IN THE SUPREME COURT OF FLORIDA

MARTIN COUNTY CONSERVATION ALLIANCE and 1000 FRIENDS OF FLORIDA, INC.,

Petitioners,

v.

MARTIN COUNTY, DEPARTMENT OF COMMUNITY AFFAIRS, MARTIN ISLAND WAY, LLC, and ISLAND WAY, L.C.,

Respondents.

CASE NO. SC11-2455
Lt. Case No. 1D09-4956

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS FILED BY AMERICAN PLANNING ASSOCIATION, FLORIDA CHAPTER

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PREFACE

Amicus Curiae American Planning Association, Florida Chapter will be referred to herein as "APA-Florida."

Petitioners Martin County Conservation Alliance and 1000 Friends of Florida, Inc., will be collectively referred to as the "Petitioners."

Respondents Martin County, Department of Community Affairs, Martin Island Way, LLC, and Island Way, LC, will be collectively referred to as the "Respondents."

IDENTITY AND INTEREST OF AMICUS CURIAE

American Planning Association, Florida Chapter ("APA-Florida") is a state-wide, not-for-profit interest and research organization founded in 1978 to advance the art and science of land use planning at the local, regional, state, and national levels. APA-Florida represents approximately 2,600 professional planners, planning officials, and citizen planners involved in urban and rural planning activities in their communities. These members are involved on a daily basis in formulating planning policies, reviewing development proposals, and preparing development regulations. APA-Florida provides statewide leadership in the development of sustainable communities by advocating excellence in planning, providing professional development for its members, and working to protect and enhance the natural and built environments.

APA-Florida's membership has adopted policies that represent the Chapter's positions on professional planning issues. APA-Florida's adopted Citizen Participation policy provides:

> APA Florida strongly supports citizen access and public input to the planning process and is committed to improving citizen involvement through local planning initiatives and legislative changes to Florida's growth management framework. APA Florida supports an open and collaborative planning process that includes meaningful citizen participation through reasonable notice, open public records and accessibility to all stages

of the planning process, as well as promoting the use of citizen participation best practices at the local level.

APA-Florida's adopted Citizen Standing policy further provides:

> Citizen standing and public participation are fundamental to an effective growth management process. APA Florida supports the rights of citizens to meaningfully participate in the planning process and will oppose proposals to weaken citizen standing.

As reflected above, APA-Florida has a particular interest in advocating for the rights of affected parties to participate fully and meaningfully in the land use process, including any administrative and appellate proceedings pursuant to Chapter 120, *Florida Statutes*. Moreover, due to the exceptional importance of the matters presented in this case to professional planners, citizens, non-profit land use advocacy organizations, and communities statewide, APA-Florida has a special interest in the Court's consideration of the merits of this case.

APA-Florida believes the First District Court of Appeal's decision below has broad implications, which if not disapproved of by this Court, will have a substantial chilling effect on the ability of citizens and non-profit organizations to exercise their rights to seek judicial review of land use decisions throughout the State of Florida. By Order dated July 3, 2012, this Court granted APA-Florida's Motion for Leave to File Amicus Curiae Brief in support of the Petitioners.

SUMMARY OF THE ARGUMENT

The First District's decision below, which imposes sanctions and awards attorneys' fees pursuant to Sections 57.105 and 120.595(5), *Florida Statutes*, based upon the finding that the Petitioners lacked "appellate" standing, creates substantial uncertainty for parties exercising their right to seek judicial review concerning the validity of a comprehensive plan amendment pursuant to Chapter 120, *Florida Statutes*. The issue of "appellate" standing is not determined during the underlying administrative hearing contesting the validity of a comprehensive plan amendment. Rather, "appellate" standing is decided for the first time on appeal. Under the majority's decision, however, a party who reasonably believes its interests may be "adversely affected" by the final agency action on the comprehensive plan amendment is put in the precarious situation of either: (1) exercising its right to appeal and facing substantial monetary sanctions if the district court disagrees on the merits or otherwise concludes that "appellate" standing is lacking; or (2) choosing to forgo exercising its appellate rights and allow the asserted legal error(s) to remain uncorrected.

The First District's decision also essentially adopts a "meritless" standard for the imposition of sanctions and award of attorneys' fees pursuant to Sections 57.105, *Florida Statutes*, and 120.595(5), *Florida Statutes*. Such standard is contrary to existing case law interpreting such statutes and will have substantial

chilling effect on a party's ability to exercise its appellate rights and to obtain counsel to appeal final agency action pursuant to Section 120.68(1), *Florida Statutes*, by essentially transforming such statutes into "prevailing party" fee provisions.

Accordingly, this Court should disapprove of the First District's decision below and quash the First District's imposition of monetary sanctions against the Petitioners pursuant to Sections 57.105 and 120.595(5), *Florida Statutes*.

ARGUMENT

For the reasons set forth herein and in the Petitioners' Initial Brief, APA-Florida submits that the Court should disapprove of the First District's decision below and quash the First District's imposition of monetary sanctions against the Petitioners.

Standard of Review

The standard of review for an order imposing sanctions or granting a motion for attorneys' fees is generally an abuse of discretion. However, where the lower court's determination is based upon a conclusion of law or an interpretation of a statute, as in the instant case, the standard of review is *de novo*. *See Country Place Cmty. Ass'n v. J.P. Morgan Mortg. Acquisition Corp.*, 51 So. 3d 1176, 1179 (Fla. 2d DCA 2010); *see also Spano v. Bruce*, 62 So. 3d 2, 6 (Fla. 3d DCA 2011) ("Where entitlement to attorney's fees depends upon the interpretation of a statute .

. . the standard of review is de novo."); *Attorney's Title Ins. Fund, Inc. v. Landa-Posada*, 984 So. 2d 641, 643 (Fla. 3d DCA 2008) ("Our standard of review is de novo because the ruling on the attorney's fees involves an erroneous interpretation and application of Florida law.").

A. The First District's Decision Creates Substantial Uncertainty And Imposes Significant Financial Risks For Those Exercising Their Appellate Rights Pursuant To Chapter 120, Florida Statutes

Briefly stated, Florida's Community Planning Act, Chapter 163, Part II, *Florida Statutes* ("Act"), requires each local government in Florida to adopt and maintain a comprehensive plan to govern future development. *See* § 163.3167(2), Fla. Stat. (2011). In accordance with the Act, a local government may adopt amendments to its comprehensive plan, which are generally subject to review by the Department of Economic Opportunity (formerly the Department of Community Affairs) ("DEO") for compliance with Florida's growth management laws. *See id.* at § 163.3184(3)-(4).

By statute, any "affected person," as defined in Section 163.3184(1)(a), *Florida Statutes*, may file a petition for a formal administrative hearing with the Florida Division of Administrative Hearings to challenge whether a comprehensive plan amendment is "in compliance" with Florida law. *See id.* at § 163.3184(5)(a). The main issue to be decided by the Administrative Law Judge ("ALJ") in such proceedings is whether the contested plan amendment is "in compliance," as

defined by Section 163.3184(1)(b), *Florida Statutes*, and the bulk of the evidence introduced during the administrative hearing relates to the compliance determination.

The administrative hearing process concludes with the ALJ entering a "Recommended Order" regarding whether the DEO or Administration Commission, as applicable, should enter a final order finding the plan amendment "in compliance" or "not in compliance." *See id.* at § 163.3184(5)(d)-(d). The ALJ's Recommended Order will typically include findings of fact and conclusions of law regarding whether the petitioner challenging the plan amendment has standing as an "affected person" pursuant to Section 163.3184(1)(a), *Florida Statutes*, to have initiated the administrative proceeding.

Significantly, however, the ALJ does ***not*** make any findings or determination during the administrative hearing regarding whether the petitioner is "adversely affected" so as to have "appellate" standing pursuant to Section 120.68(1), *Florida Statutes*, to challenge the ultimate final agency action on the contested comprehensive plan amendment. [1]

> Petitioners also sought findings that they also are "adversely affected" for purposes of appellate review under Section 120.68(1), *Florida Statutes*. ***It is***

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[1] Section 120.68(1), *Florida Statutes*, provides that "[a] party who is ***adversely affected*** by final agency action is entitled to judicial review." (Emphasis supplied).

> ***considered unnecessary and premature to determine whether any party would be entitled to judicial review of the final order entered in this case, or to make findings as to whether the parties would be "adversely affected."*** It is believed that such determinations, if they become necessary, can be made upon the evidence in the record.

Fla. Wildlife Fed'n v. Town of Marineland, 2006 WL 1169701, *22 (Div. of Admin. Hrgs. Apr. 28, 2006) (internal citations omitted) (emphasis supplied); *see also Ashley v. Dep't of Cmty. Affairs*, 2006 WL 1635445, *24 (Div. of Admin. Hrgs. June 12, 2006) (same); *1000 Friends of Fla., Inc. v. Dep't of Cmty. Affairs*, 2005 WL 995004, *41 (Div. of Admin. Hrgs. Apr. 28, 2005) (same).[2]

In other words, the determination of whether a party to the administrative proceeding is "adversely affected by final agency action" (as opposed to merely "affected") so as to have "appellate" standing is ***not*** decided during the underlying administrative hearing on the validity of a comprehensive plan amendment.

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[2] While the parties to the administrative proceeding may attempt to "stipulate[] that [those involved] have standing as 'adversely affected' parties for the purpose of appellate review pursuant to Section 120.68(1), *Florida Statutes*," *see Brevard Cnty. v. City of Cocoa*, 2006 WL 1877056, *4 n.3 (Div. of Admin. Hrgs. July 3, 2006), it is not clear that any such stipulation would be binding upon an appellate court or otherwise prevent such court from *sua sponte* examining whether the parties have standing. *Compare Polk Cnty. v. Sofka*, 702 So. 2d 1243, 1245 (Fla. 1997) (stating "parties cannot stipulate to jurisdiction over the subject matter where none exists"); *Grand Dunes, Ltd. v. Walton Cnty.*, 714 So. 2d 473, 475 (Fla. 1st DCA 1998) (addressing standing *sua sponte*, holding standing in the administrative context is a matter of subject matter jurisdiction and cannot be conferred by consent of the parties); *with Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 842 (Fla. 1993) (holding issue of standing may be waived).

Rather, the issue of "appellate" standing is decided for the first time by the district court of appeal – the very body which, pursuant to majority opinion below, can *sua sponte* impose significant monetary sanctions against a party to the administrative proceeding should the appellate panel decide (based upon the cold record) that such party lacks "appellant" standing.[3] Further, in light of the fact that the district court is typically the court of last resort in such cases, any such order imposing monetary sanctions will be virtually insulated from further judicial review.

Compounding matters, the majority opinion below reasons that, because the ALJ found the contested plan amendments would not increase development densities, the Petitioners could not establish that they were "adversely affected" by final agency action for purposes of "appellate" standing. *See Martin Cnty. Conservation Alliance v. Martin Cnty.*, 73 So. 3d 856, 863 (Fla. 1st DCA 2011). The majority's reasoning, however, is inconsistent with Florida law and would essentially preclude any appellate review, especially in cases where an appellant seeks to raise errors of law. As explained by the Second District in *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So. 3d 1079 (Fla. 2d DCA 2009):

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[3] In a typical appeal, an appellate court refrains from addressing issues that were not presented to and ruled upon by the lower tribunal. *See, e.g., Sierra ex rel. Sierra v. Pub. Health Trust of Dade Cnty.*, 661 So. 2d 1296, 1298 (Fla. 3d DCA 1995) ("An appellate court is reactive; it can only review asserted errors made by lower tribunals. . . . Appellate courts may not decide issues that were not ruled on by a trial court in the first instance.").

> IMC argues that the Authority cannot bring this appeal because the ALJ and DEP concluded that IMC's mining activities would not have any adverse effects on the Peace River. Thus, according to IMC, the Authority was not "adversely affected" by the agency action. However, ***interpreting section 120.68(1) in this manner would result in a situation in which a party who unsuccessfully challenged a permit application . . . could never appeal a final order*** issued by DEP because the permit cannot issue if there are adverse effects that are not mitigated.[4] Because the Authority presented evidence that supported its position that it would be adversely affected *if* the permit was issued, ***the determination of whether those permits were properly issued necessarily includes appellate review***.

Id. at 1086; *see also* The Florida Bar, *Florida Administrative Practice* § 4.9 (9th ed. 2011) ("A finding by the ALJ or the agency that the proposed action would not have any adverse effects on the petitioner, however, does not mean the petitioner is not 'adversely affected' by the final agency action for purposes of *F.S.* 120.68(1).").[5]

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[4] Similarly, if timely challenged, a comprehensive plan amendment cannot become effective unless it is determined to be "in compliance," as defined in the Act. *See* §§ 163.3184(3)(c)4., 163.3184(4)(e)5., Fla. Stat. (2011).

[5] In this regard, it also bears noting that the majority opinion states that Section 120.68, *Florida Statutes*, "narrowly provides standing only to parties whose legitimate interests are adversely affected in some concrete manner." *Martin Cnty. Conservation Alliance v. Martin Cnty.*, 73 So. 3d 856, 864 (Fla. 1st DCA 2011). The text of Section 120.68(1), however, provides, that "[a] party who is adversely affected by final agency action is entitled to judicial review." To the extent the majority's language can be read to further restrict and impose additional requirements for standing above and beyond the plain language of Section 120.68(1), the Court should disapprove of the same.

In sum, the majority opinion below and the low threshold adopted therein for imposing sanctions create substantial uncertainty and impose significant financial risks for a party who seeks to exercise its appellate rights pursuant to Section 120.68(1), *Florida Statutes*. Simply put, pursuant to the majority opinion, a party who reasonably believes its interests may be "adversely affected" by the final agency action on the comprehensive plan amendment or who seeks to raise an error of law is put in the precarious situation of either: (1) exercising its right to appeal and facing substantial monetary sanctions if the district court disagrees on the merits or otherwise concludes that "appellate" standing is lacking; or (2) choosing to forgo exercising its appellate rights and allow the asserted legal error(s) to remain uncorrected.

Land use and environmental appeals often times present close calls and unique issues, and few, if any, parties with legitimate claims will dare to undertake an appeal if the results of not prevailing on the merits are the punitive assessment of attorneys' fees. Indeed, if the slightest doubt exists as to the likelihood of success on appeal, parties with legitimate claims will inevitably opt against pursuing their appellate rights for fear of significant monetary sanctions. Further, such a punitive bar to appellate review may prevent parties with legitimate claims from exercising their right to an administrative hearing regarding a comprehensive plan amendment in the first place. Accordingly, the Court should disapprove of

the First District's decision below and quash the First District's imposition of monetary sanctions against the Petitioners.

B. The First District's Decision Essentially Adopts A "Meritless" Standard For The Imposition Of Monetary Sanctions Which Is Contrary To Existing Law

It is well established in Florida that "statutes awarding attorney's fees must be strictly construed." *Dade Cnty. v. Pena*, 664 So. 2d 959, 960 (Fla. 1995); *see also Willis Shaw Express, Inc. v. Hilyer Sod, Inc.*, 849 So. 2d 276, 278 (Fla. 2003). Further, as this Court has recognized, the purpose of Section 57.105, *Florida Statutes*, is to discourage baseless claims, not to cast a chilling effect on the use of the courts. *See Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982), *receded from in part on other grounds*, *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985); *Stevenson v. Rutherford*, 440 So. 2d 28, 29 (Fla. 4th DCA 1983). Moreover, "because a district court of appeal is, in the vast majority of cases, the court of last resort, it should exercise great restraint in imposing appellate sanctions." *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 570-71 (Fla. 2005).

In the instant case, the majority opinion below adopts an expansive, not strict, construction of Sections 57.105 and 120.595(5), *Florida Statutes*, essentially adopting a "meritless" standard for the imposition of sanctions and award of attorneys' fees. In so doing, the majority opinion states that "Section 57.105

applies to all who file appeals in Florida's courts . . . if their legal position was without merit." *See Martin Cnty. Conservation Alliance*, 73 So. 3d at 864. The majority opinion further states that "Section 57.105 does not require a finding of frivolousness to justify sanctions." *See id.* at 858, 865. This Court should disapprove of the reasoning and the expansive "meritless" standard adopted by the majority opinion below, which essentially transforms Sections 57.105 and 120.595(5), *Florida Statutes*, into "prevailing party" fee provisions and will have a substantial chilling effect on the ability of citizens and non-profit organizations to exercise their appellate rights regarding land use decisions in Florida.

First, contrary to the majority opinion below and notwithstanding the 1999 amendments to Section 57.105, Florida courts (including the First District) have consistently held that Section 57.105 is still intended to address "frivolous" pleadings and appeals. *See, e.g.*, *Read v. Taylor*, 832 So. 2d 219, 222 (Fla. 4th DCA 2002) ("The revised statute, while broader than its predecessors, still is intended to address the issue of frivolous pleadings."); *see also Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006); *Murphy v. WISU Props., Ltd.*, 895 So. 2d 1088, 1094 (Fla. 3d DCA 2004); *Wendy's of N.E. Fla., Inc. v. Vandergriff*, 865 So. 2d 520, 523 (Fla. 1st DCA 2003).

Second, contrary to the majority opinion below, merely raising an unsuccessful claim or failing to state a cause of action does ***not*** warrant the

imposition of sanctions pursuant to Section 57.105. As this Court explained in *Whitten*:

> A frivolous appeal is not merely one that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error, that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, *i.e.*, against appellant or plaintiff in error.

Whitten, 410 So. 2d at 505 (citation omitted); *see also Cullen v. Marsh*, 34 So. 3d 235, 242-43 (Fla. 3d DCA 2010) ("As this and many other courts have repeatedly confirmed, merely losing a case on the merits is not a basis for a section 57.105 fee award." (citing cases)); *Mason v. Highlands Cnty. Bd. of Cnty. Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002) ("Failing to state a cause of action is not, in and of itself, a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105."). Indeed, if simply losing on the merits or on standing warranted sanctions and an award of attorneys' fees, Section 57.105 sanctions would become common place, which is neither the purpose nor the intent of the statute.

Lastly, simply losing on the merits or on standing does not warrant an award of attorneys' fees pursuant to Section 120.595(5). Rather, for an administrative appeal to be "frivolous" and warrant an award of attorneys' fees pursuant to Section 120.595(5), it must present "no justiciable question and [be] so devoid of merit on the face of the record that there is little prospect it will ever succeed." *Consultech of Jacksonville, Inc. v. Dep't of Health*, 876 So. 2d 731, 736 (Fla. 1st DCA 2004); *see also Procacci Commercial Realty, Inc. v. Dep't of Health and Rehabilitative Servs.*, 690 So. 2d 603, 609 (Fla. 1st DCA 1997). Again, if simply losing on the merits or on standing warranted an award of attorneys' fees, Section 120.595(5) fee awards would become the norm, rather than the exception reserved for those limited circumstances where an administrative appeal is completely "devoid of merit on the face of the record" and "so clearly untenable" – not simply unsuccessful.

In sum, as noted by Judge Van Nortwick in his well-reasoned dissent below,

> [T]he precedent being set by this order will unduly discourage participation in the appellate process. This sanction order holds, in effect, that where a final order has found that the appellants would not be adversely affected by a development an assertion of appellate standing to challenge such order will inevitably result in section 57.105 sanctions. Such a liberal use of section 57.105 will lead to the intolerable development that only those with deep pockets, who can run the risk of sanctions if they lose, will seek appellate redress. Parties such as an average citizen, small business, or nonprofit organization, in good faith seeking review of a ruling that

> is reasonably believed to be erroneous, could be coerced into forgoing an appeal because they would be unable to risk their financial existence to potential sanctions. This chilling effect is especially present in cases in which a local nonprofit environmental organization . . . challenges a development order impacting its community. . . . [S]uch a chilling effect will not only reduce the ability of citizens to challenge environmentally adverse real estate development, but may constitute a denial of the guarantee of access to courts provided in Article I, section 21 of our State's Constitution: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

Martin Cnty. Conservation Alliance, 73 So. 3d at 872 (Van Nortwick, J., dissenting); *see also Scholastic Sys., Inc. v. LeLoup*, 307 So. 2d 166, 169 (Fla. 1974) ("A party is afforded his 'day in court' with respect to administrative decisions when he has a right to a hearing and has the right of an appeal to a judicial tribunal of the action of an administrative body."). Accordingly, the Court should disapprove of the First District's decision below and quash the First District's imposition of monetary sanctions against the Petitioners.

CONCLUSION

In sum, for the reasons set for above and in the Petitioners' Initial Brief, the Court should disapprove of the First District's reasoning below and quash the First District's decision to *sua sponte* impose sanctions against the Petitioners pursuant to Section 57.105, *Florida Statutes*, and award attorneys' fees and costs pursuant to Section 120.595(5), *Florida Statutes*.

RESPECTFULLY SUBMITTED on this 13th day of July 2012.

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CERTIFICATE OF COMPLIANCE

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

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