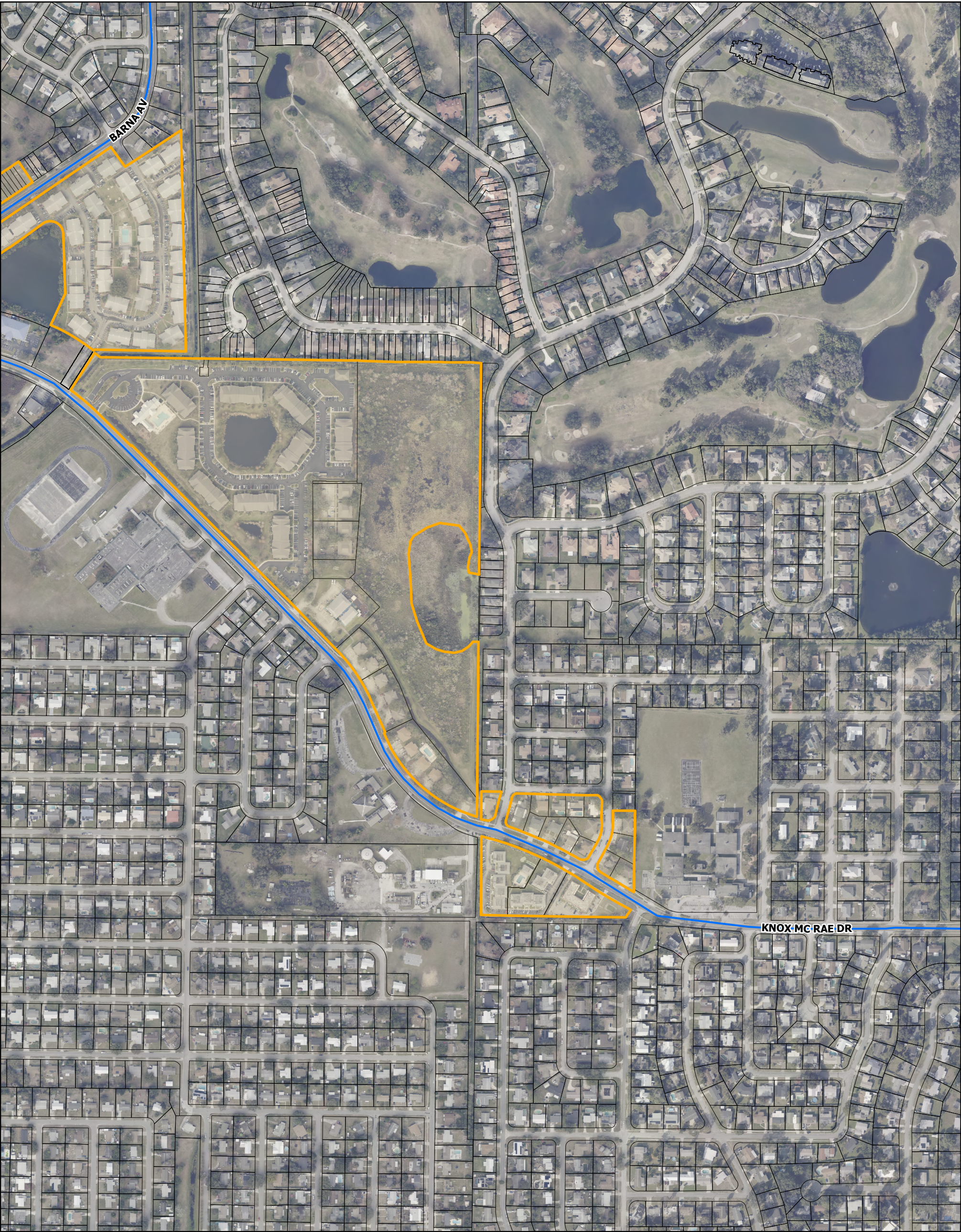
Street Type

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City Limits

City Limits

HDR vs Collector & Arterial





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1/21/2025

- Future Land Use

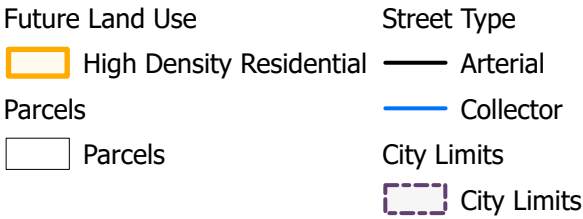
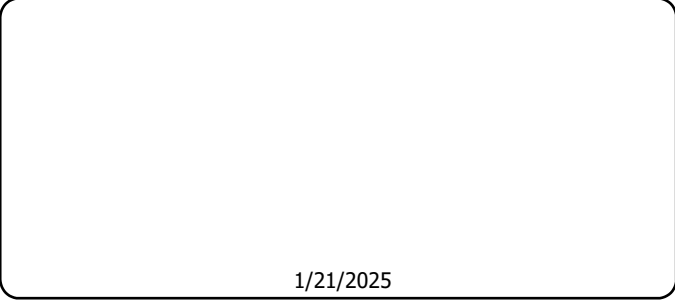
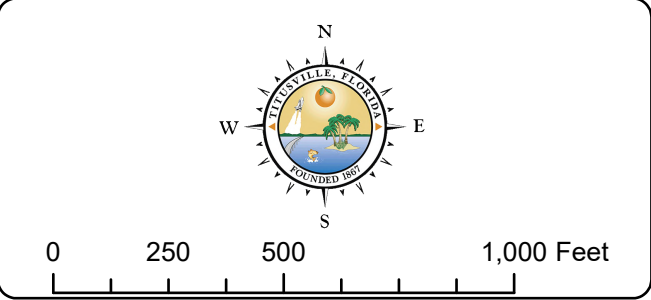
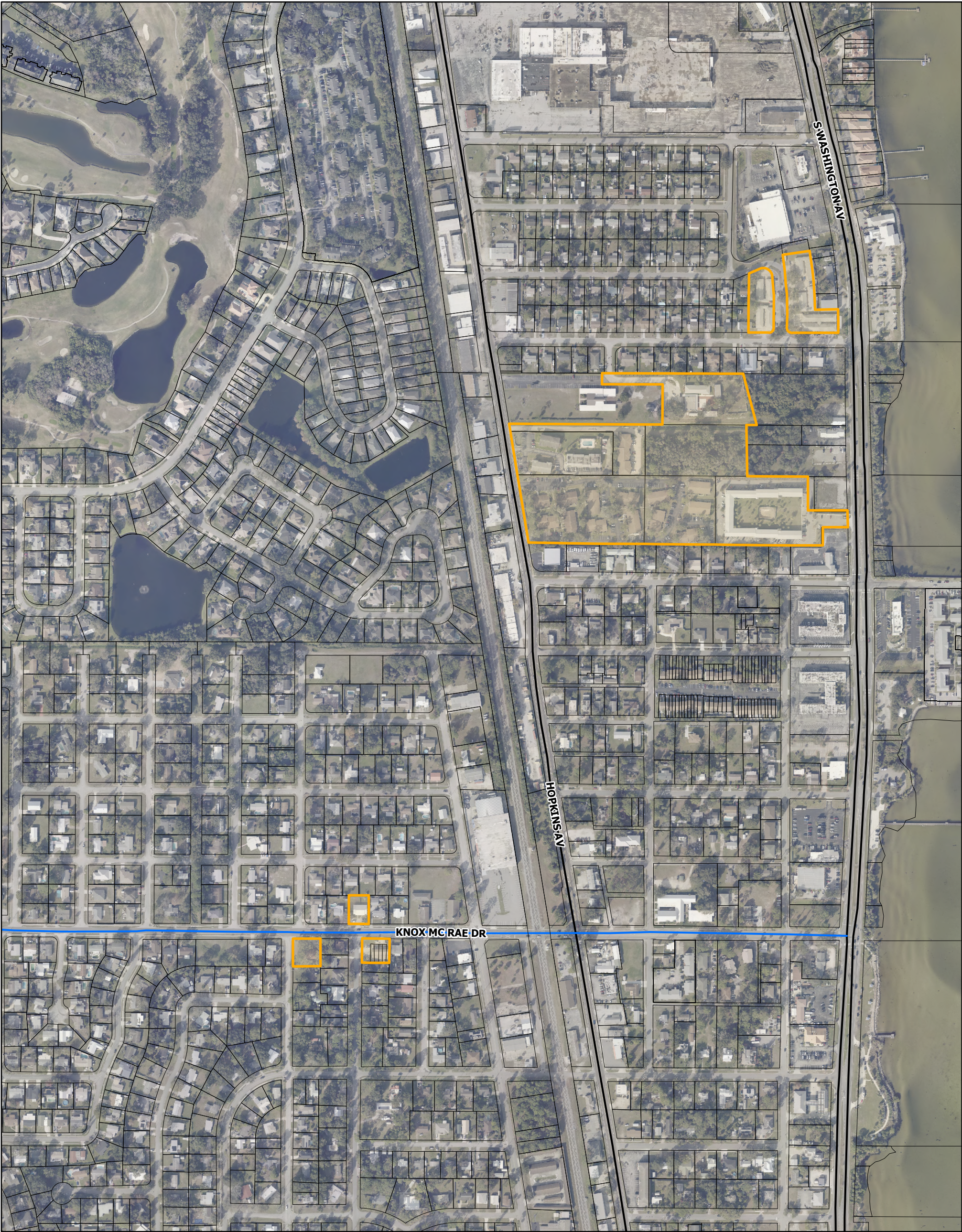
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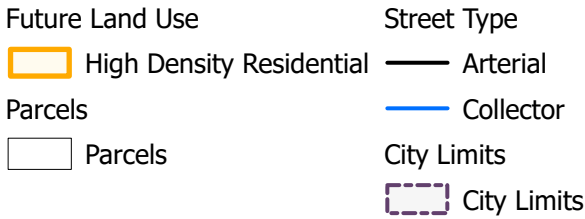
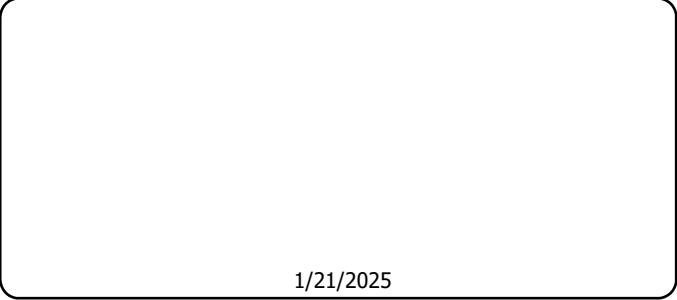
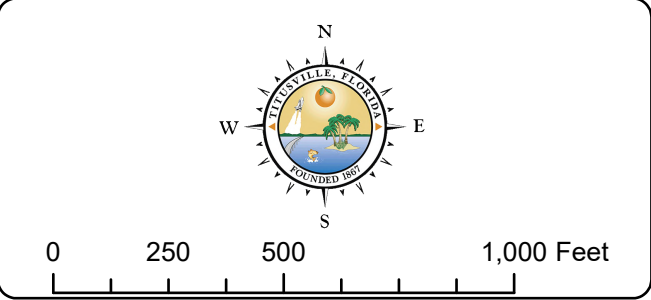
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City Limits

HDR vs Collector & Arterial



HDR vs Collector & Arterial



HDR vs Collector & Arterial





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1/21/2025

Future Land Use

 High Density Residential

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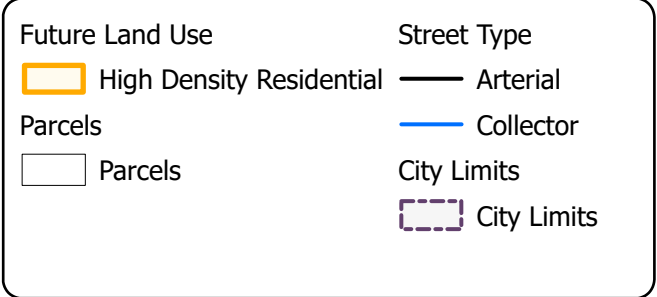
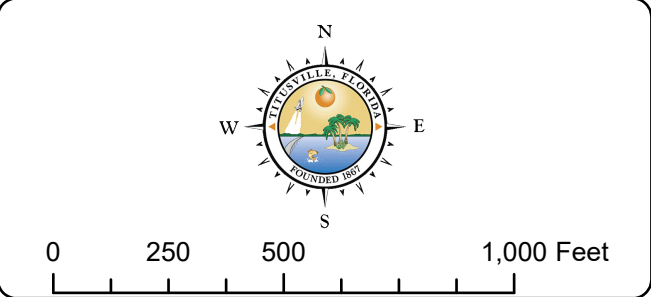
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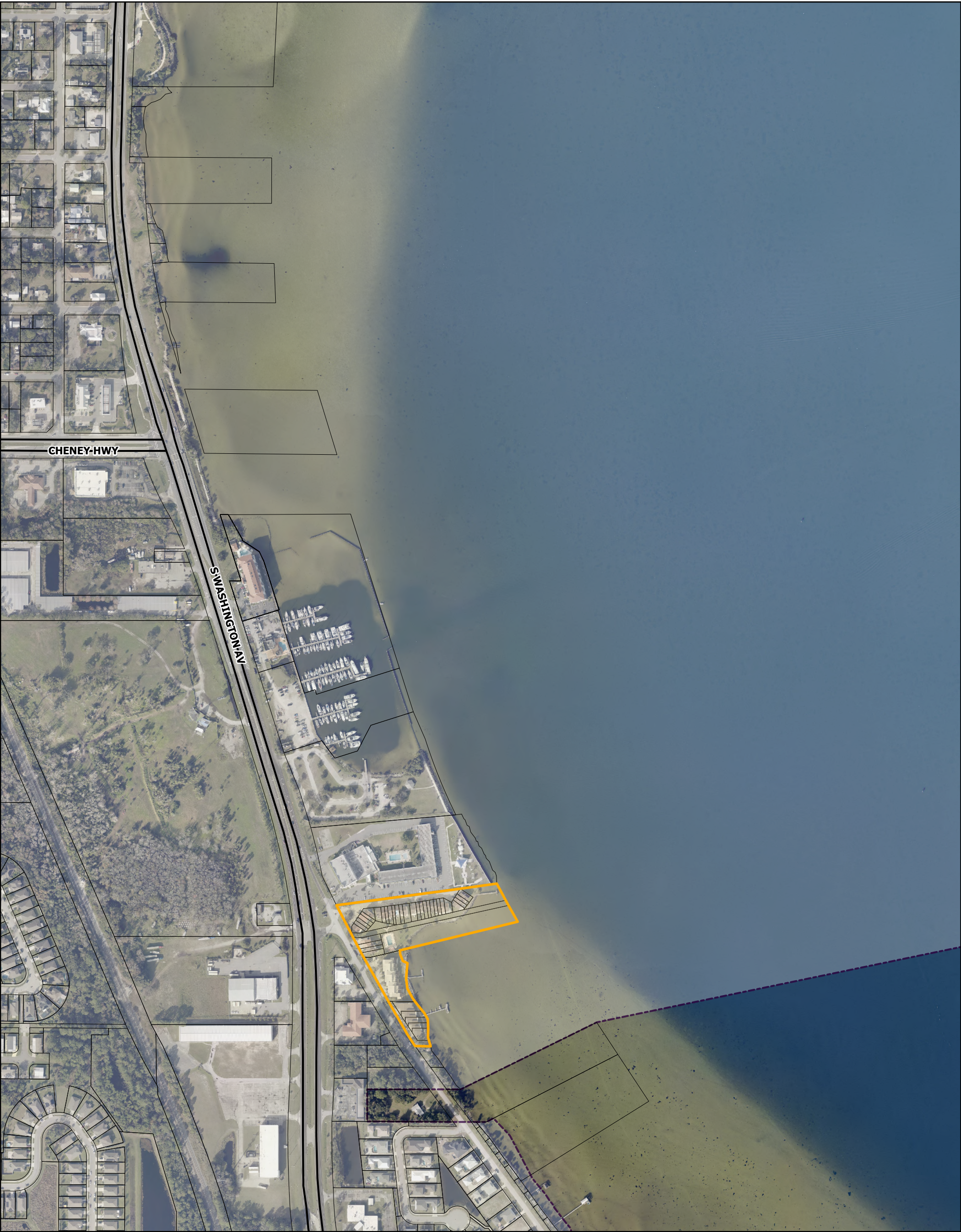
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HDR vs Collector & Arterial



HDR vs Collector & Arterial



0 250 500 1,000 Feet

1/21/2025

Future Land Use

High Density Residential

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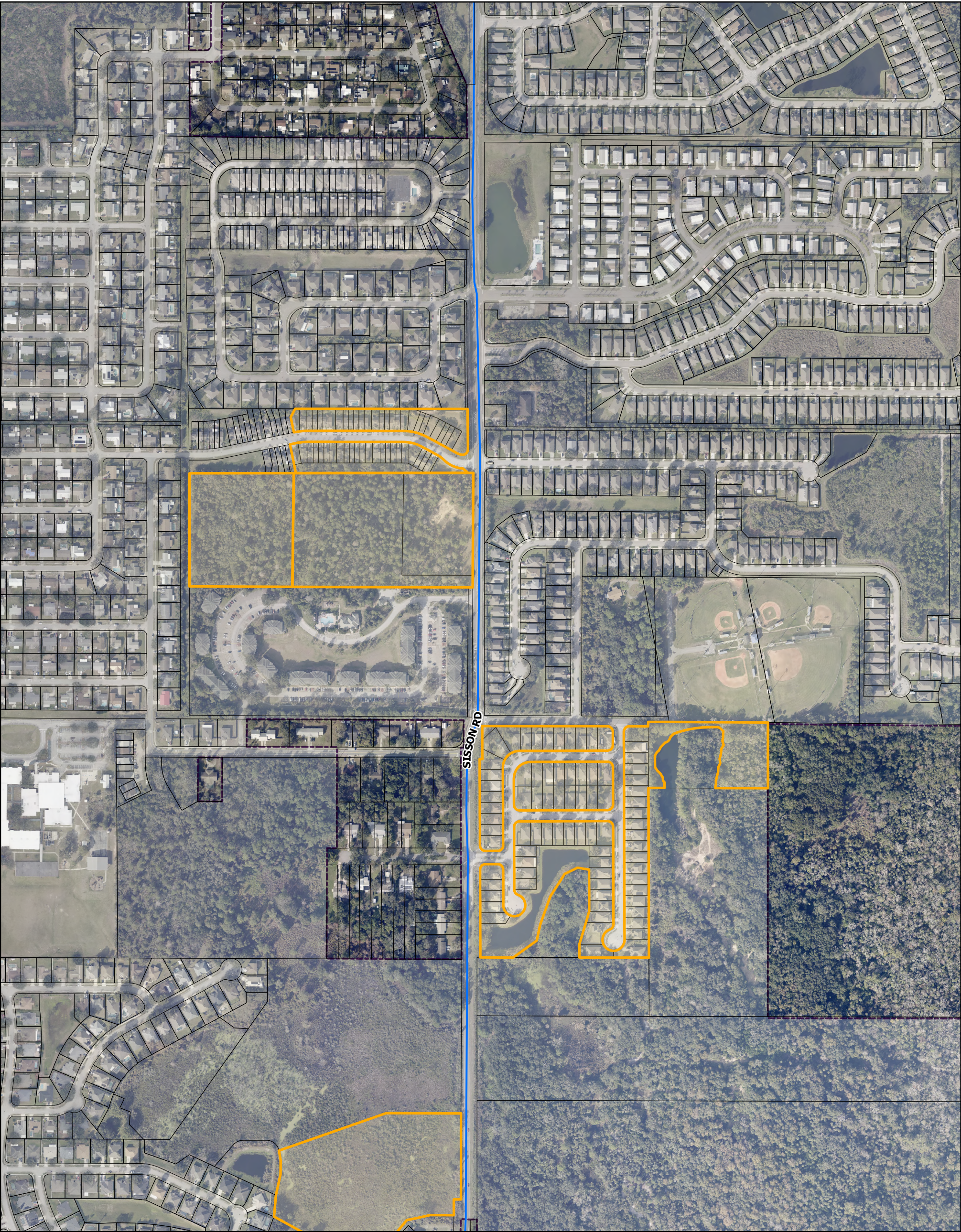
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HDR vs Collector & Arterial





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1/21/2025

Future Land Use

High Density Residential

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Street Type

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City Limits

City Limits

HDR vs Collector & Arterial





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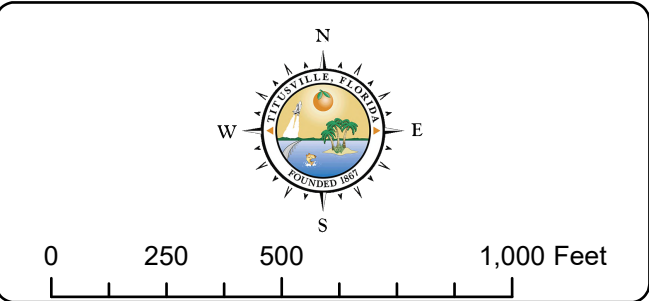
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HDR vs Collector & Arterial



1/21/2025

Future Land Use	Street Type
High Density Residential	Arterial
Parcels	Collector
Parcels	City Limits
	City Limits



City of Titusville City Attorney's Office

BOARD OF ADJUSTMENTS AND APPEALS

Appeal No. 1-2024

Meeting Date: January 29, 2025
Prepared By: Chelsea Farrell, Assistant City Attorney
Applicant: Vickie J. Conklin, Appellant

MEMORANDUM

The City of Titusville received a Notice of Appeal from Vickie J. Conklin, Appellant, on December 5, 2024, appealing the issuance of a Site Development Permit for Apollo Gardens Apartments issued to Apollo Gardens LLLP for the property located at 2727 Demaret Drive, Titusville, Florida 32780. The permit was issued on November 11, 2024.

Pursuant to Titusville Code Section 34-249, “Any **affected property owner** or his agent may file an appeal.” Accordingly, the first issue to be addressed by the Board of Adjustments and Appeals will be whether the Appellant is an “affected property owner” with standing to appeal the issuance of the Site Development Permit.

If the Board finds that the Appellant has established standing as an “affected property owner” to present this appeal, the Board will proceed to hear the merits of the appeal and render a decision.

A copy of Resolution No. 24-1997 is enclosed in the agenda packet, providing the quasi-judicial rules of procedure. Titusville Land Development Regulations, Chapter 34, Procedures, Article V, Variances and Appeals, Division 2., *Appeals to the Board of Adjustment (Appeal of Administrator)*, is also provided in the agenda packet.

RESOLUTION NO. 24 - 1997

A RESOLUTION OF THE CITY OF TITUSVILLE, FLORIDA, AMENDING RESOLUTION NO. 25-1995 BY DELETING ANY SITE SPECIFIC COMPREHENSIVE PLAN AMENDMENTS FROM THE QUASI-JUDICIAL PROCEDURE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Titusville has, by motion, previously adopted and from time to time amended rules of procedure to govern the conduct of hearings and other matters coming before the City Council; and,

WHEREAS, as a result of recent developments of case law, the City Council deems it to be in the best interests of the health, safety and welfare of the citizens of the City of Titusville to provide rules of procedure to govern hearings before the City Council and its administrative Boards when meeting in a quasi-judicial capacity in zoning related matters; and,

WHEREAS, the City Council wishes to adopt rules of procedure for quasi-judicial matters; and,

WHEREAS, the City Council realizes that case law is still developing regarding administrative Boards meeting in a quasi-judicial capacity in zoning related matters, as such, the City Council acknowledges that this Resolution will have to be amended from time to time to keep abreast of future developments in case law related to this subject matter; and,

WHEREAS, the Florida Supreme Court in Brevard County v. Snyder, 620 So.2d 469 (Fla. 1993) found that certain proceedings conducted by the administrative Boards are quasi-judicial proceedings and that substantial competent evidence must be contained in the record to support a decision of the Board; and,

WHEREAS, the Florida Supreme Court in Martin County v. Yusem, 22 Fla. L. Weekly S156 (March 27, 1997) has found that all comprehensive plan amendments are legislative; and,

WHEREAS, the case of Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991) prohibits ex-parte communications with Board members in hearings involving quasi-judicial proceedings; and,

WHEREAS, public officials such as the Board members are frequently contacted by citizens desiring to express their opinions in matters coming before the Board; and,

WHEREAS, the City Council of the City of Titusville desires to implement the process and procedure authorized by *Chapter 286.0115, Florida Statutes* that establishes the process and procedure for disclosure of contact by citizens with public officials; and,

WHEREAS, Administrative Board members will endeavor to avoid off-the-record comments from citizens in quasi-judicial proceedings and desires to establish a process or procedure for disclosure of inadvertent contact by citizens with members of the Boards in said proceedings.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY OF TITUSVILLE, FLORIDA, AS FOLLOWS:

Section 1. INTENT AND PURPOSE.

1.1. The City of Titusville recognizes that administrative Boards often serve in a quasi-judicial capacity concerning zoning related matters. As such, all interested parties should be afforded certain minimal due process safeguards in the form 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. Furthermore, the City Council recognizes the requirements of applicable law regarding the evidence and other matters which may be considered when making a quasi-judicial determination in a zoning related matter.

1.2. The rules and procedures set forth in this resolution are applicable only to administrative Boards serving in a quasi-judicial capacity concerning zoning related matters.

Section 2. DEFINITIONS. For purposes of this Resolution only, the following definitions shall apply when applicable (defined terms appear in Capital Letters):

2.1. *Board* means a City administrative body acting in a quasi-judicial capacity concerning zoning related matters, including, but not limited to: Board of Adjustments, Code Enforcement Board, Planning and Zoning Board, Community Redevelopment Agency, City Council or any other administrative body acting in such a capacity.

2.2. *Competent Substantial Evidence* means sufficiently relevant and material evidence a reasonable mind would accept as adequate to support a conclusion.

2.3. *Expert* means a person who is qualified in a subject matter by knowledge, skill, experience, training, or education.

2.4. *Interested Party* means an individual, corporation, business, or land trust, estate, trust, partnership, association, or other legal entity whose interest may be adversely affected by a Board's action.

2.5. *Site-Specific* means a zoning related matter which has an impact on a limited number of persons or property owners and include identifiable parties and interests. Specifically not included is comprehensive rezoning or any comprehensive plan changes.

2.6. *Quasi-Judicial* is determined by the essential nature of the Board's actions.

A. The Board's actions are quasi-judicial providing:

- (1) an interested party is provided notice and a hearing;
- (2) judgment of the Board is contingent on the consideration of evidence made at a hearing;
- (3) the Board adjudicates private rights of a particular person after a hearing; and,
- (4) the Board's decision can be viewed as a policy application rather than policy setting.

B. *Quasi-judicial* shall include public hearings where variances, appeals, conditional use permits, site-specific zoning changes, or other site-specific development orders are considered.

C. *Quasi-judicial* does not include comprehensive rezoning or any comprehensive plan changes of any size.

2.7. *Zoning related matter* means a public hearing where a Board considers variances, conditional use permits, appeals, site-specific zoning changes, or development orders.

Section 3. NOTICE AND SCHEDULING OF PUBLIC HEARINGS.

3.1. Notice and scheduling requirements for public hearings held before a Board shall be provided in accordance with applicable state law and City ordinances.

Section 4. EX-PARTE COMMUNICATIONS.

4.1. INTENT.

The City Council of the City of Titusville recognizes that in quasi-judicial proceedings such as zoning related matters that said proceedings have been recognized by the Florida courts to constitute quasi-judicial decisions which must be based upon competent substantial evidence contained in the record in the proceedings.

The City Council recognizes that in accordance with the case of Jennings v. Dade County, 589 So.2d 1336 (Fla. 3d DCA 1991), that in quasi-judicial proceedings that information or evidence is to be presented at a hearing before the Board. In addition, it is recognized that as public officials, citizens demand and expect the right to voice their opinions to local public officials.

In recognition of the nature of quasi-judicial proceedings and the public's expectation of being able to voice their opinions to local public officials, it is the intention of the City Council for its Boards to avoid contacts other than at hearings before the Board and that it is the desire and intent of the City Council to establish a process and procedure for disclosure of inadvertent ex parte communications.

4.2. PROCESS AND PROCEDURE.

A. In the event a member of a Board receives an ex parte communication outside of the hearing or proceeding before the Board, said Board member shall disclose and make a part of the record before final action is taken the identity of the person, group or entity with whom the communication took place and the subject of the communication including all opinions or facts discussed. Said disclosure shall be made before or during the public hearing at which a vote is to be taken on said matter and any persons having opinions contrary to those expressed in the ex parte communication shall be given a reasonable opportunity to refute, rebut or respond to the communication.

B. In the event a member of a Board receives or reads a written communication from any person relating to a quasi-judicial proceeding pending before the Board, said written comments shall be disclosed and made a part of the record before final action is taken by the Board, and any person having an opinion to the contrary to that expressed or disclosed in the written communication or opinion shall be given a reasonable opportunity to refute or rebut and respond to the communication.

C. In the event a member of a Board conducts an investigation or site visit or receives any expert opinions regarding quasi-judicial proceedings pending before the Board, then in that event said investigation or site visit or opinion shall be disclosed and

made a part of the record before final action is taken by the Board, and any person having an opinion to the contrary to that expressed in the investigation or site visit or opinion shall be given a reasonable opportunity to refute or rebut and respond to the communication.

4.3. PRESUMPTION.

In the event an ex-parte communication should occur as described herein and disclosure is made in accordance with the process and procedure described above, then in that event any official action taken by the Board in any quasi-judicial proceeding shall remove any presumption of prejudice arising from said ex-parte communication where an ex-parte communication has occurred.

Section 5. HEARING PROCEDURE. The following outline will be followed in conducting hearings:

5.1. At the beginning of a meeting, the Mayor or Chairperson shall review the order of presentation, opportunity for public participation and opportunity for cross examination of witnesses. The Mayor and Chairperson will advise that any written, photographic, or other demonstrative evidence relied upon during the presentation must be submitted into the record and will not be returned.

5.2. The Clerk has available an oath to be signed by all persons who anticipate speaking on any public hearing item. (See Section 7)

5.3. All persons who anticipate they may speak, will be asked to sign up for the public hearing item(s) they wish to address.

5.4. Open public hearing for particular item.

5.5. Ask attorney to read ordinance (if required).

5.6. Ask clerk to confirm the advertising and notice requirements for the public hearing item have been satisfied.

5.7. Remind each witness to state their name, address (firm or company if consultant), and whether they have been sworn.

5.8. REQUEST STAFF PRESENTATION.

A. Presentation should include: (1) the nature of the request; (2) the identification and discussion of issues to be determined by the Board; and (3) staff recommendation.

B. Enter into evidence the staff report and all exhibits presented or referred to by staff during its presentation. Also enter into evidence staff's resume.

C. Inquire of applicant if they wish to cross examine the staff presenter.

5.9. REQUEST APPLICANT PRESENTATION.

A. Ensure that all documents, photographs, drawings or other evidence referred to by the presenter or witness is entered into the record.

B. Allow cross examination of witness(es) by staff representative.

5.10. PUBLIC COMMENT.

A. Open floor to public comment taking speakers in order they signed up and allow cross examination of witness(es) by applicant and staff representative.

B. Ensure that all documents, photographs, drawings or other evidence referred to by the presenter or witness is entered into the record.

C. Open floor to additional speakers who failed to sign up. Ensure they are sworn.

5.11. APPLICANT'S REBUTTAL.

A. Applicant may introduce into evidence only on points raised during the public comment phase to rebut new issues.

B. Ensure that all documents, photographs, drawings or other evidence referred to by the presenter or witness is entered into the record.

5.12. Questions from Board members and staff to any presenters (Board members' comments and questions are appropriate throughout the proceeding).

5.13. Close public comment and open discussion among Board members. No additional evidence may be introduced.

5.14. Close public hearing and vote. If public hearing is to be continued, continue to a time and date certain within thirty (30) days. Readvertising and notice will not be

necessary. If continued to an unspecified time and date, readvertising and notice **will be** required.

5.15. **VOTING OF MEMBERS.** Any Board member who was absent from a prior meeting in which a specific case was heard shall review the record of the prior proceeding and such review shall be acknowledged by the Board member on the record prior to taking a vote with respect thereto.

Section 6. EVIDENTIARY REQUIREMENTS.

6.1. **BURDEN OF PROOF.** The burden of proof in quasi-judicial hearings concerning zoning related matters shall be in accordance with all applicable local, state and federal law. The burden of proof shall be as follows:

A. The initial burden is on the landowner to demonstrate that their petition or application for use of privately owned lands (rezoning, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the zoning ordinance, hardship requirements (if applicable) and that the proposal is consistent with the comprehensive plan.

B. Upon such showing by the landowner, the burden shifts to the Board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose (not arbitrary, discriminatory, or unreasonable).

C. After such showing by the Board, the landowner's only recourse is to assert and prove that the actions of the Board in denying the petition or application are confiscatory and thereby constitutes a taking.

6.2. **BASIS FOR BOARD DECISION MAKING.** The Board is not required to make findings of fact in a quasi-judicial proceeding involving a zoning related matter. However, the following shall be applicable in the Board's decision-making process:

A. All interested parties should be given a full and fair opportunity to express their views.

B. The Board must have before it competent substantial evidence to support its findings and judgment which also must be in accord with essential requirements of local, state and federal law.

C. While the Board should hear the objections of interested parties, the Board's judgment must be based on the facts adduced, and not on the mere polling of interested parties. In other words, the function of a quasi-judicial board is to make a determination on the basis of facts adduced and upon relevant zoning principles as set forth in a zoning ordinance rather than conduct a plebiscite of the neighbors.

D. Standing alone, opinions and objections of interested parties are not factual evidence and not a sound basis for denial of a petition or application for quasi-judicial action on a zoning related matter unless supported by facts, ordinance criteria or comprehensive plan requirements.

6.3. CONSISTENCY WITH COMPREHENSIVE PLAN. The City should have the discretion to decide the maximum development density of a particular area provided the Board approves some development that is consistent with the comprehensive plan and the City's decision is supported by competent substantial evidence.

A. A Board should recognize that the City's comprehensive plan establishes a long range maximum limit on the possible intensity of land use. It does not establish a minimum limit on the possible intensity of land use. Thus, a property owner is not necessarily entitled to the zoning change sought by proving consistency with the comprehensive plan when the Board's action is also consistent with the plan.

6.4. LAYMAN AND EXPERT WITNESSES. The following rules of evidence shall serve as a Board's guideline when determining how much weight should be afforded the testimony received in a quasi-judicial proceeding.

A. **GENERAL.** The Board shall not consider the testimony of a witness unless:

(1) The witness has personal knowledge of the fact in which the witness will testify to; and,

(2) In the case of testimony consisting of opinions or inferences, the testimony is qualified under paragraph 6.4.B. or C;

(3) Argument or opinions of attorneys is generally not evidence unless based upon personal factual knowledge.

B. **LAYMAN WITNESSES.** Lay witnesses will be encouraged to give information based upon their personal knowledge and may give opinions or expert

testimony only if they are qualified to express an opinion or have special knowledge or training or the opinion expressed does not require special knowledge or training

C. **EXPERT WITNESSES.** Testimony of an expert witness is qualified under this paragraph C. only if the Board determines:

(1) Whether the subject matter is **proper** for expert testimony because scientific, technical, or other specialized skill will help the Board understand the evidence being presented, or help to establish a fact in issue; and,

(2) Whether the witness is adequately **qualified** to express an opinion on the matter.

D. **QUALIFYING A WITNESS AS AN EXPERT.** For purposes of paragraph C. of this section, a witness is qualified as an expert witness only if the Board determines so in accordance with the following procedure:

(1) An interested party has the burden of requesting, and this request shall be made prior to proffering the testimony, the Board to make a determination the witness is an expert;

(2) By majority vote, the Board will determine whether the witness satisfies the criteria in Section 6.4.C. *supra*;

(3) If the Board determines the witness is qualified to testify as an expert, the witness will testify and be cross examined for the record and the Board may give weight and consideration to the expert's opinion;

(4) If the Board determines that the witness does **not** qualify to testify as an expert, or if an interested party fails to request the Board to determine the qualifications of the expert in accordance with this paragraph, the witness may still testify and be cross examined for the record, however, the Board shall not give any weight or consideration to the opinion of the witness.

6.5. **QUALIFICATIONS OF CITY STAFF.** City staff members testifying before a Board in a quasi-judicial proceeding must:

A. State for the record their qualifications, or

B. Place on record a resume listing their qualifications.

6.6. **RECORD OF THE PROCEEDINGS.** Any facts, copies of evidence, or exhibits (including any maps or photos) relied on by the Board as a basis for their decision must be on record. Failure to include evidence on record could result in the Board's decision being reversed by a reviewing court.

6.7. **EVIDENTIARY STANDARD.** Although quasi-judicial proceedings are not controlled by strict rules of evidence and procedure, the Board should attempt to limit evidence or testimony which is hearsay, irrelevant, repetitive, or unfounded in law or fact.

6.8. **PRESENTATION.** All interested parties must be afforded the opportunity to present evidence, cross examine witnesses, and be informed of all the facts upon which the Board acts.

Section 7. SWEARING IN OF PARTIES.

7.1. Before testifying, each witness shall sign in and declare on the record that they will testify truthfully by taking an oath in the following or similar manner:

I (state witness' name) swear or affirm to tell the truth, the full truth and nothing but the truth.

Section 8. SEPARABILITY AND REPEAL OF CONFLICT.

8.1. **SEPARABILITY CLAUSE.** If any section, paragraph, subdivision, clause, sentence, or provision of this Resolution shall be adjudged by any court or competent jurisdiction to be invalid, such judgment shall not affect, impair, invalidate, or nullify the remainder of this Resolution, but the effect thereof shall be confined to the section, paragraph, subdivision, clause, sentence or provision immediately involved in the controversy in which judgment or decree shall be rendered.

8.2. CONFLICT WITH OTHER LAWS.

A. All resolutions or parts thereof in conflict with this Resolution or inconsistent with this Resolution are hereby repealed to the extent of said conflict or inconsistency.

B. These rules shall be construed in a manner which is consistent with applicable local, state and federal law, and to the extent there is a conflict, applicable local, state and federal law shall prevail.

8.3. CONFLICT WITH OTHER BOARD POLICIES AND PROCEDURES.

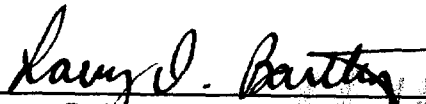
A. It is recognized that each Board may have preestablished policies and procedures to conduct Board business. Thus, to the extent such policies do not conflict with the rules and procedures set forth in this Resolution and applicable local, state and federal law, they shall remain in full force and effect.

B. Preestablished and new Board policies and procedures may be amended or created from time to time so long as no conflict exists with this Resolution and applicable local, state and federal law.

Section 9. AMENDMENT OF THIS RESOLUTION. The City Council may amend this Resolution from time to time in order to comply with new developments and modifications in applicable state or federal case law, *Florida Statutes*, or other related law.

Section 10. EFFECTIVE DATE. That this Resolution shall take effect May 27, 1997.

PASSED AND ADOPTED this 27th day of May, 1997.



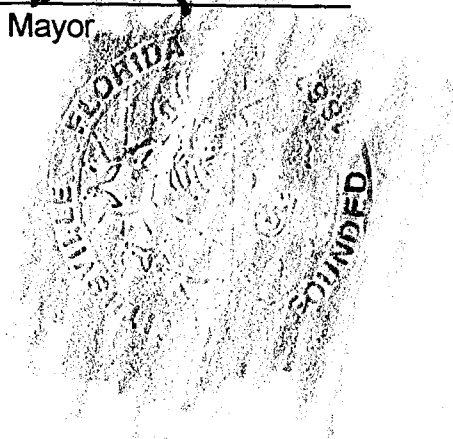
Larry D. Bartley, Mayor

ATTEST:



Maureen V. Phillips, Assistant City Clerk

DWS:jh/C:\WINWORD\RESOL\QUASIJUD.RES



***DIVISION 2. APPEALS TO THE BOARD OF ADJUSTMENT (APPEAL OF
ADMINISTRATOR)***

Sec. 34-241. Basis of decisions.

The Board of Adjustments and Appeals, when so appealed to, may modify or reverse the interpretation of the responsible City official.

Sec. 34-242. Contents.

A decision of the Board of Adjustments and Appeals to vary the application of any city ordinance or to modify an order of the responsible City official shall specify in what manner such variation and modification is made, the conditions upon which it is made and the reason therefor.

Sec. 34-243. Effect; vote; filing

Every decision of the Board of Adjustments and Appeals shall be final, subject, however, to such remedy as any aggrieved party might have at law or in equity. It shall be in writing, and shall indicate the vote upon the decision. Every decision shall be maintained by the City and shall be open to public inspection, and a certified copy shall be sent by mail or otherwise to the appellant.

Sec. 34-244. Delay.

The Board of Adjustments and Appeals shall in every case reach a decision without unreasonable or unnecessary delay.

Sec. 34-245. Appropriate action by City official.

If a decision of the Board of Adjustments and Appeals reverses or modifies a refusal, order or disallowance of the responsible City official, or varies the application of any provision of any ordinance, the responsible City official shall immediately take appropriate action in accordance with such decision.

Sec. 34-246. Requests to be heard expeditiously.

The Board of Adjustments and Appeals shall hear and decide all appeals, variance requests, and requests for interpretations as expeditiously as possible, consistent with the need to follow regularly established agenda procedures, provide notice in accordance with Section 34-228 and obtain the necessary information to make sound decisions.

Sec. 34-247. Burden of proof in appeals and variances.

When an appeal is taken to the Board of Adjustment and Appeals in accordance with this section, the Administrator shall have the initial burden of presenting to the Board sufficient evidence and argument to justify

the order or decision appealed from. The burden of presenting evidence and argument to the contrary then shifts to the appellant, who shall also have the burden of persuasion.

Sec. 34-248. Appeals of site plan.

- (a) *Procedural appeals:* Any applicant that is aggrieved by a procedural decision by the Administrator may file a written appeal within thirty (30) days after the decision in dispute, accompanied by the appropriate fee. Appeals shall be filed with the City Manager and shall state fully the grounds for the appeal and all facts relied upon by the petitioner. The City Manager shall schedule the appeal for the consideration of the Board of Adjustments and Appeals (BAA) within sixty (60) days of receipt of the appeal.
- (b) *Technical appeals:* Any applicant that is aggrieved by a technical decision of the Administrator or any other staff member empowered by the code may file a written appeal within thirty (30) days after the decision in dispute, accompanied by the appropriate fee. Appeals shall be filed with the Administrator and shall state fully the grounds for the appeal and all facts relied upon by the petitioner. The Administrator shall schedule the appeal for consideration by the Board of Adjustments and Appeals (BAA) within sixty (60) days of receipt of the appeal.

Sec. 34-249. Forms.

Appeals from a decision of an administrative official shall be filed on forms provided by the City unless otherwise provided for herein. Any affected property owner or his agent may file an appeal.

Sec. 34-250. Notice of appeal.

The notice of appeal shall be filed within thirty (30) days after the decision complained of has been rendered. This requirement is jurisdictional and the appeal period shall not be enlarged. In case an emergency condition exists, which in the opinion of the responsible City official, might be unsafe or endanger the health, safety or welfare of the public, said official may limit the time for such appeal to a shorter period than thirty (30) days.

Sec. 34-251. Filing fee.

See the adopted fee schedule.

Sec. 34-252. Hearing and decision.

The Board of Adjustments and Appeals, after due notice has been given, shall hold a public hearing on said appeal. A copy of the Board's decision shall be mailed within five (5) calendar days to the appellant by the Recording Secretary of the Board.

Sec. 34-253. Index of decisions.

The Recording Secretary shall index all decisions by the Board by the case number and include the name of the appellant and the ordinance and section involved in the appeal.

Secs. 34-254—34-260. Reserved.



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January 28, 2025

City of Titusville Board of Adjustments and Appeals
c/o City Attorney Richard Broome
Assistant City Attorney Chelsea Farrell
Titusville City Hall
555 S. Washington Avenue
Second floor, Council Chamber
Titusville, Florida 32796
richard.broome@titusville.com
chelsea.farrell@titusville.com

Re: Opposition of Apollo Gardens, LLLP to Appeal No. 1-2024 (“**Appeal**”)

Dear Board of Adjustments and Appeals Board Members:

I write as counsel for Apollo Gardens, LLLP (“**Apollo**”) regarding the referenced appeal that concerns Site Development Permit No. PSDP24-000205 (“**Permit**”) that relates to Project No. J22-5424, known as the Apollo Gardens Apartments. The Apollo Gardens project is a multifamily apartment building with 84 residential units. That use is permitted use under the Multifamily High Density Residential (R-3) zoning district. It is also a permissible use within the Comprehensive Plan High Density Residential Future Land Use District.

Ms. Vickie Conklin is the Appellant in this Appeal, and the form and associated documents of that Appeal are found in their entirety in your agenda packet at pp. 12-26. On its face, the Appeal, which must assert all ground challenged, contests only the consistency of the Permit with the City’s Comprehensive Plan. Specifically, in the Appeal Ms. Conklin asserts that the Site Development Permit is not consistent with Comprehensive Plan Future Land Use Element Strategy 1.13.11, Policy 1.14.5, and Policy 1.14.6. As explained by Brad Parrish, Community Development Director, at Agenda pp. 27-28, Ms. Conklin’s Appeal has no merit in terms of the assertion that the Permit is not consistent with the referenced Comprehensive Plan Strategy and Policies. As counsel for Apollo Gardens, I agree entirely with the analysis of Director Parrish contained in his memorandum to the Board of Adjustments and Appeals (“**BAA**”), and if the merits of this Appeal are reached, we request that it be summarily denied.

I additionally write to the BAA to provide the Motion to Intervene of Apollo Gardens that is enclosed as Topic 1, with all Exhibits referenced therein. City Resolution No. 24-1997 that can

be found in your agenda packet at pp. 91-102 conclusively supports the concept that Apollo Gardens is an Interested Party in this Appeal, and therefore should have an equal opportunity to present to the BAA as Ms. Conklin. We therefore ask that my client's Motion to Intervene be granted, and that my client be recognized officially as an Interested Party in this Appeal.

I also in submitting evidence into the record to dispute that the City Council delegated authority to the BAA to hear this Appeal. Our position on this is relatively straightforward.

First, starting with p. 24 of the *Shires* case, the law is clearly stated that a municipal administrative board like the BAA may proceed with their official functions only as authorized by applicable law, and all actions of such a board must be in accord with the authority that is conferred upon it. As such, the question of whether or not the BAA has authority to hear the Appeal is determined by whether or not the City Council conferred that authority upon the BAA when it declared the powers and duties of the BAA under the enclosed Section 31-51 of the City's Code of Ordinances. Looking at subpart (a) of that section, the scope of the power conferred to the BAA is to hear and decide appeals of decisions arising under the City's Land Development Regulations ("LDRs"). Those LDRs are not inclusive of the City's Comprehensive Plan and, as expressed at p. 41 of the enclosed *Kellerman* case, a local ordinance such as the one that conferred appellate authority to the BAA are subject to the same rules of interpretation as state statutes.

That law is material here because in looking at p. 9 of the enclosed *Headley* case, there is a principal of statutory construction that when the legislative body of a government, like the City Council, drafts legislation such as with the Section 31-51 that conferred some appellate authority to the BAA, the mention of one thing implies the exclusion of the other, and when there is a direction as to how a thing shall be done, such as how the BAA shall conduct an appeal or what it can hear, it is a prohibition against it being done any other way.

Plainly put, the City Council had the authority to confer if it wished upon the BAA the power to hear appeals asserting inconsistency with the City's Comprehensive Plan, but by not mentioning that Comprehensive Plan in Section 31-51, but instead mentioning the LDRs as being the umbrella under which the BAA has authority to operate, it excluded from that authority the ability of the BAA to hear any appeals exclusively related to a claim of inconsistency with the Comprehensive Plan of the City, which is exactly the instance in the Appeal at issue. This is further illustrated by the law as stated in the enclosed *Machado* case at pp. 631-632 where it is explained that local comprehensive plans are statutorily mandated and they act like a constitution for all future development, whereas zoning, like the LDRs, are the means by which a local comprehensive plan is implemented. That is a distinction with a difference that should compel the BAA to recognize its lack of conferred authority to hear the Appeal, and to accordingly dismiss same for lack of jurisdiction.

As an independent basis or dismissal of the Appeal, Appellant lacks standing to pursue this Appeal. Per the verified documents enclosed herewith, Appellant's "crow flies" distance from my client's property that is subject to the Permit is .29 miles, or 1535 feet. Further, her shortest driving distance between the same points is .8 miles. Additionally, there are multiple golf course holes between the Applicant and my client's property. We are unaware of any evidence in the record that would support the BAA determining that the Appellant has standing as an "affected property

owner” which is an issue that has been brought up to this Board in the Memorandum of Assistant City Attorney Chelsea Farrell at Agenda pp. 91-102. Further, granting Appellant standing under these facts would open a Pandora’s Box that neither the City nor the BAA could close.

Based on the foregoing, we ask that the BAA reject the Appeal given a lack of conferred authority to consider it, and if the BAA does not render that decision, that it dismiss the Appeal given Appellant’s lack of standing as an affected property owner. Lastly, if the Appeal is not disposed of through either of those means, that it be soundly denied based on it having no merit. Thank you for your time and consideration of this matter.

Respectfully,

Shutts & Bowen LLP

A handwritten signature in blue ink, appearing to read 'Eric E. Page', is written over the printed name.

Eric E. Page

EEP/kjc

Enclosures

1

CITY OF TITUSVILLE BOARD OF ADJUSTMENTS AND APPEALS

APPEAL NO. 1-2024 APOLLO GARDENS SITE DEVELOPMENT PERMIT
REGULAR MEETING JANUARY 29, 2025 – 6:00 P.M.

MOTION OF APOLLO GARDENS, LLLP, TO INTERVENE AS AN INTERESTED PARTY

COMES NOW, APOLLO GARDENS, LLLP (“**Apollo**”), by and through undersigned counsel and pursuant to City of Titusville Resolution No. 24 – 1997 (“**Resolution**”), and moves the City of Titusville Board of Adjustments and Appeals (“**BAA**”) to intervene as an Interested Party in the above-referenced appeal (“**Appeal**”), and in support states as follows:

I. Background.

Per the notice enclosed as **Exhibit A**, the BAA is will hear the referenced Appeal on January 29, 2025.¹ That Appeal is to be conducted in accordance with City of Titusville Resolution No. 24-1997, which is enclosed as part of **Exhibit B** hereto. The Appeal concerns the right of Apollo to develop its property at 2727 Demaret Drive, Titusville, Florida, as a multifamily apartment building in accordance with a Site Development Permit issued November 11, 2024. *See Exhibit C.* The City’s Community Development Department, through its Director Brad Parrish, has recommended that the BAA deny the Appeal. *See Exhibit C.*

II. Argument.

As the owner of the property subject to the Site Development Permit at issue on Appeal, Apollo is entitled to be granted Interested Party status. Per the Resolution, the standard to be considered an interested party is as follows:

2.4. *Interested Party* means an individual, corporation, business, or land trust, estate, trust, partnership, association, or other legal entity whose interest may be adversely affected by a Board’s action.

¹ Referenced Exhibits are pulled from the pre-Appeal Agenda packet as indicated on the “Page ___ of 107” number on each page.

Here, while the City's Community Development Department has recommended denial of the Appeal, if that is not the result then the Apollo's interests not only may be adversely affected by that BAA decision, they will be materially and adversely affected.

Further, the following provisions of the Resolution establish that the BAA cannot hold a proper hearing on the Appeal, or have a proper basis for its decision making, regardless of what that decision is, without recognizing Apollo as an Interested party:

2.6. *Quasi-Judicial* is determined by the essential nature of the Board's actions.

A. The Board's actions are quasi-judicial providing:

(1) an interested party is provided notice and a hearing;

6.2. **BASIS FOR BOARD DECISION MAKING.** The Board is not required to make findings of fact in quasi-judicial proceeding involving a zoning related matter. However, the following shall be applicable in the Board's decision making process.

A. All interested parties should be given a full and fair opportunity to express their views.

Also, in addition to Apollo's belief that the Appeal is meritless, *see* Exhibit C, Apollo also believes that the sponsor of the Appeal lacks standing as an affected property owner, and Apollo intends to submit evidence to that effect at the hearing. Apollo also intends to present legal argument on why City Council did not confer authority on the BAA to hear this Appeal.

III. Prayer For Relief.

For the foregoing reasons, Apollo respectfully requests that the BAA recognize it as an Interested Party, and allow its representatives to present testimony, evidence and argument at the hearing on the Appeal.

DATED: January 28, 2025

Respectfully submitted,

/s/ Eric E. Page

ERIC E. PAGE

Florida Bar No. 905291

E-mail: epage@shutts.com
SHUTTS & BOWEN LLP
4301 W. Boy Scout Blvd., Suite 300
Tampa, Florida 33607
Attorneys for Apollo Gardens, LLLP

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been electronically provided to City of Titusville City Attorney Richard Broome at richard.broome@titusville.com, and City of Titusville Assistant City Attorney Chelsea Farrell at chelsea.farrell@titusville.com, on this 28th day of January, 2025, in advance of, and for the purpose of having the BAA consider this motion at, the BAA hearing set for January 29, 2025.

/s/ Eric E. Page

MIADOCS 29359486 1

EXHIBIT A



CITY OF TITUSVILLE

BOARD OF ADJUSTMENTS AND APPEALS

AGENDA

Regular Meeting

January 29, 2025 - 6:00 PM

Council Chamber at City Hall

555 South Washington Avenue, Titusville, FL 32796

Any person who decides to appeal any decision of the Board of Adjustments and Appeals, with respect to any matter considered at this meeting, will need a record of the proceedings, and for such purpose, may need to ensure that a verbatim record of the proceedings is made, which record includes the testimony and evidence upon which the appeal is to be based.

The City desires to accommodate persons with disabilities. Accordingly, any physically handicapped person, pursuant to Chapter 286.26 Florida Statutes, should at least 48 hours prior to the meeting, submit a written request to the chairperson of the meeting that the physically handicapped person desires to attend.

Notice

All persons who anticipate speaking on any Public Hearing item must fill out an Oath Card to be heard on that agenda item and sign the oath contained thereon. These cards are located on the table near the entrance to the Council Chamber or may be obtained from the Recording Secretary. This meeting will be conducted in accordance to the procedures adopted in Resolution No. 24-1997.

Those speaking in favor of a request will be heard first, those opposed will be heard second, and those who wish to make a public comment on the item will speak third. The applicant may make a brief rebuttal if necessary. A representative from either side, for or against, may cross-examine a witness.

Anyone who speaks is considered a witness. If you have photographs, sketches, or documents that you desire for the Commission to consider, they must be submitted into evidence and will be retained by the City. Please submit such exhibits to the Recording Secretary.

Applicants for land use and zoning related items are advised that the resumes of staff members who prepare applicable staff reports are on file in the City Clerk's Office.

1. CALL TO ORDER

2. PLEDGE OF ALLEGIANCE

3. ROLL CALL AND DETERMINATION OF A QUORUM

4. APPROVAL OF MINUTES

A. December 5, 2024 Minutes

Approve Minutes

5. QUASI-JUDICIAL CONFIRMATION PROCEDURES

A. Verify all persons wishing to speak before the committee has signed an Oath Card.

B. Chairman confirms that all agenda items have been properly advertised.

C. Member's statements if they have visited any of the sites or spoken to any members of the public regarding an item to be reviewed today.

6. CONSENT AGENDA

7. OLD BUSINESS

8. NEW BUSINESS

A. Appeal No. 1-2024 Apollo Gardens Site Development Permit

Deny the appeal.

9. PETITIONS AND REQUESTS FROM THE PUBLIC PRESENT

10. REPORTS

A. Approval of Semi-Annual Report

11. ADJOURNMENT

EXHIBIT B



**City of Titusville
City Attorney's Office**

BOARD OF ADJUSTMENTS AND APPEALS

Appeal No. 1-2024

Meeting Date: January 29, 2025
Prepared By: Chelsea Farrell, Assistant City Attorney
Applicant: Vickie J. Conklin, Appellant

MEMORANDUM

The City of Titusville received a Notice of Appeal from Vickie J. Conklin, Appellant, on December 5, 2024, appealing the issuance of a Site Development Permit for Apollo Gardens Apartments issued to Apollo Gardens LLLP for the property located at 2727 Demaret Drive, Titusville, Florida 32780. The permit was issued on November 11, 2024.

Pursuant to Titusville Code Section 34-249, "Any **affected property owner** or his agent may file an appeal." Accordingly, the first issue to be addressed by the Board of Adjustments and Appeals will be whether the Appellant is an "affected property owner" with standing to appeal the issuance of the Site Development Permit.

If the Board finds that the Appellant has established standing as an "affected property owner" to present this appeal, the Board will proceed to hear the merits of the appeal and render a decision.

A copy of Resolution No. 24-1997 is enclosed in the agenda packet, providing the quasi-judicial rules of procedure. Titusville Land Development Regulations, Chapter 34, Procedures, Article V, Variances and Appeals, Division 2., *Appeals to the Board of Adjustment (Appeal of Administrator)*, is also provided in the agenda packet.

RESOLUTION NO. 24 - 1997

A RESOLUTION OF THE CITY OF TITUSVILLE, FLORIDA, AMENDING RESOLUTION NO. 25-1995 BY DELETING ANY SITE SPECIFIC COMPREHENSIVE PLAN AMENDMENTS FROM THE QUASI-JUDICIAL PROCEDURE; AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the City Council of the City of Titusville has, by motion, previously adopted and from time to time amended rules of procedure to govern the conduct of hearings and other matters coming before the City Council; and,

WHEREAS, as a result of recent developments of case law, the City Council deems it to be in the best interests of the health, safety and welfare of the citizens of the City of Titusville to provide rules of procedure to govern hearings before the City Council and its administrative Boards when meeting in a quasi-judicial capacity in zoning related matters; and,

WHEREAS, the City Council wishes to adopt rules of procedure for quasi-judicial matters; and,

WHEREAS, the City Council realizes that case law is still developing regarding administrative Boards meeting in a quasi-judicial capacity in zoning related matters, as such, the City Council acknowledges that this Resolution will have to be amended from time to time to keep abreast of future developments in case law related to this subject matter; and,

WHEREAS, the Florida Supreme Court in Brevard County v. Snyder, 620 So.2d 469 (Fla. 1993) found that certain proceedings conducted by the administrative Boards are quasi-judicial proceedings and that substantial competent evidence must be contained in the record to support a decision of the Board; and,

WHEREAS, the Florida Supreme Court in Martin County v. Yusem, 22 Fla. L. Weekly S156 (March 27, 1997) has found that all comprehensive plan amendments are legislative; and,

WHEREAS, the case of Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991) prohibits ex-parte communications with Board members in hearings involving quasi-judicial proceedings; and,

WHEREAS, public officials such as the Board members are frequently contacted by citizens desiring to express their opinions in matters coming before the Board; and,

WHEREAS, the City Council of the City of Titusville desires to implement the process and procedure authorized by *Chapter 286.0115, Florida Statutes* that establishes the process and procedure for disclosure of contact by citizens with public officials; and,

WHEREAS, Administrative Board members will endeavor to avoid off-the-record comments from citizens in quasi-judicial proceedings and desires to establish a process or procedure for disclosure of inadvertent contact by citizens with members of the Boards in said proceedings.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY OF TITUSVILLE, FLORIDA, AS FOLLOWS:

Section 1. INTENT AND PURPOSE.

1.1. The City of Titusville recognizes that administrative Boards often serve in a quasi-judicial capacity concerning zoning related matters. As such, all interested parties should be afforded certain minimal due process safeguards in the form 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. Furthermore, the City Council recognizes the requirements of applicable law regarding the evidence and other matters which may be considered when making a quasi-judicial determination in a zoning related matter.

1.2. The rules and procedures set forth in this resolution are applicable only to administrative Boards serving in a quasi-judicial capacity concerning zoning related matters.

Section 2. DEFINITIONS. For purposes of this Resolution only, the following definitions shall apply when applicable (defined terms appear in Capital Letters):

2.1. *Board* means a City administrative body acting in a quasi-judicial capacity concerning zoning related matters, including, but not limited to: Board of Adjustments, Code Enforcement Board, Planning and Zoning Board, Community Redevelopment Agency, City Council or any other administrative body acting in such a capacity.

2.2. *Competent Substantial Evidence* means sufficiently relevant and material evidence a reasonable mind would accept as adequate to support a conclusion.

2.3. *Expert* means a person who is qualified in a subject matter by knowledge, skill, experience, training, or education.

2.4. *Interested Party* means an individual, corporation, business, or land trust, estate, trust, partnership, association, or other legal entity whose interest may be adversely affected by a Board's action.

2.5. *Site-Specific* means a zoning related matter which has an impact on a limited number of persons or property owners and include identifiable parties and interests. Specifically not included is comprehensive rezoning or any comprehensive plan changes.

2.6. *Quasi-Judicial* is determined by the essential nature of the Board's actions.

A. The Board's actions are quasi-judicial providing:

- (1) an interested party is provided notice and a hearing;
- (2) judgment of the Board is contingent on the consideration of evidence made at a hearing;
- (3) the Board adjudicates private rights of a particular person after a hearing; and,
- (4) the Board's decision can be viewed as a policy application rather than policy setting.

B. *Quasi-judicial* shall include public hearings where variances, appeals, conditional use permits, site-specific zoning changes, or other site-specific development orders are considered.

C. *Quasi-judicial* does not include comprehensive rezoning or any comprehensive plan changes of any size.

2.7. *Zoning related matter* means a public hearing where a Board considers variances, conditional use permits, appeals, site-specific zoning changes, or development orders.

Section 3. NOTICE AND SCHEDULING OF PUBLIC HEARINGS.

3.1. Notice and scheduling requirements for public hearings held before a Board shall be provided in accordance with applicable state law and City ordinances.

Section 4. EX-PARTE COMMUNICATIONS.

4.1. INTENT.

The City Council of the City of Titusville recognizes that in quasi-judicial proceedings such as zoning related matters that said proceedings have been recognized by the Florida courts to constitute quasi-judicial decisions which must be based upon competent substantial evidence contained in the record in the proceedings.

The City Council recognizes that in accordance with the case of Jennings v. Dade County, 589 So.2d 1336 (Fla. 3d DCA 1991), that in quasi-judicial proceedings that information or evidence is to be presented at a hearing before the Board. In addition, it is recognized that as public officials, citizens demand and expect the right to voice their opinions to local public officials.

In recognition of the nature of quasi-judicial proceedings and the public's expectation of being able to voice their opinions to local public officials, it is the intention of the City Council for its Boards to avoid contacts other than at hearings before the Board and that it is the desire and intent of the City Council to establish a process and procedure for disclosure of inadvertent ex parte communications.

4.2. PROCESS AND PROCEDURE.

A. In the event a member of a Board receives an ex parte communication outside of the hearing or proceeding before the Board, said Board member shall disclose and make a part of the record before final action is taken the identity of the person, group or entity with whom the communication took place and the subject of the communication including all opinions or facts discussed. Said disclosure shall be made before or during the public hearing at which a vote is to be taken on said matter and any persons having opinions contrary to those expressed in the ex parte communication shall be given a reasonable opportunity to refute, rebut or respond to the communication.

B. In the event a member of a Board receives or reads a written communication from any person relating to a quasi-judicial proceeding pending before the Board, said written comments shall be disclosed and made a part of the record before final action is taken by the Board, and any person having an opinion to the contrary to that expressed or disclosed in the written communication or opinion shall be given a reasonable opportunity to refute or rebut and respond to the communication.

C. In the event a member of a Board conducts an investigation or site visit or receives any expert opinions regarding quasi-judicial proceedings pending before the Board, then in that event said investigation or site visit or opinion shall be disclosed and

made a part of the record before final action is taken by the Board, and any person having an opinion to the contrary to that expressed in the investigation or site visit or opinion shall be given a reasonable opportunity to refute or rebut and respond to the communication.

4.3. PRESUMPTION.

In the event an ex-parte communication should occur as described herein and disclosure is made in accordance with the process and procedure described above, then in that event any official action taken by the Board in any quasi-judicial proceeding shall remove any presumption of prejudice arising from said ex-parte communication where an ex-parte communication has occurred.

Section 5. HEARING PROCEDURE. The following outline will be followed in conducting hearings:

5.1. At the beginning of a meeting, the Mayor or Chairperson shall review the order of presentation, opportunity for public participation and opportunity for cross examination of witnesses. The Mayor and Chairperson will advise that any written, photographic, or other demonstrative evidence relied upon during the presentation must be submitted into the record and will not be returned.

5.2. The Clerk has available an oath to be signed by all persons who anticipate speaking on any public hearing item. (See Section 7)

5.3. All persons who anticipate they may speak, will be asked to sign up for the public hearing item(s) they wish to address.

5.4. Open public hearing for particular item.

5.5. Ask attorney to read ordinance (if required).

5.6. Ask clerk to confirm the advertising and notice requirements for the public hearing item have been satisfied.

5.7. Remind each witness to state their name, address (firm or company if consultant), and whether they have been sworn.

5.8. REQUEST STAFF PRESENTATION.

A. Presentation should include: (1) the nature of the request; (2) the identification and discussion of issues to be determined by the Board; and (3) staff recommendation.

B. Enter into evidence the staff report and all exhibits presented or referred to by staff during its presentation. Also enter into evidence staff's resume.

C. Inquire of applicant if they wish to cross examine the staff presenter.

5.9. REQUEST APPLICANT PRESENTATION.

A. Ensure that all documents, photographs, drawings or other evidence referred to by the presenter or witness is entered into the record.

B. Allow cross examination of witness(es) by staff representative.

5.10. PUBLIC COMMENT.

A. Open floor to public comment taking speakers in order they signed up and allow cross examination of witness(es) by applicant and staff representative.

B. Ensure that all documents, photographs, drawings or other evidence referred to by the presenter or witness is entered into the record.

C. Open floor to additional speakers who failed to sign up. Ensure they are sworn.

5.11. APPLICANT'S REBUTTAL.

A. Applicant may introduce into evidence only on points raised during the public comment phase to rebut new issues.

B. Ensure that all documents, photographs, drawings or other evidence referred to by the presenter or witness is entered into the record.

5.12. Questions from Board members and staff to any presenters (Board members' comments and questions are appropriate throughout the proceeding).

5.13. Close public comment and open discussion among Board members. No additional evidence may be introduced.

5.14. Close public hearing and vote. If public hearing is to be continued, continue to a time and date certain within thirty (30) days. Readvertising and notice will not be

necessary. If continued to an unspecified time and date, readvertising and notice **will be** required.

5.15. **VOTING OF MEMBERS.** Any Board member who was absent from a prior meeting in which a specific case was heard shall review the record of the prior proceeding and such review shall be acknowledged by the Board member on the record prior to taking a vote with respect thereto.

Section 6. EVIDENTIARY REQUIREMENTS.

6.1. **BURDEN OF PROOF.** The burden of proof in quasi-judicial hearings concerning zoning related matters shall be in accordance with all applicable local, state and federal law. The burden of proof shall be as follows:

A. The initial burden is on the landowner to demonstrate that their petition or application for use of privately owned lands (rezoning, conditional use permit, variance, site plan approval, etc.) complies with the reasonable procedural requirements of the zoning ordinance, hardship requirements (if applicable) and that the proposal is consistent with the comprehensive plan.

B. Upon such showing by the landowner, the burden shifts to the Board to demonstrate that maintaining the existing zoning classification with respect to the property accomplishes a legitimate public purpose (not arbitrary, discriminatory, or unreasonable).

C. After such showing by the Board, the landowner's only recourse is to assert and prove that the actions of the Board in denying the petition or application are confiscatory and thereby constitutes a taking.

6.2. **BASIS FOR BOARD DECISION MAKING.** The Board is not required to make findings of fact in a quasi-judicial proceeding involving a zoning related matter. However, the following shall be applicable in the Board's decision making process:

A. All interested parties should be given a full and fair opportunity to express their views.

B. The Board must have before it competent substantial evidence to support its findings and judgment which also must be in accord with essential requirements of local, state and federal law.

C. While the Board should hear the objections of interested parties, the Board's judgment must be based on the facts adduced, and not on the mere polling of interested parties. In other words, the function of a quasi-judicial board is to make a determination on the basis of facts adduced and upon relevant zoning principles as set forth in a zoning ordinance rather than conduct a plebiscite of the neighbors.

D. Standing alone, opinions and objections of interested parties are not factual evidence and not a sound basis for denial of a petition or application for quasi-judicial action on a zoning related matter unless supported by facts, ordinance criteria or comprehensive plan requirements.

6.3. CONSISTENCY WITH COMPREHENSIVE PLAN. The City should have the discretion to decide the maximum development density of a particular area provided the Board approves some development that is consistent with the comprehensive plan and the City's decision is supported by competent substantial evidence.

A. A Board should recognize that the City's comprehensive plan establishes a long range maximum limit on the possible intensity of land use. It does not establish a minimum limit on the possible intensity of land use. Thus, a property owner is not necessarily entitled to the zoning change sought by proving consistency with the comprehensive plan when the Board's action is also consistent with the plan.

6.4. LAYMAN AND EXPERT WITNESSES. The following rules of evidence shall serve as a Board's guideline when determining how much weight should be afforded the testimony received in a quasi-judicial proceeding.

A. **GENERAL.** The Board shall not consider the testimony of a witness unless:

(1) The witness has personal knowledge of the fact in which the witness will testify to; and,

(2) In the case of testimony consisting of opinions or inferences, the testimony is qualified under paragraph 6.4.B. or C;

(3) Argument or opinions of attorneys is generally not evidence unless based upon personal factual knowledge.

B. **LAYMAN WITNESSES.** Lay witnesses will be encouraged to give information based upon their personal knowledge and may give opinions or expert

testimony only if they are qualified to express an opinion or have special knowledge or training or the opinion expressed does not require special knowledge or training

C. **EXPERT WITNESSES.** Testimony of an expert witness is qualified under this paragraph C. only if the Board determines:

(1) Whether the subject matter is **proper** for expert testimony because scientific, technical, or other specialized skill will help the Board understand the evidence being presented, or help to establish a fact in issue; and,

(2) Whether the witness is adequately **qualified** to express an opinion on the matter.

D. **QUALIFYING A WITNESS AS AN EXPERT.** For purposes of paragraph C. of this section, a witness is qualified as an expert witness only if the Board determines so in accordance with the following procedure:

(1) An interested party has the burden of requesting, and this request shall be made prior to proffering the testimony, the Board to make a determination the witness is an expert;

(2) By majority vote, the Board will determine whether the witness satisfies the criteria in Section 6.4.C. *supra*;

(3) If the Board determines the witness is qualified to testify as an expert, the witness will testify and be cross examined for the record and the Board may give weight and consideration to the expert's opinion;

(4) If the Board determines that the witness does **not** qualify to testify as an expert, or if an interested party fails to request the Board to determine the qualifications of the expert in accordance with this paragraph, the witness may still testify and be cross examined for the record, however, the Board shall not give any weight or consideration to the opinion of the witness.

6.5. **QUALIFICATIONS OF CITY STAFF.** City staff members testifying before a Board in a quasi-judicial proceeding must:

A. State for the record their qualifications, or

B. Place on record a resume listing their qualifications.

6.6. **RECORD OF THE PROCEEDINGS.** Any facts, copies of evidence, or exhibits (including any maps or photos) relied on by the Board as a basis for their decision must be on record. Failure to include evidence on record could result in the Board's decision being reversed by a reviewing court.

6.7. **EVIDENTIARY STANDARD.** Although quasi-judicial proceedings are not controlled by strict rules of evidence and procedure, the Board should attempt to limit evidence or testimony which is hearsay, irrelevant, repetitive, or unfounded in law or fact.

6.8. **PRESENTATION.** All interested parties must be afforded the opportunity to present evidence, cross examine witnesses, and be informed of all the facts upon which the Board acts.

Section 7. SWEARING IN OF PARTIES.

7.1. Before testifying, each witness shall sign in and declare on the record that they will testify truthfully by taking an oath in the following or similar manner:

I (state witness' name) swear or affirm to tell the truth, the full truth and nothing but the truth.

Section 8. SEPARABILITY AND REPEAL OF CONFLICT.

8.1. **SEPARABILITY CLAUSE.** If any section, paragraph, subdivision, clause, sentence, or provision of this Resolution shall be adjudged by any court or competent jurisdiction to be invalid, such judgment shall not affect, impair, invalidate, or nullify the remainder of this Resolution, but the effect thereof shall be confined to the section, paragraph, subdivision, clause, sentence or provision immediately involved in the controversy in which judgment or decree shall be rendered.

8.2. CONFLICT WITH OTHER LAWS.

A. All resolutions or parts thereof in conflict with this Resolution or inconsistent with this Resolution are hereby repealed to the extent of said conflict or inconsistency.

B. These rules shall be construed in a manner which is consistent with applicable local, state and federal law, and to the extent there is a conflict, applicable local, state and federal law shall prevail.

8.3. CONFLICT WITH OTHER BOARD POLICIES AND PROCEDURES.

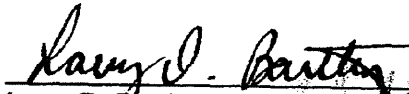
A. It is recognized that each Board may have preestablished policies and procedures to conduct Board business. Thus, to the extent such policies do not conflict with the rules and procedures set forth in this Resolution and applicable local, state and federal law, they shall remain in full force and effect.

B. Preestablished and new Board policies and procedures may be amended or created from time to time so long as no conflict exists with this Resolution and applicable local, state and federal law.

Section 9. AMENDMENT OF THIS RESOLUTION. The City Council may amend this Resolution from time to time in order to comply with new developments and modifications in applicable state or federal case law, *Florida Statutes*, or other related law.

Section 10. EFFECTIVE DATE. That this Resolution shall take effect May 27, 1997.

PASSED AND ADOPTED this 27th day of May, 1997.


Larry D. Bartley, Mayor

ATTEST:


Maureen V. Phillips, Assistant City Clerk

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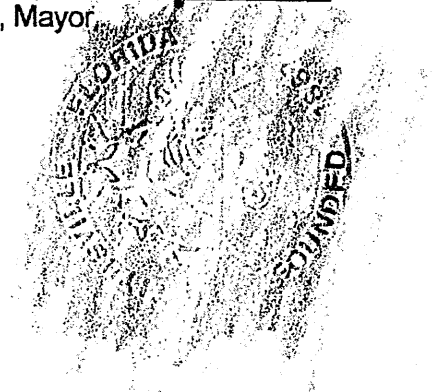


EXHIBIT C



City of Titusville Community Development Department

BOARD OF ADJUSTMENTS AND APPEALS

Appeal No. 1-2024

Meeting Date: January 29, 2025
Prepared By: Brad Parrish, Community Development Director
Applicant/Owner: Vickie Conklin, Appellant

BACKGROUND INFORMATION

Location: 2727 Demaret Dr, Titusville, FL. Tax No. 2207868. Parcel I.D. 22-35-16-00-34

Zoning: Multifamily High Density (R-3)

Administrative Interpretation:

The Apollo Gardens site plan was approved on September 19, 2023, consistent with the Land Development Regulations and the Comprehensive Plan. On November 11, 2024, Site Development Permit No. PSDP24-000205 for Project No. J22-5424, the Apollo Gardens apartments, was issued authorizing on-site construction.

Background

On December 5, 2024, the appellant submitted appeal No. 1-2024. Pursuant to Section 34-250, "The notice of appeal shall be filed within thirty (30) days after the decision complained of has been rendered." The completed appeal application was submitted within the required timeframe.

The Apollo Gardens project is a multifamily apartment building with 84 residential units. The property is zoned Multifamily High Density Residential (R-3). The project is permitted in the R-3 zoning district. The property is designated with the Comprehensive Plan High Density Residential Future Land Use District. The property has frontage on Demaret Drive, which is a public right-of-way.

ANALYSIS

According to the appellant, the Apollo Gardens project is not a conventional multifamily development, and is not consistent with Comprehensive Plan Future Land Use Element Strategy 1.13.11, Policy 1.14.5 and Policy 1.14.6 [The appeal incorrectly cites Policy 1.14.16].

The comprehensive plan and LDRs do not define a conventional multifamily development. The LDRs defines Multifamily dwellings as a building containing two (2) or more dwelling units [Chapter 37]. The LDRs do not distinguish between an owner-occupied condominium type multifamily development and apartments for rent. Multifamily dwellings such as duplex, triplex, quadraplex, etc. are permitted in the R-3 zoning district [Sec 28-54 Use Table]. The R-3 zoning district is consistent with the High Density Residential Future Land Use District [Sec. 27-21 Land Use/Zoning Consistency Matrix].

Strategy 1.13.11 is not applicable to the Apollo Gardens property. The Strategy describes the US 1 Corridor Future Land Use District, which was specifically created to implement the US 1 Corridor Master Plan, adopted in 2007. The property is not located within the boundaries of the US 1 Corridor Master Plan.

Policy 1.14.5 is also not applicable to the Apollo Gardens property. The Policy describes the Medium Density Residential Future Land Use District. The Apollo Gardens property is not designated Medium Density Residential.

The crux of the appeal is whether Policy 1.14.6 is applicable to the Apollo Gardens property. The Policy describes the High Density Residential Future Land Use District. In 1988, the City Council adopted the Comprehensive Plan. The City Council also designated several properties, including the Apollo Gardens property, with the High Density Residential Land Use District consistent with the Comprehensive Plan. The Policy was cited as Objective 10, Policy 1D and stated,

“High Density Residential uses (9.1 to 15 units per acre) or mobile homes shall consider existing and proposed land uses to ensure compatibility. Further, such densities shall be located adjacent to at least a minor arterial street.”

The City Council determined consistency with the Comprehensive Plan, including the policy statement related to densities located adjacent to at least a minor arterial street. Harrison Street and Barna Avenue are the only adjacent roads that would have qualified as minor arterial streets.

The appeal is based upon the current policy which was amended in 2007, 19 years after City Council had determined consistency with the comprehensive plan and designation of the property as High Density Residential, to state the following:

“High density residential uses (maximum fifteen (15) units per acre) or mobile homes shall consider existing and proposed land uses to ensure compatibility. Further, such densities shall be located adjacent to at least a collector or arterial street unless the property is located along the following local road, which already has a multi-family development pattern and is capable of supporting higher density: Rock Pit Road (from Tropic Street to South Street).”

Harrison Street and Barna Avenue are collector roads according to the City’s LDRs. The property is consistent with the policy statement related to densities located adjacent to a collector.

The permit was issued consistent with the comprehensive plan, including the High Density Residential Future Land Use District Policy.

Enclosed is a map identifying the location of properties with the High Density Residential Future Land Use District.

RECOMMENDATION

Concur with the administrative interpretation and deny the appeal.

BOARD OF ADJUSTMENTS & APPEALS ACTION

BAA Action: _____ ☐ Approved ☐ Denied
(date)

2

of the automobile by a person other than the owner thereof. It will be noted that in the instant complaint the plaintiff does not allege simply the operation of the motor vehicle by a person other than the owner, but sets forth affirmatively that the automobile was in the possession of the service station operator.

[2,3] The dangerous instrumentality doctrine as applied to automobiles in Florida has always been grounded exclusively upon respondeat superior. *Weber v. Porco*, Fla.1958, 100 So.2d 146. The complaint in the present instance affirmatively shows that the automobile was not being operated by an agent or servant of the defendant, owner, but on the contrary that it was being operated by a person under the direction and control of the filling station operator. We hold therefore that the complaint failed to state a cause of action against the owner.

Affirmed.



CITY OF MIAMI, a municipal corporation in the State of Florida, and **Wendall C. Bailey**, as Director of Finance of the City of Miami, Appellants,

v.

Earl E. SHIRES, Appellee.

No. 64-117.

District Court of Appeal of Florida.

Third District.

Sept. 1, 1964.

Suit against a city and its director of finance for a declaratory decree determining rights of a retired police detective under employees' retirement system of the city. The Circuit Court for Dade County, Harvie S. DuVal, J., entered a final de-

cree on plaintiff's motion for judgment on the pleadings, and the defendants appealed. The District Court of Appeal, Tillman Pearson, J., held that the findings of the medical board that the police officer's disability was not the result of specific accident occurring in line of duty and was not the result of heart disease, hypertension or tuberculosis were findings on medical questions and therefore conclusive under the city code and that the retirement board had no authority to grant a service-connected disability retirement pension in the face of such findings.

Reversed and remanded with directions.

1. Municipal Corporations ⇨220(9)

Under provisions of Miami city code relating to city employees' retirement system, findings of medical board on medical questions were conclusive on retirement board.

2. Municipal Corporations ⇨220(9)

Relationship of accident to disability was a "medical question" within city code provisions governing employees' retirement system and making findings of medical board on such questions conclusive.

See publication Words and Phrases for other judicial constructions and definitions.

3. Municipal Corporations ⇨187(8)

Findings of medical board that disability of city police detective was not result of specific accident occurring in line of duty and was not result of heart disease, hypertension or tuberculosis were findings on "medical questions" which under provisions of city code relating to employees' retirement system were conclusive and retirement board had no authority to grant retirement pension for service-connected disability in the face of such findings.

4. Municipal Corporations ⇨167

Municipal administrative boards may proceed in their official functions only as

and in the manner authorized by applicable law and all actions of such administrative boards must be in accord with authority duly conferred.

John R. Barrett, City Atty., and Anthony F. Paterna, Asst. City Attys., for appellants.

Rayman & Duhig, Miami, for appellee.

Before BARKDULL, C. J., and HORTON and TILLMAN PEARSON, JJ.

TILLMAN PEARSON, Judge.

The appellant, City of Miami, was defendant with its Director of Finance to a complaint for a declaratory decree brought by Earl E. Shires, who was a retired police detective of the City of Miami. The complaint sought determination of Shire's rights under the Employees' Retirement System. He had made application for retirement for a claimed service-connected disability and was granted a pension by the retirement board of the City of Miami Employees' Retirement System. The Director of Finance had declined to pay the pension upon the ground that the action of the retirement board was a void act. After answer by the City the final decree appealed was entered upon a motion of the plaintiff for a judgment on the pleadings. In so ordering the court stated:

"THE COURT: I am not ruling on the merits of the case. I am ruling that you are precluded from denying the decision of the Pension Board at this time. That you have slept on your rights, so to speak, and that you could have appealed it just the same way as any other litigant appeals a matter from an adverse ruling by a quasi-judicial or administrative board."

In its appeal from the final decree the City urges first, that it is entitled to a reversal because the action of the retirement board was a void act under the law estab-

lished in the case of *City of Miami v. Groner*, Fla.App.1964, 164 So.2d 26. See also *Bailey v. Taylor*, Fla.App.1964, 164 So.2d 564. By its second point the City urges that the judgment on the pleadings was premature.

In order to determine whether or not this cause comes within the purview of the case above cited, it is necessary to give certain additional facts which appear in this record. It appears from the exhibits attached to the pleadings that the report of the medical board, on the application of appellee, Shires, was to the effect that he was (a) totally and permanently incapacitated for further performance of duty as a police detective; (b) that the disability was not the result of a specific accident occurring in the line of duty; (c) that the disability was not the result of heart disease, hypertension or tuberculosis. Acting on this recommendation the retirement board ratified the finding of total and permanent incapacity for further performance of duty as a police detective, but approved the application for disability retirement thereby either rejecting the finding of the medical board that the disability was not the result of a specific accident occurring in the line of duty, or rejecting the medical board's finding that the disability was not a result of heart disease, hypertension or tuberculosis.

City of Miami v. Groner, Fla.App.1964, 164 So.2d 26, was a reversal by this Court of a judgment granting pre-emptory writ of mandamus by which the City had been ordered to pay a pension. Strictly speaking, the decision is authority only for the holding that the appellee (pension claimant and petitioner for the writ) had not demonstrated a clear legal right to the payment of the pension. But in order to reach the conclusion that a clear legal right had not been demonstrated, it was necessary for the court to determine the legal effect of an order awarding appellee (in that case) a disability pension.

The factual basis of the decision in the trial court was parallel in that case and to

this one. In each case the appellee is a member of the City of Miami Police Department who claimed a service-connected disability. Each appellee filed a petition for retirement. The appellee in each case was examined by a medical board appointed by the retirement board. In the Groner case the medical board found that he was "not permanently incapacitated." In the instant case, the medical board found that Shires was not incapacitated as a "result of a specific accident occurring in the line of duty" and that his disability was not "the result of heart disease, hypertension or tuberculosis." In each instance the retirement board overruled the medical board and the appellee was awarded a disability pension. The holding in the Groner case that the appellee had failed to demonstrate a clear legal right to the performance of the ministerial act (payment of the pension) could only have been reached upon a holding that:

"The Code of the City of Miami, Section 2-90(12), provides for a medical board and specifically provides that *their report and findings shall be binding and conclusive*. We have not been cited to, nor are we aware from the record before us, of any authority vested in the City of Miami Employees' Retirement System to reject or ratify the findings and report of the medical board. As a matter of fact, we find no provision which permits them to review the report and findings of the medical board."

[1] Under these circumstances, it is necessary to delineate the area in which the medical board's findings may be changed by the retirement board. As determined in the Groner and Taylor cases, the findings of the medical board on a medical question may not be changed by the retirement board. It therefore becomes necessary to determine whether or not the action of the

retirement board was on a medical question or on a question of fact unconnected with the necessity of medical findings.

[2] We have previously pointed out that there were two bases upon which the retirement board could have determined that Officer Shires was entitled to a pension. The first of these requires a determination of whether the disability is a result of a specific action occurring in line of duty. It is apparent that this is a medical matter since the relationship of any accident to a disability must be medical. We do not mean by this holding to imply that the question of whether an accident occurred would be a medical matter, but we hold that the relationship of an accident to a disability is a medical determination.

[3, 4] The second possible determination mentioned above is that the disability was a result of heart disease, hypertension or tuberculosis. It is apparent that this is a medical matter. Therefore, it affirmatively appears from this record that in order to grant Officer Shires a pension, it was necessary for the retirement board to assume authority it did not have. Municipal administrative boards may proceed in their official functions only as and in the manner authorized by applicable law; and all actions of such municipal administrative boards must be in accord with authority duly conferred. *City of Miami v. Rosen*, 151 Fla. 677, 10 So.2d 307. Therefore the determination of the trial judge must be reversed and this cause remanded for the entry of a decree for the defendant, City.

Having concluded that reversible error was shown under appellants' first point, we need not consider the second point presented. The decree on the pleadings is reversed with directions to proceed in accordance with the views herein set forth.

Reversed and remanded.

ARTICLE IV. BOARD OF ADJUSTMENTS AND APPEALS

Footnotes:

--- (1) ---

Code of Ordinances Reference—Enforcement of the standard code for the elimination or repair of unsafe buildings by the board of adjustments and appeals, § 6-117.

Sec. 31-51. Powers and duties.

- (a) The Board of Adjustments and Appeals shall have the power to hear and decide appeals of any decision, order, requirement or an interpretation of an administrative official of these [Land Development] Regulations, including, but not limited to, the following:
 - (1) Zoning of land and water use (Chapter 28, Zoning);
 - (2) Subdivision regulations (Chapter 34, Procedures);
 - (3) Protection of potable water well fields, the regulation of areas subject to seasonal and periodic flooding, drainage and stormwater management and the protection of environmentally sensitive lands (Chapter 30, Development standards);
 - (4) Signage;
 - (5) The provision of public facilities and service concurrent with the impacts of development, and;
 - (6) The provision of safe and convenient on-site traffic flow, including vehicle parking (Chapter 30, Development standards).
- (b) The Board shall also hear and decide appeals and variances regarding the following:
 - (1) Building code, electrical code, fire prevention code, gas code, housing code, mechanical code, motion picture theaters ordinance, plumbing code, streets regulations, swimming pool regulation, as provided for in the Code of Ordinances, Volumes I, and II.
 - (2) Hear and decide requests for variance from these regulations in accordance with the procedures set forth in Chapter 34, Article V of these [Land Development] Regulations.
 - (3) Hear and decide conflicts between the minimum building code and minimum safety code as authorized by Section 553.73, Florida Statutes (1989), including any conflicts between the local building official and local fire official concerning the application or interpretation of the minimum building code and minimum safety code.
- (c) Appeals, variances and interpretations, shall not extend to decisions of an administrative official relating to public projects; or public policy decisions made by the City Council.

Sec. 31-52. Appointment and terms of office.

- (a) The Board of Adjustments and Appeals shall be composed of five (5) regular members and two (2) alternates. All members shall be residents of the City of Titusville for at least one (1) year and be a registered voter. Members of the Board shall consist of the following:

- (1) At least three (3) of the regular members of the Board shall be persons with the following expertise/experience in at least one of the following disciplines:
 - a. A licensed architect, engineer, landscape architect or surveyor;
 - b. A general or building contractor;
 - c. A person associated with the building trades industries;
 - d. A person having an education degree (bachelor or master degree) in urban planning or with a current American Institute of Certified Planner certification;
 - e. A person with a minimum of ten (10) years' experience in land development or urban planning field.
 - (2) The other two (2) remaining members of the Board and the two (2) alternates may be appointed from the City citizenship at large.
- (b) All five (5) regular members and the two (2) alternates of the Board shall be appointed by the City Council for two-year terms. There shall be appointed at the second regular meeting in July of each odd-numbered year three (3) regular members and one alternate for two-year terms, and in each even-numbered year, two (2) regular members and one alternate for two-year terms. The term of the members appointed shall commence on August 1, and shall be for a period of two (2) years or until their successors are appointed.
 - (c) The City Council shall fill any vacancy occurring on the Board, and such appointment shall be for the unexpired term of the vacancy. The alternate members may serve on the Board in lieu of a regular member when said regular member is unable to attend an official meeting of the Board or when a regular member has a conflict of interest on any item, and said alternate shall serve for the entire meeting.
 - (d) Members of the Board may be reappointed to successive terms without limitation.
 - (e) Members of the Board may be removed at the discretion of the City Council. If any member of the Board is convicted of a felony his position on the Board shall be forfeited immediately and his seat vacated. The seat of any member who is absent from three (3) or more meetings during any period of six (6) successive months shall be vacated, unless such absences are officially excused by a majority of the Board members.

Sec. 31-53. Organization and meetings.

- (a) The Board shall establish rules and regulations of its own procedure not inconsistent with the provisions of these Land Development Regulations. The Board shall meet on the fourth Wednesday of every month or in any event frequent enough so that business of the Board may be expeditiously completed.
- (b) Minutes shall be kept of all Board meetings.
- (c) The Board shall conduct its meetings in accordance with the quasi-judicial procedures set forth in Chapter 34, Procedures, Articles V, Variances and Appeals, Division 1, Variances and Division 2, Appeals to the Board of Adjustment of these [Land Development] Regulations.
- (d) All meetings of the Board shall be open to the public and the agenda for same shall be available to the public at least twenty-four (24) hours prior to the meeting.

- (e) Board members shall be subject to Chapter 286, Florida Statutes, the "Open Meetings Law."
- (f) Four (4) members of the Board shall constitute a quorum. In varying the application of any of the provisions of any City ordinance or in modifying any order of any administrative City official, concurring votes of four (4) members of the Board shall be necessary. If four (4) concurring votes cannot be reached, the subject matter before the Board shall be considered denied.
- (g) The procedure for a member to withdraw, abstain or be excused from voting is in accordance with Section 112.3143, Florida Statutes.

Sec. 31-54. Board of Adjustments and Appeals officers and staff.

- (a) At its first regular meeting in August, the Board shall, by majority vote of its membership (excluding vacant seats) elect one (1) of its members to serve as Chairman and preside over the Board's meetings and one (1) member to serve as Vice-Chairman who shall preside in the absence or withdrawal of the Chairman.
- (b) The Chairman shall sign all correspondence for the Board and shall sign all opinions of the Board.
- (c) The Chairman or any member temporarily acting as Chairman may administer oaths to witnesses coming before the Board.
- (d) The Chairman and Vice-Chairman may take part in all deliberations and vote on all issues.
- (e) An official in the employ of the City shall be appointed by the Administrator to act as secretary to the Board and shall be responsible to supply the Board with the proper facilities, agendas, minutes, evidence and information which the Board may request in the performance of their duties. Said secretary shall receive and schedule for hearings all appeals filed, notify the Board of same and coordinate the advertisement of the Board's agenda with the City Clerk, as required, in a locally circulated newspaper.
- (f) The Board, with the prior approval of the City Council, is authorized and empowered to employ such clerks and subordinates, including technical and expert advisors, and to incur such expenses as in its judgment may be necessary, provided that the total expense shall not exceed the amount set apart in the budget of the City for such purpose.
- (g) The Board may, if it is deemed necessary, call upon any City official in the employ of the City or upon other appointed City board(s) for technical advice, information, or recommendations prior to acting on any appeal which may be brought before it.

Sec. 31-55. Appeal to decision of the Board of Adjustment and Appeals.

Any person substantially effected (as defined in Florida Statutes) by the decision of the Board of Adjustment and Appeals, may appeal such decision to the Circuit Court of Brevard County, Florida. Said decision must be appealed within thirty (30) days after rendered. The decision shall be presumed correct and the appeal shall be a review of the record before the Board of Adjustments and Appeals. The appeal shall not be a trial de novo. The Clerk shall prepare the record in accordance with the Florida Rules of Appellate Procedure. The time periods set forth in the Florida Rules of Appellate Procedure for processing appeals from the County Court to the Circuit Court shall govern appeals from the Board of Adjustments and Appeals to the Circuit Court.

Secs. 31-56—31-65. Reserved.

John KELLERMAN and Robert
Allen, Appellants,

v.

The BOARD OF TRUSTEES OF the
CITY OF HOLLYWOOD FIRE-
FIGHTERS' PENSION SYSTEM and
The City of Hollywood, Appellees.

No. 4D20-2349

District Court of Appeal of Florida,
Fourth District.

[January 5, 2022]

Background: Retired firefighters brought class-action suit against city and board of trustees of firefighters' pension system, for statutory and constitutional violations, breach of contract, and for declaratory judgment, after city passed ordinance that reduced firefighters' supplemental pension benefit. The Circuit Court, 17th Judicial Circuit, Broward County, Jack B. Tuter, J., granted board's motion to dismiss. Firefighters appealed.

Holdings: The District Court of Appeal, Ciklin, J., held that firefighters were current pension recipients, and, thus, could bring action against city and board of directors.

Reversed and remanded.

1. Pretrial Procedure ⇨681, 687

To rule on a motion to dismiss, a court's gaze is limited to the four corners of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true.

2. Pretrial Procedure ⇨556.1, 561.1

If the face of the complaint contains allegations which demonstrate the existence of an affirmative defense, such as

standing, then such a defense may be considered on a motion to dismiss.

3. Pretrial Procedure ⇨681

A court may not look to factual allegations or exhibits attached to a motion to dismiss to grant such a motion.

4. Action ⇨13

Standing requires a sufficient interest in the outcome of litigation before the court will consider the matter. Fla. R. Civ. P. 1.210(a).

5. Action ⇨13

A case or controversy exists, for purposes of standing, if a party alleges an actual or legal injury; an actual injury includes an economic injury for which the relief sought will grant redress.

6. Municipal Corporations ⇨200(7)

Public Employment ⇨396

Retired firefighters were current pension recipients, and, thus, could bring action against city and board of directors of firefighters' retirement system for breach of contract for enacting ordinance that reduced supplemental pension benefit; plain and ordinary meaning of "current pension recipients" in ordinance that created supplemental pension benefit included people who were receiving payments from the pension fund when supplemental benefit was enacted by city ordinance, firefighters alleged that they had been retired for ten years, that they received supplemental pension benefit checks, and that they were injured when benefit was reduced because of wrongful enactment or application of ordinance.

7. Municipal Corporations ⇨120(2, 4)

Local ordinances are subject to the same rules of interpretation as are state statutes; a court interpreting local ordinances must first look to the plain and

Archer v. State, 681 So. 2d 296, 297-98 (Fla.

1st DCA 1996).

ordinary meaning of the words in the ordinance.

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jack B. Tuter, Judge; L.T. Case No. 18-27523 CACE (07).

Elliot B. Kula and William D. Mueller of Kula & Associates, P.A., Miami, and Jared A. Levy of Morgan & Morgan, P.A. West Palm Beach, for appellants.

Robert D. Klausner, Adam P. Levinson and Blanca T. Greenwood of Klausner, Kaufman Jensen & Levinson, P.A., Plantation, for appellee Board of Trustees of The City of Hollywood Firefighters' Pension System.

J. Robert McCormack of Ogletree, Deakins, Nash, Smoak & Stewart, P.A., Tampa, for appellee The City of Hollywood.

Ciklin, J.

John Kellerman and Robert Allen ("the plaintiffs") appeal a final order of dismissal entered in favor of the City of Hollywood ("the City") and the Board of Trustees of the City of Hollywood Firefighters' Pension System ("the Board"). We agree with the plaintiffs' argument the trial court erred by dismissing their complaint based on lack of standing. We reverse and remand for further proceedings.

According to the second amended complaint's allegations and attachments, the plaintiffs were each employed as firefighters for the City for over twenty years and retired in 2002 and 2003, respectively. In 1999, the firefighters' union and the City entered into a collective bargaining agreement ("the 1999 CBA") that contained a supplemental pension benefit to "current pension recipients" who had been retired or entered into the Deferred Retired Options Program ("DROP") for ten years. In a fiscal year, if the annual investment re-

turn on the pension fund's assets exceeded 8%, then eligible recipients would receive a portion of the excess by way of this supplemental pension benefit, which is known as the "13th check." In October 2004, the City passed Ordinance 2004-25, which provided for the 13th check benefit ("the 2004 Ordinance").

In relevant part, the 2004 Ordinance provides:

Sec. 12.26. Supplemental pension benefit.

....

4. Eligible recipients for supplemental pension benefit distribution shall be:

A. Current pension recipients who retired or entered into the DROP at least ten (10) years prior to September 30th of the year for which supplemental pension benefits are to be paid.

In 2011, the City passed an ordinance that reduced this benefit, and the plaintiffs brought a class action suit against the City and the Board, asserting various claims for breach of contract, violations of constitutional and statutory law, and declaratory judgment. The Board moved to dismiss the second amended complaint for lack of standing, arguing that a retiree's benefits are fixed to the pension plan in effect at the time he or she retired, the plaintiffs retired in 2002 and 2003, and the 13th check benefit was not codified until the 2004 Ordinance was passed, and, thus, the plaintiffs were not entitled to the 13th check benefit.

The trial court granted the motion to dismiss for lack of standing on the basis that the plaintiffs retired before 2004:

[T]he allegations in the Complaint demonstrate the existence of the affirmative defense of standing, namely that *Plaintiffs retired before the 2004 ordinance that Plaintiffs rely upon in claiming*

benefits in this case. The Court finds the Board's argument on standing well-taken and determines that new class representatives shall be appointed in this action.

(Emphasis added.) Certain individual counts were also dismissed on other grounds, but are not challenged on appeal.

[1–3] “This court reviews an order granting a motion to dismiss *de novo*.” *Abraham & Assocs., Inc. v. Surrey Holding Corp.*, 939 So. 2d 332, 332 (Fla. 4th DCA 2006). “To rule on a motion to dismiss, a court’s gaze is limited to the four corners of the complaint, including the attachments incorporated in it, and all well pleaded allegations are taken as true.” *Swerdlin v. Fla. Mun. Ins. Tr.*, 162 So. 3d 96, 97 (Fla. 4th DCA 2014) (citations omitted). “[I]f the face of the complaint contains allegations which demonstrate the existence of an affirmative defense,” such as standing, “then such a defense may be considered on a motion to dismiss.” *Llano Fin. Grp., LLC v. Yespy*, 228 So. 3d 108, 112 (Fla. 4th DCA 2017) (quoting *Papa John’s Int’l, Inc. v. Cosentino*, 916 So. 2d 977, 983 (Fla. 4th DCA 2005)). However, a court may not look to factual allegations or exhibits attached to a motion to dismiss to grant such a motion. See *Swerdlin*, 162 So. 3d at 97-98.

[4, 5] “Standing requires a sufficient interest in the outcome of litigation before the court will consider the matter.” *Llano Fin. Grp.*, 228 So. 3d at 112; see also Fla. R. Civ. P. 1.210(a) (“All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs . . .”). “A case or controversy exists if a party alleges an actual or legal injury. An actual injury includes an economic injury for which the relief sought will grant redress.” *Sosa v. Safeway Premium Fin. Co.*, 73 So. 3d 91, 117 (Fla. 2011) (citations omitted).

[6] The plaintiffs argue on appeal that they are entitled to the 13th check benefit in accordance with the plain language of the 2004 Ordinance. The City and the Board maintain that a retiree’s benefits are fixed in accordance with the pension ordinances in effect at the time of his or her retirement, and because the plaintiffs retired before the enactment of the 2004 Ordinance, they are not entitled to the 13th check benefit enacted therein.

[7] Local ordinances such as the 2004 Ordinance “are subject to the same rules of interpretation as are state statutes; a court interpreting local ordinances must first look to the plain and ordinary meaning of the words in the ordinance.” See *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1041 (Fla. 2d DCA 2012). Where a word or phrase is not defined in a statute, a court may “look to the common, ordinary dictionary meaning of the word.” *Interlatin Supply, Inc. v. S & M Farm Supply, Inc.*, 654 So. 2d 254, 255 (Fla. 3d DCA 1995). “If the plain and ordinary meaning is clear, then ‘other rules of construction and interpretation are unnecessary and unwarranted.’” *Longboat Key*, 95 So. 3d at 1041 (quoting *Rinker Materials Corp. v. City of N. Miami*, 286 So. 2d 552, 554 (Fla. 1973)).

The 13th check provision within the 2004 Ordinance states that “eligible recipients” are “current pension recipients” who have been retired or in DROP for ten years. “Current pension recipients” and “pension” are not defined by the 2004 Ordinance. Accordingly, we look to dictionaries for definitions of those words. Black’s Law Dictionary provides several relevant definitions for the word “current,” including, “[r]unning; now in transit; present existence; now in progress; whatever is at present in course of passage,” and “as applied to current obligations it denotes

the obligations then passing or present in its progress, the service rendered and the compensation therefor measured by the time of the occurrence of the event.” *Current*, BLACK’S LAW DICTIONARY (6th ed. 1990). In relevant part, “pension” means “[a] regular series of payments made to a person (or the person’s representatives or beneficiaries) for past services or some type of meritorious work done; esp., such a series of payments made by the government.” *Pension*, BLACK’S LAW DICTIONARY (11th ed. 2019). “Recipient” means “[s]omeone or something that receives.” *Recipient*, THE AMERICAN HERITAGE DESK DICTIONARY (1981).

Consistent with these definitions, the plain and ordinary meaning of “current pension recipients” includes people who are receiving payments from the pension fund when the Ordinance was enacted. Thus, under the plain language of the ordinance, the people eligible to receive the 13th check include anyone who was receiving pension payments and who had been retired or in DROP for at least ten years prior to September 30 of the year for which the 13th check is to be paid. In other words, the 13th check provision applied to people who were already retired, and it was not merely a benefit for those who retired on the date the ordinance was passed and later.

The plaintiffs effectively alleged in the complaint that they were current pension recipients. They alleged that they retired in 2002 and 2003, respectively, and that they were current members of the pension system. They further alleged, “Beginning in 2014, for each of fiscal years 2013 through 2018, [the plaintiffs] each received annual supplemental pension benefit checks that were based improperly on the Board’s calculations pursuant to the 2011 Ordinance.” (Emphasis omitted.) Finally, they alleged that they were injured when

their 13th check benefit was reduced because of the wrongful enactment and/or application of 2011 Ordinance.

These allegations, taken as true, in conjunction with the plain language of the 2004 Ordinance attached to the complaint, establish an actual injury. Thus, the plaintiffs sufficiently alleged standing.

We reverse and remand for further proceedings.

Reversed and remanded.

Gross and Damoorgian, JJ., concur.



J.S., the Father, Appellant,

v.

**DEPARTMENT OF CHILDREN AND
FAMILIES and Guardian Ad
Litem, Appellees.**

No. 4D21-1923

District Court of Appeal of Florida,
Fourth District.

[January 19, 2022]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Luis Delgado, Judge; L.T. Case No. 50-2020-DP-000607.

Thomas J. Butler of Thomas Butler, P.A., Miami Beach, for appellant.

Andrew Feigenbaum, Appellate Counsel, Children’s Legal Services, West Palm Beach, and Logan Bartholomew, Certified Legal Intern, Florida A&M University College of Law, Orlando, for appellee Department of Children and Families.

Walter E. HEADLEY, Jr., Miami
Lodge No. 20, Fraternal Order
of Police, et al., Petitioner,

v.

CITY OF MIAMI, Florida, Respondent.

No. SC13-1882

Supreme Court of Florida.

[March 2, 2017]

Background: Police union filed an unfair labor practice charge after city declared a financial urgency and modified its collective bargaining agreement with the union. The Public Employees Relations Commission (PERC) held in favor of the city. Union appealed, and the District Court of Appeal, 118 So.3d 885, affirmed and certified conflict. Union sought review.

Holdings: The Supreme Court, Quince, J., held that:

- (1) in order to modify a collective bargaining agreement (CBA) under statute allowing a public employer to modify terms of a CBA in the event of a financial urgency, the employer must show that the funds are not available from any other possible reasonable source, and
- (2) statute allowing CBA modification permits the unilateral implementation of changes to the CBA only after parties have completed the impasse resolution proceedings and failed to ratify the agreement.

District Court of Appeal decision quashed; remanded.

Polston, J., filed a concurring opinion.

Canady, J., dissented.

1. Appeal and Error ⇌893(1)

Issues of statutory interpretation are subject to de novo review.

2. Labor and Employment ⇌1870

On judicial review of a Public Employees Relations Commission (PERC) order, the view of the PERC majority is presumptively the product of special expertise to which courts should defer. Fla. Stat. Ann. §§ 447.205, 447.207.

3. Administrative Law and Procedure ⇌435

Where an agency has erroneously interpreted a provision of the law, an agency's construction is not entitled to deference.

4. Labor and Employment ⇌1236

The constitutional right to contract is enforceable in labor contracts by operation of the "right to work" provision of state constitution. Fla. Const. art. 1, §§ 6, 10.

5. Labor and Employment ⇌1304

Generally, an agreement regarding wages, hours, or terms and conditions of employment reached through the collective bargaining process cannot be unilaterally modified during the term of the agreement absent a compelling state interest.

6. Labor and Employment ⇌1304

In statute allowing a public employer to modify terms of a collective bargaining agreement in the event of a financial urgency, a "financial urgency" is a dire financial condition requiring immediate attention and demanding prompt and decisive action, but not necessarily a financial emergency or bankruptcy. Fla. Stat. Ann. § 447.4095.

See publication Words and Phrases for other judicial constructions and definitions.

7. Statutes ⇌1108

If the language of the statute is clear and unambiguous and conveys a clear and definite meaning there is no need to resort to statutory construction.

8. Labor and Employment ⇌1304

Under statute allowing a public employer to modify terms of a collective bargaining agreement in the event of a financial urgency, a financial urgency may only be invoked where modification of the agreement is required, and if there are other means of addressing the financial condition, then modification is not required. Fla. Stat. Ann. § 447.4095.

9. Labor and Employment ⇌1304

Under statute allowing a public employer to modify terms of a collective bargaining agreement in the event of a financial urgency requiring modification of the agreement, the term "requiring modification" forces the local government to demonstrate that the only way of addressing its dire financial condition is through modification of the collective bargaining agreement; to do this, the local government must demonstrate that the funds are available from no other reasonable source. Fla. Stat. Ann. § 447.4095.

10. Labor and Employment ⇌1304

In order to modify a collective bargaining agreement (CBA) under statute allowing a public employer to modify terms of a CBA in the event of a financial urgency, the employer must show that the funds are not available from any other possible reasonable source. Fla. Stat. Ann. § 447.4095.

11. Labor and Employment ⇌1304

Under statute allowing a public employer to modify terms of a collective bargaining agreement in the event of a financial urgency, if other cost-saving measures are unreasonable, then modification is warranted. Fla. Stat. Ann. § 447.4095.

12. Labor and Employment ⇌1304

Under statute allowing a public employer to modify terms of a collective bargaining agreement in the event of a fi-

nancial urgency, the government must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part. Fla. Stat. Ann. § 447.4095.

13. Labor and Employment ⇌1122

Under the concept of "impact bargaining," if modification of a subject in a collective bargaining agreement classified as a management right would have an effect on the employees' terms and conditions of employment, then the public employer is required to give those employees' bargaining agent an opportunity to bargain the impact of that modification.

See publication Words and Phrases for other judicial constructions and definitions.

14. Statutes ⇌1370

When the words in a statute are technical in nature and have a fixed legal meaning, it is presumed that the legislature intended that the words be given their technical meaning.

15. Statutes ⇌1377

Under the principle of "expressio unius, est exclusio alterius," meaning "the mention of one thing implies the exclusion of another," legislative direction as to how a thing shall be done is, in effect, a prohibition against it being done any other way.

See publication Words and Phrases for other judicial constructions and definitions.

16. Labor and Employment ⇌1489

Statute allowing a public employer to modify terms of a collective bargaining agreement (CBA) in the event of a financial urgency permits the unilateral implementation of changes to the CBA only after parties have completed the impasse resolution proceedings and failed to ratify the agreement. Fla. Stat. Ann. §§ 447.403, 447.4095.

Application for Review of the Decision of the District Court of Appeal—Direct Conflict of Decisions, First District—Case No. 1D12-2116, (Miami-Dade County)

Ronald Jay Cohen of Rice Pugatch Robinson & Schiller, P.A., Fort Lauderdale, Florida, and Robert David Klausner of Klausner, Kaufman, Jensen and Levinson, P.A., Plantation, Florida, for Petitioners

Victoria Mendez, City Attorney, John Anthony Greco, Deputy City Attorney, Diana Vizcaino, Former Assistant City Attorney, and Kerri Lauren McNulty, Assistant City Attorney, Miami, Florida, for Respondent

Richard Anthony Sicking, Coral Gables, Florida, for Amicus Curiae Florida Professional Firefighters, Inc., International Association of Firefighters, AFL-CIO

Noah Scott Warman of Sugarman & Susskind, P.A., Coral Gables, Florida, for Amicus Curiae Hollywood Fire Fighters, Local 1375, IAFF, Inc.

Thomas Wayne Brooks of Meyer, Brooks, Demma and Blohm, P.A., Tallahassee, Florida, for Amicus Curiae Florida Education Association

Paul Andrew Donnelly and Laura Ann Gross of Donnelly and Gross, P.A., Gainesville, Florida, for Amicus Curiae Communications Workers of America

G. Hal Johnson, Tallahassee, Florida, for Amicus Curiae Florida Police Benevolent Association

Daniel H. Thompson and Mitchell Wayne Berger of Berger Singerman LLP, Fort Lauderdale, Florida, and Stephen Hale Cypen of Cypen & Cypen, Miami Beach, Florida, for Amicus Curiae Board of Trustees of the City of Hollywood, etc., et al.

David Clayton Miller and James Chumley Crosland of Bryant Miller Olive P.A., Miami, Florida, for Amicus Curiae The City of Hollywood, Florida

Michael Patrick Spellman, Hetal Desai McGuire, and Jeffrey Douglas Slanker of Sniffen and Spellman, P.A., Tallahassee, Florida; and Harry Morrison, Jr. and Kraig Armantrout Conn, Florida League of Cities, Inc., Tallahassee, Florida, for Amicus Curiae Florida League of Cities

John Maxwell Hament, Sarasota, Florida, for Amicus Curiae East Naples Fire Control & Rescue District

QUINCE, J.

Walter E. Headley, Jr., Miami Lodge No. 20, Fraternal Order of Police, Inc. (“the Union”), seeks review of the decision of the First District Court of Appeal in Walter E. Headley Jr., Miami Lodge No. 20, Fraternal Order of Police v. City of Miami, 118 So.3d 885, 887 (Fla. 1st DCA 2013), on the ground that it expressly and directly conflicts with the decision of the Fourth District Court of Appeal in Hollywood Fire Fighters Local 1375 v. City of Hollywood, 133 So.3d 1042 (Fla. 4th DCA 2014),¹ regarding whether an employer must demonstrate that funds are available from no other possible reasonable source before unilaterally modifying a collective bargaining agreement. We have jurisdiction. See art. V, § 3(b)(3), Fla. Const. For the reasons that follow, we approve the decision of the Fourth District and quash the decision of the First District.

FACTS

This case involves a certified bargaining agreement (“CBA”) between Miami Lodge

in Headley.

1. In its decision, the Fourth District also certified conflict with the First District’s decision

No. 20, Fraternal Order of Police (the Union), which represents officers employed by the City of Miami's police department, and the City of Miami ("the City"). The agreement covered the period of October 1, 2007, through September 30, 2010. Headley, 118 So.3d at 888. On July 28, 2010, the City declared a "financial urgency" and invoked the process set forth in section 447.4095, Florida Statutes (2010). Id. It notified the Union that it intended to implement changes regarding wages, pension benefits, and other economic terms of employment. Id. Following negotiations concerning the financial urgency, the City informed the Public Employees Relations Commission (PERC)² that a dispute remained between the parties. Headley, 118 So.3d at 888. Despite agreeing on a special magistrate, the parties did not pursue the impasse resolution process. Id.

On August 31, 2010, the City's legislative body voted to unilaterally alter the terms of the CBA in order to address the financial urgency, and adopted changes that:

[I]mposed a tiered reduction of wages, elimination of education pay supplements, conversion of supplemental pay, a freeze in step and longevity pay, modification of the normal retirement date, modification of the pension benefit formula, a cap on the average final compensation for pension benefit calculations, alteration of the normal retirement form, and modification of average final compensation.

Id. The Union then filed an unfair labor practice ("ULP") charge with PERC on September 21, 2010, arguing that the City improperly invoked section 447.4095 and unilaterally changed the CBA before completing the impasse resolution process provided for in section 447.4095. Id. at 889.

At a hearing before a PERC hearing officer, the City presented evidence of its financial situation. Id. The evidence showed that:

[T]he City's budget was approximately \$500 million and that it faced a deficit of approximately \$140 million for the 2010/2011 fiscal year; that the City had already implemented hiring freezes, completed all previously contemplated layoffs, ceased procurement, and instituted elimination of jobs as employees left; that labor costs comprised 80% of the City's expenses; that, if additional action was not taken to reduce expenditures, the City's labor costs would exceed its available funds, which would leave the City unable to pay for utilities, gas, and other necessities and render it unable to provide essential services to its residents; and that the City's unemployment rate was 13.5% and property values were in decline, with 49% of homes in the City having negative equity.

Id. In response, the Union suggested raising the millage tax rate, installing red light cameras, imposing non-union employee layoffs and furloughs, freezing the current cost of living adjustment, and changing the pension funding methodology. Id. These changes, according to the City, "would not adequately address the shortfall because they either failed to generate enough revenue to offset the deficit or they would increase the City's long term financial obligations." Id.

The hearing officer then issued an order recommending dismissal of the Union's ULP charge. Id. The hearing officer found that the statute had been properly invoked by the City and the parties were not required to proceed through the impasse

2. PERC is a commission created by the Legislature to carry out the provisions of part II,

chapter 447, Florida Statutes. §§ 447.205, .207, Fla. Stat. (2010).

procedures before implementing the changes. *Id.* In the final order, PERC first defined “financial urgency” as “a financial condition requiring immediate attention and demanding prompt and decisive action which requires the modification of an agreement; however, it is not necessarily a financial emergency or bankruptcy.” *Id.* PERC went on to explain that a determination of financial urgency requires an examination “of the employer’s complete financial picture on a case-by-case basis” and an evaluation of whether the employer acted in “good faith.” *Id.* (quoting PERC’s final order). As to good faith, PERC focused on whether “a reasonable person could reach the conclusion that ‘funding was not available to meet the employer’s financial obligations to its employees.’” *Id.* at 889–90 (quoting final order). The order also found that section 447.4095 did not require the City to proceed through the impasse resolution process before implementing changes to the CBA. *Id.* at 890. PERC interpreted the statute to require “impact bargaining,” which allowed the employer to make the changes after providing notice and a reasonable opportunity to bargain. *Id.*

The First District affirmed PERC’s final order, finding that it did not err in interpreting or applying section 447.4095. *Id.* at 896. Petitioner now seeks review, arguing that an employer must demonstrate that funds are available from no other possible reasonable source before unilaterally modifying a CBA and that modification can only be made after completing the impasse resolution process.

ANALYSIS

[1, 2] Petitioner first argues that before unilaterally modifying a CBA pursuant to the financial urgency statute, an employer must demonstrate that funds are available from no other possible reasonable

source. Deciding this issue will require the interpretation of section 447.4095, Florida Statutes (2010). Issues of statutory interpretation are subject to de novo review. See, e.g., *Fla. Dep’t of Env’tl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So.2d 1260, 1264 (Fla. 2008). However, on judicial review of a PERC order, “the view of the PERC majority is . . . presumptively the product of special expertise to which courts should defer.” *United Faculty of Fla. v. Pub. Emps. Relations Comm’n*, 898 So.2d 96, 100 (Fla. 1st DCA 2005).

[3] Thus, PERC’s determination that the statute does not require the employer to demonstrate that the funds are available from no other possible reasonable source is an interpretation of chapter 447 that is entitled to deference. See *Pub. Emps. Relations Comm’n v. Dade Cty. Police Benevolent Ass’n*, 467 So.2d 987, 989 (Fla. 1985) (“[A] reviewing court must defer to an agency’s interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence.”). Despite this tenet of appellate review, where an agency has erroneously interpreted a provision of the law, an agency’s construction is not entitled to deference. See *City of Safety Harbor v. Commc’ns Workers of Am.*, 715 So.2d 265, 266 (Fla. 1st DCA 1998) (citing *Pensacola Jr. College v. Public Emps. Rels. Comm’n*, 400 So.2d 59 (Fla. 1st DCA 1981); *Se. Volusia Hosp. Dist. v. Nat’l Union of Hosp. & Health Care Emps.*, 429 So.2d 1232 (Fla. 5th DCA 1983)).

[4, 5] The right to contract is expressly guaranteed by article 1, section 10 of the Florida Constitution. It is equally enforceable in labor contracts by operation of article 1, section 6 of the Florida Constitution. Petitioner argues that PERC’s interpretation of the financial urgency statute violates the Union’s right to collectively

bargain under article 1, section 6 and its right to contract under article 1, section 10 because the statute impermissibly allows for unilateral changes to CBAs. Generally, an agreement regarding wages, hours, or terms and conditions of employment reached through the collective bargaining process cannot be unilaterally modified during the term of the agreement absent a compelling state interest. Headley, 118 So.3d at 890.

[6] The statute at issue in this case, section 447.4095, provides:

Financial urgency—In the event of a financial urgency requiring modification of an agreement, the chief executive officer or his or her representative and the bargaining agent or its representative shall meet as soon as possible to negotiate the impact of the financial urgency. If after a reasonable period of negotiation which shall not exceed 14 days, a dispute exists between the public employer and the bargaining agent, an impasse shall be deemed to have occurred, and one of the parties shall so declare in writing to the other party and to the commission. The parties shall then proceed pursuant to the provisions of s. 447.403. An unfair labor practice charge shall not be filed during the 14 days during which negotiations are occurring pursuant to this section.

The statute does not define “financial urgency,” and the term is not defined elsewhere in chapter 447. Headley, 118 So.3d at 891. Moreover, the legislative history does not provide any guidance related to the meaning of the term. Id. The staff analysis merely notes, “The term is undefined in the bill or in chapter 447 and that its interpretation is left to practice.” Id. (citing Fla. S. Comm. on Govt. Ops., CS for SB 888 (1995) Staff Analysis (March 27, 1995) (on file with comm.)). Because there are other statutes that apply where

the government is facing a financial emergency or bankruptcy, we adopt PERC’s definition that a financial urgency is a dire financial condition requiring immediate attention and demanding prompt and decisive action, but not necessarily a financial emergency or bankruptcy.

[7, 8] We have long held that a “statute must be given its plain and obvious meaning.” Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984) (quoting A.R. Douglass, Inc. v. McRaney, 102 Fla. 1141, 137 So. 157, 159 (1931)). If the language of the statute is “clear and unambiguous and conveys a clear and definite meaning” there is no need to resort to statutory construction. Id.; accord Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So.2d 452, 454 (Fla. 1992). Because a government entity acting under section 447.4095 has the potential to impair two fundamental rights afforded to public employees, the statute must be given a strict construction. State v. J.P., 907 So.2d 1101, 1109 (Fla. 2004). Based on the plain language of the statute, a financial urgency may only be invoked where modification of the agreement is required. If there are other means of addressing the financial condition, then modification is not “required.”

We have previously set forth the standard that must be followed where a government entity attempts to change a bargaining agreement to address a revenue shortfall. In Chiles v. United Faculty of Florida, 615 So.2d 671 (Fla. 1993), the Legislature eliminated raises that had been authorized following an impasse between the State and various public employee unions. Id. There, we held that the raise was a fully enforceable contract and once it had been funded by the Legislature, “the state and all its organs are bound by that agreement under the principles of contract law.” Id. at 672–73. While we recognized that the Legislature must have

leeway to respond to emergencies, we stated that the right to contract severely limits the Legislature's ability to alter a contract. Id. at 673. Therefore, we held that "the legislature has authority to reduce previously approved appropriations to pay public workers' salaries made pursuant to a collective bargaining agreement, but only where it can demonstrate a compelling state interest." Id. at 673. Before doing so, "the legislature must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part." Id. Further, "the legislature must demonstrate that the funds are available from no other possible reasonable source." Finding that the Legislature did not satisfy the requirements of this test, we ordered the reinstatement of the pay raises. Id.

Section 447.4095 is the codification of the strict scrutiny standard we outlined in Chiles. The term "financial urgency" represents the first prong of strict scrutiny. As previously stated, a financial urgency is "a dire financial condition requiring immediate attention and demanding prompt and decisive action, but not necessarily a financial emergency or bankruptcy." Headley, 118 So.3d at 892; see also Hollywood Fire Fighters, 133 So.3d at 1045 (quoting Headley). In showing that its current financial condition is dire and requires immediate attention, the local government establishes a compelling state interest and satisfies the first prong of strict scrutiny.

[9] The phrase "requiring modification of an agreement" represents the second prong of strict scrutiny. While a local government may be able to show that its financial condition requires immediate attention and demands prompt and decisive action, this may not necessarily require modification of the agreement. As we stated in Chiles, "the mere fact that it is politically more expedient to eliminate all

or part of the contracted funds is not in itself a compelling reason." Chiles, 615 So.2d at 673. Thus, the term "requiring modification" forces the local government to demonstrate that the only way of addressing its dire financial condition is through modification of the CBA. To do this, the local government must demonstrate that the funds are available from no other reasonable source. This satisfies the second requirement of strict scrutiny, that the law be narrowly tailored to achieve a compelling state interest.

In the instant case, the First District held that the language from Chiles is not "constitutionally mandated" and should not be extended to section 447.4095. Headley, 118 So.3d at 893. The court further concluded that a local government "is not required to demonstrate that funds are not available from any other possible source to preserve the agreement." Id. Instead, the court held that a local government need only show that "other potential cost-saving measures and alternative funding sources are unreasonable or inadequate to address the financial condition facing the local government." Id. In the conflict case, the Fourth District held that Chiles mandates that the Legislature must demonstrate that the funds are not available from any other source. Hollywood Fire Fighters, 133 So.3d at 1045. The Fourth District went on to reject the "modified Chiles test" outlined in Headley, which it found lowers the standard that a local government must satisfy before unilaterally modifying an agreement. Id. at 1046.

[10–12] We agree with the Fourth District. The First District erred in holding that our precedent is not constitutionally mandated and should not be extended to the financial urgency statute. Moreover, the First District incorrectly stated that Chiles requires a local government to demonstrate "that funds are not available from

any other possible source.” Headley, 118 So.3d at 893. Not so. As we stated in Chiles, the employer must show that the funds are not available from any other possible reasonable source. Therefore, as the First District held, if the other cost-saving measures are unreasonable, then modification is warranted. However, we do not agree with the First District that if the alternative funding sources are also inadequate then modification is permissible. Instead, the government “must demonstrate no other reasonable alternative means of preserving its contract with public workers, either in whole or in part.” Chiles, 615 So.2d at 673 (emphasis added).

We have long recognized the right to bargain collectively and the right to contract free of impairment. See Hillsborough Cty. Govtl. Emps. Ass’n v. Hillsborough Cty. Aviation Auth., 522 So.2d 358, 362 (Fla. 1988) (“The right to bargain collectively is, as part of the state’s constitution’s declaration of rights, a fundamental right. As such, it is subject to official abridgment only upon a showing of a compelling state interest.”); Yamaha Parts Distribs., Inc. v. Ehrman, 316 So.2d 557, 559 (Fla. 1975) (“Virtually no degree of contract impairment has been tolerated in this state.”). Thus, our conclusions as to this issue “are compelled by the Florida Constitution.” Chiles, 615 So.2d at 673. Accordingly, we approve the decision of the Fourth District and quash the decision of the First District on this issue.

Petitioner also argues that the First District erred in construing the statute to allow an employer to unilaterally modify the CBA without first proceeding through the impasse resolution process set forth in section 447.403, Florida Statutes (2010). This issue centers on the procedure to be followed once a local government has de-

clared a financial urgency requiring modification of an agreement.

As the First District explained:

Section 447.4095 provides for an expedited period of negotiation, not to exceed 14 days, upon declaration of a financial urgency by a local government and requires the parties to meet as soon as possible after the declaration to “negotiate the impact” of the financial urgency. The statute further provides that, if a dispute remains between the parties after the expiration of the expedited negotiation period, an impasse shall be deemed to have occurred and “[t]he parties shall then proceed pursuant to the provisions of s. 447.403.” § 447.4095, Fla. Stat.

The impasse resolution process in section 447.403 begins with the appointment of a special magistrate who is charged with conducting a hearing and making a recommendation to the local government’s legislative body as to the resolution of any disputed issues. See § 447.403(3), Fla. Stat. The statute does not establish a deadline for the hearing, but it does provide for at least 45 days of post-hearing procedures. See § 447.403(3)–(4), Fla. Stat. (providing 15 days for the special magistrate to submit his or her recommended decision to the parties, 20 days for the parties to reject the special magistrate’s recommendations, and then 10 days for the local government’s chief executive officer to submit his or her recommendations to the legislative body). The legislative body is not required to accept the special magistrate’s recommendations and, thus, the end-result of the impasse resolution process may be the local government unilaterally imposing changes to the agreement. See § 447.403(4), Fla. Stat.

Headley, 118 So.3d at 894. Petitioner argues that by requiring the parties to proceed through the impasse resolution process under section 447.403, the statute mandates that no changes may be made to the agreement until after the conclusion of that process. Petitioner argues that because the public employer seeks to change a mandatory term³ of the agreement, collective bargaining⁴ is required. Respondent argues that the Legislature specifically used the term “impact” in reference to “impact bargaining,” which is a type of bargaining applicable to managerial decisions that impact terms and conditions of employment within the bargaining unit. Impact bargaining requires only notice and an opportunity to negotiate before the proposed changes are implemented. In essence, the parties dispute the point at which a modification may be made.

[13] Employing the rules of statutory interpretation is appropriate here, as both parties provide reasonable interpretations of the statute and the statute is ambiguous as to when a modification may be made. “Impact” is a term of art in public sector labor law. See Sch. Dist. of Indian River Cty. v. Fla. Pub. Emps. Relations Comm’n, 64 So.3d 723, 729 (Fla. 4th DCA 2011). Under the concept of impact bargaining, if the modification of a subject classified as a management right⁵ would have an effect on the employees’ terms and conditions of

employment, then the public employer is required to give those employees’ bargaining agent an opportunity to bargain the impact of that modification. See Jacksonville Supervisors Ass’n v. City of Jacksonville, 26 F.P.E.R. 31140 (2000). The statutory language that Respondent relies on as an indicator that the Legislature intended to allow for impact bargaining is “negotiate the impact of the financial urgency.” § 447.4095, Fla. Stat. (2013).

[14–16] It is true that when the words in a statute are technical in nature and have a fixed legal meaning, it is presumed that the Legislature intended that the words be given their technical meaning. See 48A Fla. Jur. 2d Statutes § 135 (2014). However, under the principle of expressio unius, est exclusio alterius, meaning “the mention of one thing implies the exclusion of another,” legislative direction as to how a thing shall be done is, in effect, a prohibition against it being done any other way. See Sun Coast Int’l, Inc. v. Dep’t of Bus. Reg., 596 So.2d 1118, 1121 (Fla. 1st DCA 1992). Therefore, section 447.4095 permits the unilateral implementation of changes to the CBA only after parties have completed the impasse resolution proceedings and failed to ratify the agreement. If the Legislature had intended the changes to take effect earlier or under any other circumstances, it would have stated as much.

3. Chapter 447 does not provide a list of subjects to be treated as mandatory in terms of bargaining. Accordingly, PERC is tasked to make that decision on a case-by-case basis. Public Employees Relations Commission, Scope of Bargaining 2 (2d ed. 2005).

4. Collective bargaining means a process of mutual obligations in which a public employer and a bargaining agent have to meet at reasonable times, negotiate in good faith, and effect a written contract encompassing agreements reached concerning the wages, hours, terms and conditions of employment. § 447.309(1), Fla. Stat. (2013).

5. The Florida Legislature defines public employers’ rights as:

[T]he right of the public employer to determine unilaterally the purpose of each of its constituent agencies, set standards of services to be offered to the public, and exercise control and discretion over its organization and operations. It is also the right of the public employer to direct its employees, take disciplinary action for proper cause, and relieve its employees from duty because of lack of work or for other legitimate reasons.

§ 447.209, Fla. Stat. (2013).

This is especially true considering that the changes here are unlike the changes that are usually the result of impact bargaining. As noted by Petitioner, impact bargaining results from management making decisions outside of the scope of an agreement which affect the agreement in some way. Bargaining under the financial urgency statute, on the other hand, seeks to alter the terms of the agreement itself. Impact bargaining requires a threshold determination as to whether the employer's decision affects employees' wages, hours, or working conditions. Bargaining under financial urgency inherently seeks to change wages, hours, or working conditions. Moreover, altering the agreement effectively alters the "status quo" between the parties that will remain in place until they are changed through bargaining.

The interpretation set forth by PERC and the First District would allow a local government, once it has declared a financial urgency, the ability to exercise a management right to unilaterally alter the terms and conditions of a contract before completing the procedures set forth by the Legislature in section 447.4095. This interpretation does not comport with our acknowledgment of and respect for the constitutional right of collective bargaining and prohibition of the impairment to contract. Therefore, we also quash the decision of the First District and remand the case for proceedings that are consistent with this decision.

It is so ordered.

LABARGA, C.J., and PARIENTE, and LEWIS, JJ., concur.

POLSTON, J., concurs in result with an opinion.

CANADY, J., dissents.

LAWSON, J., did not participate.

POLSTON, J., concurring in result.

I agree with the majority's view that a local government, once it has declared a financial urgency, does not have the ability to unilaterally alter the terms and conditions of a collective bargaining agreement before completing the procedures required by the Legislature in sections 447.4095 and 447.403, Florida Statutes. I would decide this on the plain requirements of the statutory provisions rather than any constitutional grounds.



CITY OF LARGO, Florida, Petitioner,

v.

AHF-BAY FUND, LLC, Respondent.

No. SC15-1261

Supreme Court of Florida.

[March 2, 2017]

Background: City brought action against property owner, which was exempt from ad valorem taxes as non-profit operator of affordable housing, for failure to make annual payment under payments-in-lieu-of-taxes (PILOT) agreement. The Circuit Court, Pineallas County, John A. Schaefer, J., entered judgment in favor of city. Owner appealed. The District Court of Appeal, 169 So.3d 133, reversed and remanded and certified question.

Holdings: The Supreme Court, Quince, J., held that:

- (1) affordable housing property exemption does not prohibit payment of ad valorem taxes that equal amount of taxes that would be due if property owner

AFFIRMED in part, **REVERSED** in part, and **REMANDED** for further proceedings consistent with this opinion.

DOWNEY, DELL and **STONE, JJ.**, concur.

**ON MOTION FOR REHEARING
BY ORDER OF THE COURT:**

We deny the parties' motions for rehearing, but amend this court's order of July 1, 1987 to read as follows:

ORDERED that the motion for attorney's fees filed by Victor K. Rones, Esq. of Margulies & Rones, P.A., is hereby granted as to appellant Weitzer Moon Lake, Ltd. and pursuant to Rule 9.400(b), Fla.R. App.P., upon remand of this cause the amount thereof shall be assessed by the trial court upon due notice and hearing, subject to review by this court under Rule 9.400(c), Fla.R.App.P., and further

ORDERED the appellee's November 11, 1986 motion to tax attorney fees and costs against Weitzer Moon Lake, Ltd., is hereby denied, and granted and remanded as to Fidelity and Deposit Company of Maryland, Inc.



Jose L. MACHADO, Maria Ortega, Jose Baeza and Nubro Corporation, Dade County, Petitioners,

v.

Barbara MUSGROVE, Linda Varner, Ron Weeks, June Still and Bird-Kendall Homeowners' Association, Respondents.

No. 87-415.

**District Court of Appeal of Florida,
Third District.**

July 14, 1987.

On Rehearing En Banc Feb. 23, 1988.

County commission granted request to have property rezoned from interim zoning

to professional offices in area designated by comprehensive land use plan as estate residential. The Circuit Court, Dade County, Moie J.L. Tendrich, Richard Y. Feder and Sidney B. Shapiro, JJ., reversed, and landowners sought certiorari review. The District Court of Appeal held that: (1) test in reviewing challenge to zoning action on grounds that proposed project is inconsistent with comprehensive land use plan is whether zoning authority's determination that proposed development conforms to each element and the objectives of the plan is supported by competent and substantial evidence, and the traditional and nondeferential standard of strict judicial scrutiny applies; (2) burden of proof is on the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements; (3) neighborhood study, when adopted by ordinance, became law and an integral element of the land use plan, which county was bound by; and (4) the proposed commercial project was not shown to be consistent with each element of the land use plan or to further its objectives.

Certiorari denied.

1. Zoning and Planning §191

That properties to one side of subject parcel had been approved for school and temple was totally irrelevant to land use consistency question on application to rezone property from interim zoning to professional offices, in area designated by comprehensive land use plan as estate residential, and thus zoning director's recommendation for approval of commercial rezoning based on approval of the school and temple was entitled to no consideration where schools and churches, unlike commercial offices, were contemplated in estate residential zones.

2. Zoning and Planning §601

Land use planning and zoning are different exercises of sovereign power and

proper analysis, for review purposes, requires that they be considered separately.

3. Zoning and Planning ⇐602

Zoning action is an exercise of legislative power to which a reviewing court applies the deferential "fairly debatable" test.

4. Zoning and Planning ⇐30

Statutory requirement that all zoning action conform to an approved land use plan is, in effect, a limitation on local government's otherwise broad zoning powers. West's F.S.A. §§ 163.3161 et seq., 163.3161(7), 163.3167(1).

5. Zoning and Planning ⇐605

Test in reviewing challenge to zoning action on grounds that proposed project is inconsistent with comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence, and the traditional and nondeferential standard of strict judicial scrutiny applies. West's F.S.A. § 163.3161 et seq.

6. Zoning and Planning ⇐680

Where zoning action is challenged as violative of the comprehensive land use plan, burden of proof is on the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements. West's F.S.A. § 163.3161 et seq.

7. Zoning and Planning ⇐159

Requested zoning will be denied as inconsistent with comprehensive plan when evidence shows nonconformity with the plan, whether proposed project constitutes a greater intensity use, a lesser intensity of use, a different and incompatible character of use, or a failure to comply with the plan's mandatory procedures. West's F.S.A. § 163.3161 et seq.

8. Zoning and Planning ⇐30

Neighborhood study, when adopted by ordinance, becomes law and an integral element of the land use plan, and no longer an expression of general policy, and county is

bound to follow it. West's F.S.A. § 163.3161(7).

9. Zoning and Planning ⇐605

Even where there is some basis for consideration by court pursuant to statute providing that court, in reviewing local government action under the Local Government Comprehensive Planning and Land Development Regulation Act, may consider reasonableness of comprehensive plan or elements thereof and relationship of plan or element thereof to governmental action taken, its actions must be consistent with the overall purpose and intent of the Act. West's F.S.A. §§ 163.3161, 163.3194, 163.3194(4)(a), 166.041(1)(a).

10. Zoning and Planning ⇐167

Rezoning from interim zoning to professional offices in an area designated by comprehensive land use plan as estate residential was not shown to be consistent with each element of the land use plan or to further its objectives, and thus was invalid where the requested rezoning was for nonresidential use on a site within a residential zone which was the subject of a neighborhood area study and such study limited nonresidential development in the zone to ranchlands, nurseries and croplands. West's F.S.A. § 163.3161 et seq.

Papy, Weissenborn & Papy; Fine, Jacobson, Schwartz, Nash, Black & England and Stanley B. Price; Robert A. Ginsburg, Co. Atty., and Robert L. Krawcheck, and Eileen B. Mehta, Asst. Co. Attys., Miami, for petitioners.

John G. Fletcher, South Miami, for respondents.

Before HUBBART, DANIEL S.
PEARSON and FERGUSON, JJ.

PER CURIAM.

Petitioners sought to have their property rezoned from GU (interim zoning) to RU-5A (professional offices) in an area designated by the comprehensive land use plan as estate residential—up to two units per gross acre. They seek certiorari review of a circuit court decision reversing the Coun-

ty Commission's grant of the requested change. Applying the "fairly debatable" standard the circuit court held the proposed 140,000 square foot office complex incompatible with other uses in the area and violative of the land use plan.

The 8.5 acre site of the proposed commercial use is within the area covered by a neighborhood study called the West Dade Ranch Area Study which limits the area to ranchlands, nurseries and croplands. The neighborhood study, an element of the land use plan, is the subject of an ordinance now codified at section 2-116.7, Dade County Code.

This application came before the County Commission on two occasions. In the first appearance, on November 21, 1985, both the Planning Director and the Zoning Director recommended that the application be denied. The Zoning Director expressed an opinion that the proposed RU-5A zoning would be incompatible with the Area Study and the agricultural and institutional uses on the east side of S.W. 127th Avenue.¹ He was specifically concerned that "approval of semi-professional office uses in this area could prompt similar or commercial uses on other properties in the area which could be detrimental." Administrative action was deferred.

When the matter came before the County Commission a second time on January 23, 1986, the Planning Director was still firmly of the view that office zoning on the site would set a precedent for similar requests on undeveloped sites in the area causing erosion of an already dwindling area set aside for ranches and farmland. However, the Zoning Director had changed his view, recommending approval primarily because "the property to the east across S.W. 125th Avenue has been approved for a temple and property to the northeast has been approved for a private school."

Testimony was heard from long-time area residents—farmers, ranchers, and single-family homeowners—who opposed the

proposed zoning for fear that it would bring burdensome traffic and alter the character of the area. The applicant presented exhibits and legal argument. In a session closed to the public, County Commissioners thereafter approved the zoning request on a 3-2 vote.

[1] At the outset we note that the Zoning Director's reason in support of a recommendation for approval of the commercial project—that properties to the east had been approved for a school and temple—was totally irrelevant to the land use plan consistency question. The recommendation was thus entitled to no consideration. *Cf. Hall v. Korth*, 244 So.2d 766 (Fla. 3d DCA 1971). Schools and churches as defined in section 33-18, Dade County Code, unlike commercial offices, are contemplated in estate residential zones so long as they satisfy the impact requirements of that section and section 33-311(d), for unusual uses. See *Metropolitan Dade County v. Fuller*, 497 So.2d 1322 (Fla. 3d DCA 1986), and *Board of County Comm'rs v. First Free Will Baptist Church*, 374 So.2d 1055 (Fla. 3d DCA 1979).

I

PLANNING AND ZONING AS SEPARATE FUNCTIONS

[2] Application of the fairly debatable standard to both the land use and zoning questions, as is often done, tends to obscure the difference between their distinct functions. Land use planning and zoning are different exercises of sovereign power, *Baker v. City of Milwaukee*, 271 Or. 500, 533 P.2d 772 (1975); Haar, *In Accordance With A Comprehensive Plan*, 68 Harv.L. Rev. 1154 (1968); therefore, a proper analysis, for review purposes, requires that they be considered separately.

A local comprehensive land use plan is a statutorily mandated legislative plan to control and direct the use and development

immediately west are unimproved. Dade County and the applicant describe the plant nursery as a commercial use. Both the Planning Director and Zoning Director treat it as consistent with an agricultural use.

1. The site is at the southwest corner of S.W. 127th Avenue and Sunset Drive in Dade County. Surrounding property includes two churches to the north, a plant nursery to the south, and single family homes (RU-1) to the west. Lands

of property within a county or municipality. § 163.3167(1), Fla.Stat. (1985); *Southwest Ranches Homeowners Ass'n v. Broward County*, 502 So.2d 931 (Fla. 4th DCA 1987). The plan is likened to a constitution for all future development within the governmental boundary. *O'Loane v. O'Rourke*, 231 Cal.App.2d 774, 782, 42 Cal.Rptr. 283, 288 (1965).

Zoning, on the other hand, is the means by which the comprehensive plan is implemented, *City of Jacksonville Beach v. Grubbs*, 461 So.2d 160 (Fla. 1st DCA 1984), and involves the exercise of discretionary powers within limits imposed by the plan. *Baker v. Milwaukie*, 533 P.2d at 775. It is said that a zoning action not in accordance with a comprehensive plan is ultra vires. Haar, *In Accordance With A Comprehensive Plan*, at 1156.

II

STANDARD OF REVIEW; BURDEN OF PROOF

[3] It is well settled that a zoning action is an exercise of legislative power to which a reviewing court applies the deferential fairly debatable test. See, e.g., *Southwest Ranches*, 502 So.2d at 935. If the zoning action is one where reasonable people could differ as to its propriety, i.e., whether the action is arbitrary, capricious, or otherwise an abuse of discretion, the administrative decision will not be disturbed by a reviewing court. *Dade Savings & Loan Ass'n v. City of North Miami*, 458 So.2d 861 (Fla. 3d DCA 1984).

[4] Part II of chapter 163, Florida Statutes, called the Local Government Comprehensive Planning and Land Development Regulation Act, and the local comprehensive plans which it mandates, are not zoning laws. The statute's requirement that all zoning action conform to an approved land use plan is, in effect, a limitation on a

2. That the land use plan does restrict local zoning power becomes increasingly clear with each legislative session. Section 163.3177(6), Florida Statutes (1985), requires that the future land use map designate the exact location and extent of all proposed commercial uses. Sections 163.3167, 163.3177, and 163.3184, Florida Statutes

local government's otherwise broad zoning powers. *Maryland-National Capital Park & Planning Comm'n v. Mayor & Council of Rockville*, 272 Md. 550, 325 A.2d 748 (Ct.App.1974). The purpose of the statute is to accomplish, *inter alia*, orderly growth, protection of resources and stability of land use throughout the state. § 163.3161(7), Fla.Stat. (1985).²

[5] The test in reviewing a challenge to a zoning action on grounds that a proposed project is inconsistent with the comprehensive land use plan is whether the zoning authority's determination that a proposed development conforms to each element and the objectives of the land use plan is supported by competent and substantial evidence. The traditional and non-deferential standard of strict judicial scrutiny applies.

Strict scrutiny is not defined in the land use cases which use the phrase but its meaning can be ascertained from the common definition of the separate words. Strict implies rigid exactness, *People v. Gardiner*, 33 A.D. 204, 53 N.Y.S. 451 (1893), or precision, Black's Law Dictionary 1275 (5th ed. 1979). A thing scrutinized has been subjected to minute investigation. *Commonwealth v. White*, 271 Pa. 584, 115 A. 870 (1922). Strict scrutiny is thus the process whereby a court makes a detailed examination of a statute, rule or order of a tribunal for exact compliance with, or adherence to, a standard or norm. It is the antithesis of a deferential review.

[6, 7] Analogously where a zoning action is challenged as violative of the comprehensive land use plan the burden of proof is on the one seeking a change to show by competent and substantial evidence that the proposed development conforms strictly to the comprehensive plan and its elements. See *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973) (en banc). See also Comment, *Bur-*

(Supp.1986), mandate that local comprehensive plans coordinate with regional and state plans, subject to review for compliance with state and regional land use plans. See deHaven-Smith & Paterson, *The 1986 Glitch Bill-Missing Links In Growth Management*, Fla.Env'tl. & Urban Issues, October 1986, at 4.

den of Proof in Land Use Regulations: A Unified Approach and Application to Florida, 8 Fla.St.U.L.Rev. 499 (1980) (the proof of conformity of the zoning action to the land use plan must be discernible to a reviewing court on a verbatim record). Where the record is silent, or the evidence shows nonconformity with the plan, e.g., that a proposed project constitutes a greater intensity of use, *Baker v. Milwaukie; Maryland-National Capital Park & Planning Comm'n v. Mayor & Council of Rockville*, a lesser intensity of use, *City of Cape Canaveral v. Mosher*, 467 So.2d 468 (Fla. 5th DCA 1985), a different and incompatible character of use, *Alachua County v. Eagle's Nest Farms, Inc.*, 473 So.2d 257 (Fla. 1st DCA 1985), or a failure to comply with the plan's mandatory procedures, *Hillsborough County v. Putney*, 495 So.2d 224 (Fla. 2d DCA 1986), the requested rezoning will be denied as inconsistent with the comprehensive plan.

In *Sengra Corp. v. Metropolitan Dade County*, 476 So.2d 298 (Fla. 3d DCA 1985), we held that a grant of zoning for a use not consistent with the comprehensive land use plan was invalid, implicitly rejecting the notion that the statutes permitted a reviewing court to further consider the extent and degree of a clear inconsistency.³ Two recent cases, *Alachua County v. Eagle's Nest Farms, Inc.* and *Hillsborough County v. Putney*, appear to follow a strict adherence view although, as in *Sengra*, there was no in-depth examination of the meaning of consistency.

III

CONSISTENCY WITH LAND USE PLAN

The tests for consistency of a development project with a land use plan have

3. On this point we differ with the unique view adopted by the court in *Southwest Ranches* that it may weigh competing public and private interests for determining consistency even where a proposed development fails to conform to one or more critical elements of the land use plan. The court rejected Judge Cowart's strict adherence view articulated in *Mosher* which we think more closely follows the statute.

been, until recently, conflicting or imprecise primarily because the word consistency lacked definition.⁴ In 1985 the legislature added a definition of consistency at section 163.3194(3)(a), Florida Statutes (1985):

A development order or land development regulation shall be consistent with the comprehensive plan if the land uses, densities or intensities, and other aspects of development permitted by such order or regulation are compatible with and further the objectives, policies, land uses, and densities or intensities in the comprehensive plan and if it meets all other criteria enumerated by the local government.

The legislation implies, as one writer has noted in a thoughtful examination of the subject, that application of a fairly debatable, or for that matter any other deferential or discretionary standard, is not the correct standard of review of an administrative determination that a development order is consistent with the local comprehensive plan. McPherson, *Cumulative Zoning and the Developing Law of Consistency with Local Comprehensive Plans*, 61 Fla.B.J. 71 (1987).

Writing a concurring opinion in *City of Cape Canaveral v. Mosher*, 467 So.2d 468 (Fla. 5th DCA 1985), Judge Cowart gave the term consistency a working definition which squares with the statute:

The word "consistent" implies the idea or existence of some type or form of model, standard, guideline, point, mark or measure as a norm and a comparison of items or actions against that norm. Consistency is the fundamental relation between the norm and the compared item. If the compared item is in accordance with, or in agreement with, or within the parameters specified, or exemplified, by

4. Compare *City of Cape Canaveral v. Mosher* (change of zoning from medium density residential district to single family homes not consistent with plan, therefore invalid) with *City of Jacksonville v. Grubbs* (use of land more limited than the future use contemplated by the comprehensive plan is not inconsistent with the plan). Both cases agree, however, that a use more intense than proposed by the comprehensive plan is subject to strict scrutiny.

the norm, it is "consistent" with it but if the compared item deviates or departs in any direction or degree from the parameters of the norm, the compared item or action is not "consistent" with the norm.

Mosher, 467 So.2d at 471.

Further, in reasoning which we adopt, he wrote:

A comprehensive land use plan legislatively sets a zoning norm for each zone. Under Section 163.3194(1), Fla.Stat., after adoption of such a plan, zoning changes should be made only when existing zoning is inconsistent with the plan; otherwise, the plan should be legislatively amended as to the area of the entire zone or as to the uses permitted within the entire zone. This is ... the only way to (1) regulate and maintain land use by zones; (2) make individual zoning changes, which are essentially executive action, conform to a legislated plan; and (3) avoid arbitrary "spot zoning" change that permits the use of individual parcels to depart from a plan.

Mosher, 467 So.2d at 471.

Dade County is critical of *Mosher* and its requirement for strict adherence to the land use plan,⁵ contending that it would deprive local government of the flexibility needed to respond to rapidly changing conditions in Dade County. In response the opponents, neighboring landowners, contend that conditions change in rapid and uncontrolled fashion in Dade County, increasing the need for costly public services and facilities, due to loose enforcement of the land use planning scheme. We briefly examine the three elements of the Land Use Plan in light of the arguments.

The Land Use Plan consists of a color-coded map which separates uses of all county lands into roughly thirteen categories including residential (six densities), industrial and office, agricultural, and parks and recreation. Textual material on the reverse side of the map constitutes the second element of the plan. Neighborhood and functional studies and plans, as

5. McPherson urges adoption of Judge Cowart's views as expressed in *Mosher* that all development orders challenged as being inconsistent

adopted pursuant to ordinance, make up the third element of the comprehensive plan.

The pertinent textual material provides:

The residential designations [on the map] only indicate the overall maximum residential density for an area. *Non-residential uses that are permitted in these areas are not shown.* Decisions by the County relative to when, where and how these areas are to be developed with respect to non-residential uses *will be* guided through the use of the policies and written guidelines of the Comprehensive Development Master Plan. *The application of these policies and guidelines for planning ... of ... nonresidential permitted use is most appropriate and beneficial at the neighborhood level.*

(Emphasis added.) See note 2 for additional land use map detail now required by statute.

[8] Dade County argues that the plan's textual language states a general policy which it is not bound to follow. We agree with respondents that if that is the case then there are no standards or parameters to guide when, where, what kind and how much commercial use will be permitted in a planned residential zone, leaving the zoning authority free to approve, *ad hoc*, commercial zoning in a residential zone subject only to a deferential court review. We have previously rejected that philosophy:

[T]he law of Florida is committed to the doctrine of the requirement that zoning ordinances ... must be predicated upon legislative standards which can be applied to all cases, rather than to the theory of granting an administrative board or even a legislative body the power to arbitrarily decide each case entirely within the discretion of the members of the administrative board or legislative body.

City of Homestead v. Schild, 227 So.2d 540, 543 (Fla. 3d DCA 1969).

with the local comprehensive plan should be judicially scrutinized.

A Comprehensive Land Use Plan is not a "vest-pocket tool," *Baker v. City of Milwaukee*, for making individual zoning changes based on political vagary, see Haar & Kayden, *Zoning Laws Reflect Our Values and Priorities*, N.Y. Times, Nov. 24, 1986, at 17, col. 1, noted in *Southwest Ranches*. Instead, it is a broad statement of a legislative objective "to protect human, environmental, social, and economic resources; and to maintain, through orderly growth and development, the character and stability of present and future land use and development in this state." § 163.3161(7), Fla.Stat. (1985) (emphasis added). See 1979 Att'y Gen.Op.Fla. 079-88 (Sept. 28, 1979).

Further, a neighborhood study, when adopted by ordinance, becomes a law and an integral element of the land use plan. To accept Dade County's argument, that it is not bound by the neighborhood study element of the plan, would render useless the costly and time-consuming processes of formulating a comprehensive plan, and adopting neighborhood area studies. Uselessness will not be attributed to legislative acts. *Allied Fidelity Ins. Co. v. State*, 415 So.2d 109 (Fla. 3d DCA 1982). Finally, and significantly, the neighborhood study once adopted by ordinance is no longer an expression of general policy. The study becomes a permanent law of local government which continues in force until repealed. § 166.041(1)(a), Fla.Stat. (1985). We know of no rule and petitioners have offered none, which allows government, acting in its executive capacity, to disregard its own laws.

[9] Section 163.3194(4)(a), Florida Statutes (1985),⁶ relied upon by the petitioners in support of the argument that the plan is a flexible instrument, does not compel a different result. We read the provision, in context, as a recognition of the court's

6. Section 163.3194(4)(a) provides:

A court, in reviewing local governmental action ... under this act, may consider, among other things, the reasonableness of the comprehensive plan, or element or elements thereof, relating to the issue justiciably raised or the appropriateness and completeness of the comprehensive plan, or element or ele-

ments thereof, in relation to the governmental action ... under consideration. The court may consider the relationship of the comprehensive plan, or element or elements thereof, to the governmental action taken ... but private property shall not be taken without due process of law and the payment of just compensation.

inherent power to take into account fundamental fairness questions as may arise from a strict application of the plan—not as a license to second-guess the legislative body where there is simply the to-be-expected collision of the plan with private interests. The record reflects no contention or showing below that the plan is totally unreasonable as applied to the development involved in the litigation, or that the plan is incomplete or internally inconsistent, or that the plan, in its application, would constitute a taking of private property without due process or fair compensation. Even where there is some basis for consideration by the court pursuant to section 163.3194, its actions must be consistent with the overall purpose and intent of the Act as expressed in section 163.3161.

CONCLUSION

Whether a proposed development project is consistent with a local comprehensive land use plan and all of its elements is tested on review by a standard of strict scrutiny; the burden is on the applicant for rezoning to show by competent and substantial evidence that the requested rezoning conforms to the legislative plan.

[10] A neighborhood area study is a critical element of Dade County's land use plan; without it there are no legislative standards to guide where, when, what kind and the amount of nonresidential uses will be allowed in a residential zone. The requested rezoning for a non-residential use is on a site within a residential zone which is the subject of a neighborhood area study. That study, now codified at section 2-116.7, Dade County Code, as the West Dade Ranch Study Area, limits non-residential development in the zone to ranchlands, nurseries and croplands.

Because the applicants were unable to show that their proposed commercial

project was consistent with each element of the land use plan and furthered its objectives, the circuit court was eminently correct in voiding the rezoning.

In light of our determination on the land use plan issue we need not reach the separate zoning question.

Certiorari denied.

Before SCHWARTZ, C.J., and
BARKDULL, HENDRY, HUBBART,
NESBITT, BASKIN, DANIEL S.
PEARSON, and FERGUSON, JJ.*

On Rehearing En Banc

Upon consideration of this cause en banc, the court unanimously adopts the panel opinion herein filed July 14, 1987, as its own. Accordingly, the petition for writ of certiorari is denied.



Annette YOUNGENTOB and Joel
Youngentob, Appellants,

v.

ALLSTATE INSURANCE
COMPANY, Appellee.

No. 4-86-3116.

District Court of Appeal of Florida,
Fourth District.

Nov. 12, 1987.

On Petition for Rehearing Feb. 24, 1988.

Action was brought to recover for injuries sustained in automobile accident. The Circuit Court, Broward County, M. Daniel Futch, Jr., J., entered judgment on jury verdict for defendant, and appeal was taken. The District Court of Appeal, Letts, J., held that automobile accident defendant was not entitled to "seat belt instruction" where there was no evidence as to operabil-

* JORGENSON, J., did not participate.

ity of belts other than fact that automobile was in good condition.

Reversed and remanded.

Anstead, J., concurred specially and filed opinion, and dissented with opinion from denial of rehearing.

Trial 252(8)

Automobile accident defendant was not entitled to "seat belt instruction" where there was no evidence as to operability of belts other than fact that automobile was in good condition.

Corey R. Stutin of Steinberg & Stutin,
P.A., Orlando, for appellants.

John R. Hargrove of Tew, Jorden &
Schulte, Fort Lauderdale, for appellee.

LETTS, Judge.

An injured car driver appeals, claiming that it was error to give a seat belt instruction. We agree and reverse.

The seminal case about seat belt defenses is *Insurance Company of North America v. Pasakarnis*, 451 So.2d 447, 454 (Fla. 1984), which unequivocally places the burden of proof on the defense to establish not only that a car is equipped with seat belts, but that they are "operational." In the case at bar, there is absolutely no evidence as to the operability of the belts other than the fact that the automobile was in good condition. Undoubtedly that is so, but we are of the opinion that an essential element of proof to support the *Pasakarnis* requirement that the seat belts are operational, is absent. As a consequence, it was reversible error to give such an instruction.

In so holding, we do not believe our conclusion conflicts with *American Automobile Association v. Tehrani*, 508 So.2d 365 (Fla. 1st DCA 1987) because in that case there was at least some evidence of operability in that the belts "clicked."

**REVERSED AND REMANDED FOR A
NEW TRIAL.**

3

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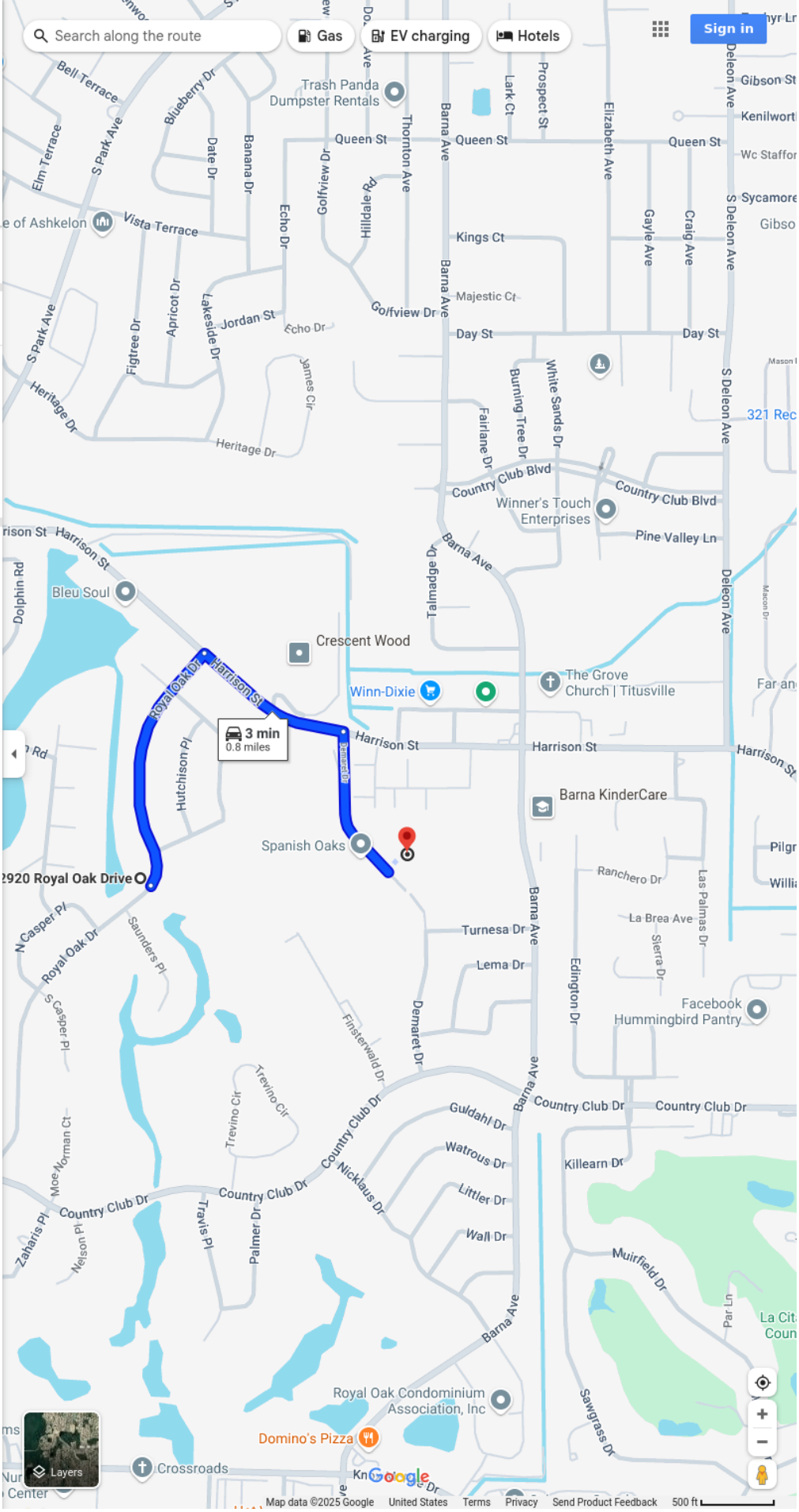
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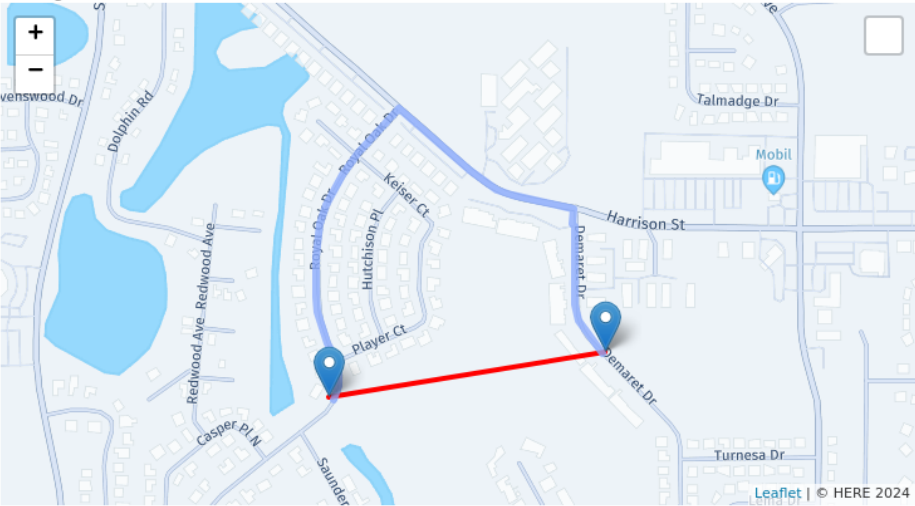
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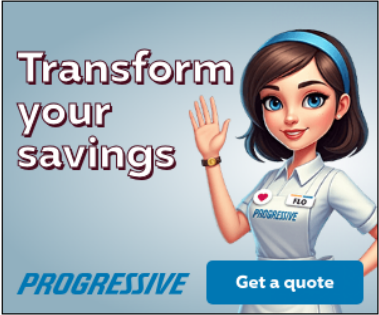
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