IN THE SUPREME COURT OF FLORIDA

Case No. SC11-2455

District Court Case No. 1D09-4956

Division of Administrative Hearings Case Nos. 08-1144GM & 08-1465GM

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

vs.

MARTIN COUNTY, DEPARTMENT OF COMMUNITY AFFAIRS, MARTIN ISLAND WAY, LLC, and ISLAND WAY, LC,
Respondents.

RESPONDENT MARTIN COUNTY'S ANSWER BRIEF

STEPHEN FRY
County Attorney

DAVID A. ACTON
Senior Assistant County Attorney

Martin County Administrative Center
2401 SE Monterey Road
Stuart, FL 34996-3322

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STATEMENT OF THE CASE

The statement of the case presented by Petitioners in their initial brief is inadequate. It omits important events that are critical to the issue which must be decided in this appeal from the First District Court of Appeal's post-dismissal order imposing monetary sanctions on Petitioners and their attorneys.

The Administrative Case and Corresponding Appeal from the Administrative Final Order

The lower tribunal, the First District Court of Appeal, accurately set forth in its November 2011 order imposing sanctions (the order now under review by this Court) the relevant history of the underlying case, from initial adoption of the comprehensive plan amendments that were challenged by Petitioners in administrative proceedings through the lower tribunal's dismissal of Petitioners' appeal from the administrative final order filed on June 21, 2010. *See Martin County Conservation Alliance v. Martin County,* 73 So. 3d 856, 859-861 (Fla. 1st DCA 2011). Most of that narrative is repeated here, with some brief supplemental material added [in brackets]:

> "In 2007, the Martin County Commission passed two ordinances amending the Martin County Comprehensive Growth Management Plan (the Plan). The first amendment, known as the Land Protection Incentives Amendment (Land Protection Amendment), was submitted to create opportunities for permanent preservation of contiguous open space, environmentally sensitive land, and agricultural land use while maintaining residential capacity. The Land Protection Amendment created an optional development design for parcels of 500 acres or more [located "outside" the boundaries of the county's Primary Urban Services District and Secondary Urban Services District], by authorizing clusters of

residential units on smaller lots than the current minimum [size of 20 acres], while maintaining the density status quo, and permanently setting aside at least 50% of the parcel for preservation, continued agricultural use, or surface water management projects. ...

The second amendment at issue, known as the Secondary Urban Services District Amendment (Urban Services Amendment), allows owners within the boundary of the Secondary Urban Services District to connect to public water and sewer facilities at the owner's expense, thus eliminating septic tanks and private wells.

The Department of Community Affairs (the Department) initially disapproved of the Land Protection Amendment, while finding the Urban Services Amendment in compliance with section 163.3184(1)(b), Florida Statutes [(2008)]. The Department requested a formal administrative hearing regarding the Land Protection Amendment, and Appellants [now Petitioners] intervened [having already initiated a separate case challenging the Department's finding concerning the Urban Services Amendment, which had been consolidated with the Department's case concerning the Land Protection Amendment]. Soon thereafter, Martin County and the Department entered into a settlement agreement, with Martin County adopting compliance amendments for the Land Protection Amendment. Administrative litigation ensued, however, when Appellants [Petitioners] continued to challenge the Amendments' compliance. Appellees [now Respondents] Martin Island Way, LLC, and Island Way, LC, then intervened on the basis that they are landowners who will be affected by the Urban Services Amendment.

The ALJ held a hearing. ... Appellants [Petitioners] claimed standing [to pursue administrative challenges to both Amendments] under section 163.3184(1), Florida Statutes [(2008)], because they met the definition of "affected persons"; however, Appellants [Petitioners] did not argue that they will be adversely affected if the Amendments are found to be in compliance. Appellants' [Petitioners'] proposed recommended order does not assert that any specific environmental harm will result from approval of the amendments.

In his recommended order, the ALJ concluded that both Amendments comply with chapter 163, Florida Statutes [(2008); specifically, §§163.3164, et seq., then known as the Local Government Comprehensive Planning and Land Development Regulation Act]. ...

The ALJ concluded that Appellants did not prove the amendments

are contrary to Florida standards regarding comprehensive plans. ...

Appellants [Petitioners] filed 25 exceptions to the recommended order. They did not challenge the benefits of extending water and sewer service [into the Secondary Urban Services District], nor did they dispute the ALJ's findings that the Amendments will positively affect the environment, fire safety and drinking water quality, and that taxpayers will not be adversely affected.

The Department adopted the ALJ's findings of fact and conclusions of law *in toto*, rejecting Appellants' [Petitioners'] exceptions. Appellants [Petitioners] appealed and, as noted, this court dismissed the appeal, finding they lacked standing because they could not establish that they were an aggrieved party. *See Martin County Conservation Alliance* [*v. Martin County*], ___ So. 3d at ___ [35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010)]." *See* copy at Pet'rs Appendix, Tab A.

After the lower tribunal dismissed Petitioners' appeal for lack of standing, Petitioners did not file any motion for rehearing, clarification, or certification pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, did not file any motion for rehearing en banc pursuant to Rule 9.331(d)(1), Florida Rules of Appellate Procedure, and – most importantly – **did not file any Notice to invoke the discretionary jurisdiction of this Court pursuant to Rule 9.120(b), Florida Rules of Appellate Procedure**. Consequently, the order of the First District Court of Appeal dismissing Petitioners' appeal for lack of standing became final on July 22, 2010 (a Thursday), the thirty-first day after it was rendered.

The Post-Dismissal Order of the Lower Tribunal Imposing Sanctions on Petitioners and Their Attorneys

On the same day that the lower tribunal dismissed Petitioners' appeal for lack of

standing, the court *sua sponte* issued a separate order requiring Petitioners "to show cause why sanctions should not be imposed upon them pursuant to section 57.105(1), Florida Statutes, for the filing of an appeal for which standing clearly is not present." *See* copy at Martin County's Supplemental Appendix, Tab D [Tabs A-C already appear in Petitioners' Appendix]. Petitioners jointly filed a response to the order, and Respondents filed separate replies to Petitioners' response.

The lower tribunal issued an order on December 14, 2010, imposing monetary sanctions on Petitioners and their attorneys pursuant to section 57.105(1), Florida Statutes, consisting of the attorneys' fees and costs incurred by all Respondents. It also granted the motion of Respondents Martin Island Way, LLC, and Island Way, LC, for attorney's fees and costs pursuant to section 120.595(5), Florida Statutes.

Petitioners jointly filed a motion for rehearing "**of the Court's Order dated December 14, 2010,** which held that the Appellants and their counsel filed this appeal in violation of Sections 57.105(1) and 120.595(5), Florida Statutes, and imposed sanctions against Appellants and their counsel." (R. 31, bold emphasis added). The full extent of the relief requested in Petitioners' motion was as follows: "A. Grant this Motion for Rehearing; [and] B. Withdraw [the court's] December 14 Order, and issue a revised Order discharging [the court's] June 21, 2010 Order to Show Cause and denying the Motion for Attorney's Fees and Costs filed by Appellee[s] Martin Island

Way, LLC and Island Way, LC." (R. 37.) Simultaneously, Petitioners filed a motion for rehearing *en banc* "**of the Court's Order dated December 14, 2010** requiring payment of attorney's fees as a sanction for the filing of an appeal for which standing was found to be clearly not present." (R. 40, bold emphasis added). The full extent of the relief requested in that motion was as follows: "that the Court grant rehearing *en banc*, and vacate the Sanctions Order entered on December 14, 2010." (R. 49.) **Neither motion sought rehearing of, nor requested any relief concerning, the final order of dismissal entered by the lower tribunal on June 21, 2010.**

The lower tribunal issued an order "On Motion For Rehearing" on November 4, 2011, denying Petitioners' motions for rehearing and for rehearing *en banc*, but with-drawing the prior order issued December 14, 2010, and substituting a new order in its place. *See* copy at Pet'rs Appendix, Tab B. It is this November 2011 order which is now under review, pursuant to this Court granting Petitioners' notice seeking an exercise of this Court's discretionary jurisdiction on one basis: to review decisions that "expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law." Fla. R. App. P. 9.030(a)(2)(A)(iv).

Petitioners never filed a motion with the lower tribunal seeking certification of the lower tribunal's order concerning sanctions and attorney's fees as being a decision which passed upon a question of great public importance.

STATEMENT OF THE FACTS

In the November 2011 order imposing sanctions, the majority opinion of the First District Court of Appeal accurately summarized the facts established during the administrative hearing about the purposes, provisions, and impacts of the two Martin County legislative enactments challenged by Petitioners, the Land Protection Amendment and the Urban Services Amendment. *See Martin County Conservation Alliance v. Martin County*, 73 So. 3d at 859-860. The majority opinion also accurately summarized the facts about the record of testimony and evidence presented during the administrative hearing that were relevant to determining whether Petitioners had proven a substantial number of their members would be adversely affected by any of the comprehensive plan changes enacted by either Amendment. *Id.* at 860-861.

Petitioners filed their notice of appeal with the agency clerk of the Department of Community Affairs on September 29, 2009, seeking judicial review of the final order of the Department finding both the Land Protection Amendment and the Urban Services Amendment "in compliance." The notice of appeal was filed by the attorney who had represented Petitioners throughout the administrative process.

Petitioners and their attorneys knew when they appealed the agency's final order that they had called 10 witnesses to testify about matters relevant to the "standing" of the two Petitioners, both for the administrative hearing and for possible future judicial

review. They knew that 7 of the 10 witnesses were "members" of both Petitioners and thus had offered testimony as to the standing of both. They also knew that only 4 of the 10 witnesses had testified about the impact of both Amendments, and that the other 6 witnesses had testified only about the impact of the Land Protection Amendment.

1000 Friends of Florida ("1000 Friends")

Petitioners and their attorney knew that the president of 1000 Friends testified on matters relevant to the standing of 1000 Friends, as did 7 of its "members." (*See* Pres. Pattison: Tr. Vol. III, 63-111; Melzer: Tr. Vol. VI, 151-180; Hurchalla: Tr. Vol. IV, 246-251; Thornton: Tr. Vol. VI, 180-188; Florio: Tr. Vol. VI, 188-191; Tomlinson: Tr. Vol. VI, 191-194; Brumfield: Tr. Vol. VI, 194-199; & Fielding: Tr. Vol. VI, 206-213.) According to the president, 1000 Friends was a non-profit corporation and anyone could become a "member" upon "donation" of money. (Tr., Vol, III, 100 & 106.) At the time of the administrative hearing, the president estimated 1000 Friends had approximately 3,500 members, of whom approximately 550 were Martin County residents (including the 7 members who testified). (Tr., Vol. III, 64.)

Martin County Conservation Alliance ("MCCA")

Petitioners and their attorney knew that the chairperson of the board of MCCA, who was one of the above-referenced members of 1000 Friends (Melzer), also testified on matters relevant to the standing of MCCA, as did the other 6 members of 1000 Friends who also were members of MCCA. (*See* transcript volumes and pages, *supra*.)

An eighth county resident, who was a member only of MCCA, and the executive director Audubon of Martin County, an "organizational member" of MCCA, also testified. (*See* Carnevale: Tr. Vol. VI, 200-205; & Exec. Dir. Braun, Tr. Vol. V, 6-31.) According to the chairperson, MCCA was a non-profit corporation and allowed both individuals and organizations to be "members." (Tr., Vol. VI, 156.) At the time of the administrative hearing, the chairperson estimated MCCA had approximately 120 individual members, of whom 38 "own homes and live in Martin County" (including the 8 members who testified). (Tr., Vol. VI, 159; Pet'rs Exh. 4.) MCCA also had 14 organizational members, including 1000 Friends. (Tr. Vol. VI, 159, 173.)

Land Protection Amendment testimony

When Petitioners and their attorney filed the notice of appeal, they knew that virtually all 10 witnesses they had called to testify on matters concerning the standing of either entity had been asked to address whether the Land Protection Amendment would adversely affect them personally. (*See* Melzer: Tr. Vol. VI, 166-169; Hurchalla: Tr. Vol. IV, 251; Braun, for Audubon: Tr. Vol. V, 13-18 & 21-26; Thornton: Tr. Vol. VI, 183; Florio: Tr. Vol. VI, 190-191; Tomlinson: Tr. Vol. VI, 194; Brumfield: Tr. Vol. VI, 196-198; Carnevale: Tr. Vol. VI, 201-203; & Fielding: Tr. Vol. VI, 211-212.)

The president of 1000 Friends also was asked by one of Petitioners' attorneys to clarify why he believed that "many members of your organization will be affected by

this Amendment," which he answered by broadly referring to both amendments collectively. (Tr. Vol. III, 93-94.)

Petitioners and their attorney knew that some witnesses had testified about using lands or waters "outside" the Primary and Secondary Urban Service Districts for some recreational uses, such as bird watching, hiking, kayaking, and target practice. (*See* Melzer: Tr. Vol. VI, 153 & 159; Hurchalla: Tr. Vol. IV, 248-250; Braun, for Audubon: Tr. Vol. V, 9-11 & 15-17; & Florio: Tr. Vol. VI, 190-191.) They also knew, however, that none of those witnesses had testified as to how the Land Protection Amendment would actually affect their future pursuit of such recreational uses *adversely*.

Petitioners and their attorney knew that only 2 of the 10 witnesses had testified about owning any real property located near a tract of more than 500 acres of land that might undergo residential development using the clustering plus conservation option allowed by the Land Protection Amendment. They also knew that no other members had testified about any adverse effect to their own property from that Amendment.

Martin County resident Thornton, a member of both MCCA and 1000 Friends, testified about owning one acre of land located "outside" both the Primary and Secondary Urban Service Districts, and "within 600 feet" of a large tract of land already approved for residential development as "ranchettes" with a density of 1 dwelling unit per 20 acres. (Tr. Vol. VI, 183 & 186.) He did not testify, however, about how

the proximity of his property to the large tract of land caused him to be adversely affected by the adoption of the Land Protection Amendment. He admitted that it was mere speculation that such nearby land, *already approved* for development without using the clustering plus conservation option allowed by the Amendment, might someday seek approval for the new optional development pattern instead. (Tr. Vol. VI, 187.)

The executive director of Audubon of Martin County (a member of MCCA, *but not of 1000 Friends*) testified that his organization owned 260 acres of undeveloped land used as a wildlife preserve. (Tr. Vol. V, 13 & 21 [originally 280 acres, less 20 acres given to another non-profit entity].) Audubon's land is located "outside" the Primary Urban Services Boundary, but is "surrounded" by land zoned for residential development density of 1 dwelling unit per 5 acres and *not* for density of 1 dwelling unit per 20 acres, the type of land subject to application of the clustering plus conservation option under the Land Protection Amendment. (*See* Tr. Vol. V, 13-15 & 21-25.)

Finally, Petitioners and their attorney knew that the physical evidence they had offered concerning standing during the administrative hearing was intended to prove Petitioners' contention that both non-profit corporations were "operating a business" within the County, *see* § 163.3184(1)(a), Fla. Stat. (2008), and not to prove that any *member* of either Petitioner would be adversely affected personally by the Land Protection Amendment.

Urban Services Amendment testimony

When Petitioners and their attorney filed the notice of appeal, they knew that only 3 of the 9 residents they had called to testify on matters concerning the standing of either entity had attempted to address whether the Urban Services Amendment would adversely affect them personally. (*See* Melzer: Tr. Vol. VI, 165-166; Hurchalla: Tr. Vol. IV, 248-250; Thornton: Tr. Vol. VI, 184-186.) Also, the president of 1000 Friends was asked by one of Petitioners' attorneys to clarify why he believed that "many members of your organization will be affected by this Amendment," which he answered by broadly referring to both amendments collectively. (Tr. Vol. III, 93-94.)

Petitioners and their attorney also knew that, of the two witnesses who had testified about owning property, only the owner of the one acre of land (Thornton) had alleged any adverse effect from the Urban Services AmendmentL: a *presumed* increase in his utility bill for his residential property, not the one acre of undeveloped land. (Tr. Vol. VI, 184-186.) They knew that the executive director of Audubon, the other property owner, had not offered any testimony concerning the Urban Services Amend-ment, much less any concerning Audubon itself being adversely affected by it.

Finally, Petitioners and their attorney knew that they had not offered any physical evidence to prove that any member of either Petitioner would be adversely affected personally by the Urban Services Amendment.

SUMMARY OF ARGUMENT

The order issued by the First District Court of Appeal in November 2011, imposing sanctions on Petitioners and their attorneys because they appealed an administrative final order even though they knew (or should have known) they had failed to prove during the administrative hearing that either of the comprehensive plan amendments they had challenged would adversely affect a substantial number of the members of either Petitioner, constituted a sound and well reasoned exercise of the district court's discretion under section 57.105(1), Florida Statutes. The order is correctly based upon the district court's review of the record and includes the findings required to justify the imposition of such sanctions. Petitioners' appeal is the sort of frivolous litigation that section 57.105(1) is intended to discourage.

Petitioners' request that this Court also review and reverse the district court's prior order dismissing their appeal must be denied. This Court lacks jurisdiction to review that decision because Petitioners did not file any notice of discretionary jurisdiction, allowing that decision to be become final on the 31st day after it was issued.

The arguments by Petitioners and amicus curiae that the district court's order imposing sanctions must be reversed because of its "chilling effect" on parties and attorneys pursuing meritorious appeals in administrative cases should be rejected, just as this court and district courts have rejected the same argument in past cases.

STANDARD OF REVIEW

Petitioners' assertion that a *de novo* standard of review is applicable in this case is incorrect. It is well settled that "[a] lower court's decision to impose sanctions is reviewed under an abuse of discretion standard. *See Harless v. Kuhn,* 403 So. 2d 423, 425 (Fla. 1981) (noting that "[i]n the absence of an abuse of discretion the sanctions imposed by [a] judge should stand.")." *Boca Burger, Inc. v. Forum,* 912 So. 2d 561, 573 (Fla. 2005). *Accord, Siegel v. Rowe,* 71 So. 3d 205, 211 (Fla. 2nd DCA 2011); *Montgomery v. Larmoyeux,* 14 So. 3d 1067, 1073 (Fla. 4th DCA 2009); *Yakavonis v. Dolphin Petroleum, Inc.,* 934 So. 2d 615, 618 (Fla. 4th DCA 2006).

The relevant portion of the opinion in *Peyton v. Horner,* 920 So. 2d 180 (Fla. 2nd DCA 2006), is particularly appropriate in this case since the facts are so similar. There, the court entered judgment for defendants on grounds that plaintiff lacked standing to pursue its claim, and sanctioned the plaintiff's attorney by imposing attorney's fees against him pursuant to section 57.105, Florida Statutes. Concerning the appropriate standard of review, the appellate court stated:

> "The [plaintiff] did not appeal the final judgment. Therefore, our task in this appeal is not to determine whether that judgment was correct. Rather, we review the circuit court's ruling that [the plaintiff's attorney] knew or should have known that [his client's] position ... was not supported by the material facts necessary to establish the claim. We review the court's award of section 57.105 fees for an abuse of discretion. [citation omitted]" *Id.* at 183.

Accord, *Siegel v. Rowe, supra,* at 210-211. Furthermore, the finding that sanctions are appropriate "must be based upon substantial competent evidence presented to the court at the hearing on attorney's fees or otherwise before the court and in the … record." *Yakavonis v. Dolphin Petroleum, Inc., supra.*

ARGUMENT

I. THE NOVEMBER 2011 ORDER IMPOSING SANCTIONS IS A SOUND EXERCISE OF THE DISTRICT COURT OF APPEAL'S DISCRETION AND CONSISTENT WITH SECTION 57.105(1), FLA. STAT., BECAUSE PETITIONERS APPEALED EVEN THOUGH THEY KNEW OR SHOULD HAVE KNOWN THEY HAD FAILED TO PROVE DURING THE ADMINISTRATIVE HEARING THAT EITHER OF THE CHALLENGED COMPREHENSIVE PLAN AMENDMENTS WOULD ADVERSELY AFFECT A SUBSTANTIAL NUMBER OF MEMBERS OF EITHER PETITIONER IN ANY WAY

The issue in this case is whether the First District Court of Appeal abused its discretion when issuing its November 2011 order imposing monetary sanctions on Petitioners and their attorneys for having appealed the administrative final order finding the two challenged comprehensive plan amendments in compliance, where the district court found that Petitioners knew or should have known they had failed to prove that either of the Amendments would adversely affect a substantial number of the members of either Petitioner in any way. The sanctions imposed by the court and the finding by the court based upon its review of the record of testimony and evidence presented during the administrative hearing are entirely consistent with the require-

ments of sections 57.105(1), Florida Statutes (2011).

A. Petitioners' appeal is precisely the sort of frivolous litigation that section 57.105(1), Fla. Stat., is intended to discourage by allowing a trial or appellate court to impose monetary sanctions upon both the parties and their attorney when they knew or should have known that their claim or appeal lacked any foundation in law or fact.

Petitioners begin their appeal in this case by arguing that high standards must be met before a court may impose monetary sanctions against parties and their attorneys under sections 57.105(1) and 120.595(5), Florida Statutes. Petitioners cite and quote from several cases that they believe enunciate those high standards. One of those cases is the decision of this Court in *Boca Burger, Inc. v. Forum*, 912 So. 2d 561 (Fla. 2005).

In that case, this Court addressed the substantial rewriting of section 57.105 by the Florida Legislature in 1999 "to significantly broaden the courts' authority to award attorney's fees under that section." *Id.* at 570. This court stated:

> "The standard for granting fees also has changed. Previously, a movant had to show 'a *complete* absence of a justiciable issue of either law or fact raised by the losing party.' § 57.105, Fla. Stat. (Supp. 1978). Under the revised version, however, a movant need only show that the party and counsel 'knew or should have known' that any claim or defense asserted was (a) not supported by the facts or (b) not supported by an application of 'then-existing' law. § 57.105, Fla. Stat. (2000). *The amendments therefore greatly expand the statute's potential use.*"

Id., (emphasis added). With respect to appeals, this Court also made the cautionary statement that "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."

Id., at 570-571.

In their initial brief, however, Petitioners have attempted to resurrect the former wording of the statute and reinsert the word "complete" in the section 57.105 standard for imposing sanctions, then cite this Court's decision in the *Boca Burger* case as though it supported their reworded standard that "[s]anctions are appropriate only when a claim is *completely* unsupported by the facts or law." (Pet'rs Init. Br., 7.), (emphasis added). Petitioners' wording is both wrong and unsubstantiated by this Court's opinion in *Boca Burger*.

Petitioners do correctly state that the purpose for which section 57.105 was intended "was to deter frivolous pleadings." *Wendy's of N.E. Fla., Inc. v. Vander-griff*, 865 So. 2d 520, 523 (Fla. 1st DCA 2003). Furthermore, pursuant to the 1999 rewrite of section 57.105, it is now clear that "the bar for the imposition of sanctions has been lowered, but just how far it has been lowered is an open question requiring a case by case analysis … ." *Id.*, at 524.

To the extent that the application of section 57.105 is still based upon a concept of frivolousness, the attempt of the court to address that concept in *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482, 491 (Fla. 3rd DCA 2000), merits attention.

> "In sum, an appeal which lacks a factual basis or well-grounded legal argument will be considered devoid of merit. [citation omitted] In other words, a 'frivolous' appeal is one which raises arguments a reasonable lawyer would either know are not well grounded in fact, or would know

> are not warranted either by existing law or by a reasonable argument for the extension, modification, or reversal of existing law."

Under that "standard" (?), the appeal by Petitioners in this case was manifestly frivolous with respect to their standing to seek judicial review of the administrative final order. However, the First District Court of Appeal was correct when it stated in its November 2011 order imposing sanctions that "Section 57.105 does not *require* a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in fact or law. [citations omitted]."

Petitioners are simply wrong when they assert that their pursuit of an appeal in this case "bears no resemblance to the egregious situations in which courts have appropriately sanctioned a party for *blatant disregard of clear substantive or procedural law.*" (Pet'rs Init. Br., 10), (emphasis added). It is the district court that was right when it found that "no possible view of the evidence presented at the final hearing below would support a reasonable conclusion that [Petitioners] had standing to appeal. This is precisely the type of litigation the Legislature meant to prevent when it amended section 57.105 in 1999. *Wendy's* [*v. Vandergriff*], 865 So. 2d at 523 … ."

[**NOTE**: Petitioners' arguments at the end of Argument section I.A. of their initial brief about the alleged "chilling effect" the decision in this case will have on appeals from final orders in administrative proceedings is relocated and addressed in new Argument section III, *infra*, in conjunction with the arguments advanced by the several amicus curiae granted leave to file briefs in this case.]

B. The November 2011 order imposing sanctions is correctly based on the district court's review of the record below and its finding that Petitioners knew or should have known that the testimony and evidence they presented during the administrative hearing failed to prove that either of the challenged comprehensive plan amendments would adversely affect a substantial number of Petitioners' members in any way.

1. The district court found "a lack of appellate standing" in its June 2010 order dismissing the appeal, which is not under review, and not in its November 2011 order imposing sanctions, and the district court's inclusion in the latter order of a more detailed explanation of the basis for the earlier decision does not provide a basis for reversal of the November 2011 order imposing sanctions nor conflict with any of the cited prior decisions of other district courts of appeal.

Petitioners' argument that the First District Court of Appeal "improperly relied on the rulings on the merits below to find a lack of appellate standing" is flawed in two respects. Either of the flaws is fatal to Petitioners' argument.

The first flaw is that the district court's determination of Petitioners' "lack of appellate standing" was rendered in the June 2010 decision actually dismissing the appeal for lack of standing and not in the November 2011 *post-dismissal* order imposing sanctions. *See Martin County Conservation Alliance v. Martin County*, ___ So. 3d ___, 35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010), at Petitioners Appendix, Tab A ("The appellants have not demonstrated that their interests or the interests of a substantial number of members are 'adversely affected' by the challenged order, so as to give them standing to appeal."). The earlier decision dismissing the appeal is not under review by this Court. Indeed, this Court lacks jurisdiction to review the

dismissal or the basis for it because Petitioners failed to file any notice to invoke the discretionary jurisdiction of this Court within 30 days after that decision was issued, resulting in the dismissal of the appeal becoming final on the 31st day (July 22, 2010). *See State ex rel. Cantera v. District Court of Appeal, Third District*, 555 So. 2d 360, 362 (Fla. 1990), ("An appellate court cannot exercise jurisdiction over a cause where a notice of appeal has not been timely filed."); *Roadrunner Const., Inc. v. Dep't of Financial Svcs.*, 33 So. 3d 78, 79 (Fla. 1st DCA 2010), ("failure to initiate an appellate proceeding within the time set by the supreme court divests the appellate court of jurisdiction."); *Breakstone v. Baron's of Surfside, Inc.*, 528 So. 2d 437, 439 (Fla. 3rd DCA 1988), ("jurisdiction to entertain an appeal is invoked *solely* by the notice of appeal which must timely seek review of an appealable … order or orders."). The fact that the district court chose to include a more detailed discussion about the basis for the court's previous dismissal of the appeal in its more recent order imposing sanctions than the court had provided in its earlier decision actually dismissing the appeal is not a basis for reversal of the November 2011 order imposing sanctions, which is the only order or decision of the district court now under review.

The second flaw in Petitioners' argument is that the cases which Petitioners cite as supporting the proposition that standing is a "forward looking concept" are simply not relevant to the determination of standing to appeal. Indeed, three of the four cited

cases did not address *appellate* standing at all! *See St. Johns Riverkeeper, Inc. v. St. Johns Water Mgmt. Dist.*, 54 So. 3d 1051 (Fla. 5th DCA 2011); *Palm Beach County Envtl. Coalition v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Reily Enterprises, LLC v. Fla. Dep't of Envtl. Prot.*, 990 So. 2d 1248 (Fla. 4th DCA 2008). Those cases only addressed standing to *initiate* an administrative hearing under sections 120.569 and 120.57, Florida Statutes. The fourth case cited, *Peace River / Manasota Reg. Water Supp. Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079 (Fla. 2nd DCA 2009), did address both standing to initiate an administrative hearing, *Id.* at 1082-1085, and standing to appeal under section 120.68, Florida Statutes, *Id.* at 1085-1086. Yet in their initial brief to this Court, Petitioners persist – as they have in *all* prior appellate pleadings – to rely only upon the text of the opinion addressing standing to initiate an administrative hearing and not the text concerning appellate standing. The only reasonable explanation can be that when the district court addressed the issue of *appellate* standing in that case, it held that the appellant actually had presented evidence which "supported its position that it would be adversely affected *if* the permit was issued," *Id.*, (emphasis original), and thus engaged – as a district court *must* do in any appeal – in a "backward looking" *review of the record* in order to resolve the issue of appellate standing. Of couse, this is precisely what the First District Court of Appeal did in this case, too. The court found, *upon reviewing the record of testimony*

and evidence presented during the administrative hearing, that Petitioners had failed to assert or prove that they or a substantial number of their members would be *adversely affected* by the challenged comprehensive plan amendments. See Martin County Conservation Alliance v. Martin County, ___ So. 3d ___, 35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010); Pet'rs Appendix, Tab A. Although this outcome is different than the result reached by the Second District Court in the *IMC Phosphates* case, there is no "holding conflict" between the two decisions, which applied the same law but did not involve "substantially similar controlling facts."

This case provides this Court with an opportunity to clarify the distinction between the determination of standing at the outset of civil litigation or administrative proceedings and the determination of standing at the outset of an appeal. In the former, the determination of a plaintiff's or petitioner's standing to file and prosecute a complaint or administrative petition is evaluated by a trial judge or an administrative law judge (ALJ) based upon mere *allegations* in an initial pleading. Even the party and its attorney are similarly constrained, not knowing whether their allegations are sufficient to establish standing due to the absence of any evidence proving or disproving the truth of such allegations at that point in the proceedings. Yet in an appellate case such as this one, a full evidentiary record is available, both to the court which must determine whether a party has standing to appeal *and to the party and its*

attorney when they file the notice of appeal. The extent of the evidence – or, as in this case, the lack of evidence – showing not only *the existence of interests* that could be affected, but more importantly the likelihood of those interests *actually being adversely affected* if the appellants do not prevail, is well known to all by the time the notice of appeal is filed. Simply put, an appellate court must "look backwards" to the record in order to determine the standing of an appellant to challenge the decision in question, before it can consider the merits of any appellate arguments advanced by the appellant.

Petitioners' argument under I.B.1. fails to establish any basis for reversal of the November 2011 order imposing sanctions.

2. The district court's November 2011 order imposing sanctions did not require any "legal interpretations" of the Martin County comprehensive plan and was correctly based only upon the facts concerning how either Amendment would – or would not – adversely affect any member of either Petitioner, as established by the record of testimony and evidence presented during the administrative hearing.

Petitioners' argument that the district court's November 2011 order imposing sanctions conflicts with earlier decisions of this court and other district courts that hold "the interpretation of [comprehensive plans] presents legal, not factual, issues," (Pet'rs Init. Br., 16), is based upon a misapprehension of what the district court needed to consider in order to decide whether to impose sanctions on Petitioners and their attorneys. Furthermore, the contention by Petitioners that the issues concerning the merits of the administrative final order which they were raising on appeal were legal

issues rather than factual ones might have been an appropriate argument to make when seeking judicial review of the June 2010 decision dismissing the appeal, but has no bearing on the district court's November 2011 order imposing sanctions.

The district court's determination that sanctions should be imposed in this case clearly did not rest upon any "interpretation" of any provision of Martin County's comprehensive plan, either as an issue of law or as an issue of fact. It rested upon (1) the district court's review of the record below, including the evidence (or lack of it) and the administrative law judge's findings of fact as approved by the Department of Community Affairs, (2) the parties' briefs on appeal, (3) the parties' responses to the district court's order to show cause, and (4) the current law *concerning sanctions* under section 57.105(1), Florida Statutes. There simply were no "rulings" by the district court that depended upon any "interpretation" of the comprehensive plan.

Petitioners' selected *and very heavily edited* quotations of passages from the district court's November 2011 order imposing sanctions are grossly misleading. (Pet'rs Init. Br., 17.) The first two are from the district court's recitation of the "Facts and Procedural History" of the case below, (73 So. 3d at 859-861), and clearly are not rulings by the district court as Petitioners have asserted. The third, fourth, and fifth passages are from the district court's "Analysis" of "Standing Under Section 120.68, Florida Statutes," but have been lifted from three paragraphs addressing the *burden of*

proof that Petitioners had to fulfill below in order to establish a factual record supporting their standing to appeal under that statute, (73 So. 3d at 863). They also are not rulings on the "merits" of Petitioners' arguments on appeal. Indeed, the district court *never* addressed the merits of Petitioners' arguments, as even Petitioners themselves admit. (*See* Pet'rs Init. Br., 24: "The [district] court's opinion dismissing the appeal did not reach the merits of any of the issues raised by Petitioners.").

Petitioners' argument is now presented to this court in reliance upon the same four principal cases that they have relied upon heretofore in seeking rehearing by the district court and in arguing for "conflict jurisdiction" as a basis for review of the district court's November 2011 order imposing sanctions. None are applicable because none involved appellate review of an administrative final order determining whether a comprehensive plan amendment was "in compliance" with the applicable state statutory and rule provisions. This Court's decision in *Rinker Materials Corp. v. City of North Miami*, 286 So. 2d 552 (Fla. 1973), pre-dated the existence of comprehensive plan requirements in Florida and instead involved review of a trial court's interpretation of a local zoning code provision. The other three cases, *Dixon v. City of Jacksonville*, 774 So. 2d 763 (Fla. 1st DCA 2000), *Johnson v. Gulf County*, 26 So. 3d 33 (Fla. 1st DCA 2009), and *Nassau County v. Willis*, 41 So. 3d 270 (Fla. 1st DCA 2010), involved the issue of "consistency" between a county or municipal development order

and the corresponding local comprehensive plan provisions. *See* §163.3215, Fla. Stat. (2008). The "liberalized" standing allowed for "consistency" challenges under that statute is inapposite to the more strict requirement under section 120.68 that limits standing "only to parties whose legitimate interests are *adversely affected* in some *concrete* manner." *Martin County Conservation Alliance v. Martin County*, 73 So. 3d at 864.

As part of this argument, Petitioners have included in their initial brief in this case an extensive recitation of the arguments that they wanted the district court to consider concerning the merits of the administrative final order. (*See* Pet'rs Init. Br., 19-23.) Petitioners are contending in essence that because they raised "legal issues" instead of "factual issues" they should have standing to seek appellate review even if they presented no evidence that the outcome of such appellate review would adversely affect any of the interests of their members personally. This is tantamount to putting the cart before the horse. The district court could not even consider the merits of Petitioners' arguments, regardless of whether they involved issues that were legal or factual, until it resolved the issue of Petitioners' standing *to raise any issues at all* concerning the administrative final order!

Fundamentally, Petitioners' argument under I.B.2. is really just a belated attack on the earlier dismissal of their appeal by the district court, again through criticism of

the more detailed explanation of the basis for that earlier decision in the November 2011 order imposing sanctions. This argument fails to establish any basis for reversal of the order imposing sanctions.

> **3. The district court found that sanctions were appropriate in this case because Petitioners and their attorneys ignored controlling case law and filed an appeal where no evidence was presented in the administrative forum that the challenged agency action adversely affected a substantial number of the members of either Petitioner, and not merely because of the earlier dismissal of Petitioners' appeal.**

The district court's November 2011 order imposing sanctions is far from being the merely "automatic" imposition of sanctions based solely upon the earlier dismissal of Petitioners' appeal, as Petitioners (and amicus curiae) claim it to be. (Pet'rs Init. Br., 27.) Indeed, the decision clearly resulted from a thorough and thoughtful review of the entire record below, leading to the finding that sanctions were warranted against Petitioners and their attorneys "for filing an appeal without citing material facts to support standing or 'then existing law' to support an appeal based on the material facts as found below." 73 So. 3d at 857.

> "Instead of directly addressing standing on appeal in their Initial Brief, [Petitioners] argued: "The potential for a 'bait and switch,' whereby these amendments are approved on the promise of positive outcomes under the law, but *in a subsequent judicial proceeding are interpreted differently* under the applicable 'strict scrutiny' standard of review, *is the primary basis of this appeal.*" (Emphasis added.) In other words, [Petitioners] essentially conceded they could assert no past or current adverse affect from the Department's final order, but instead based their appeal on speculation."

73 So. 3d at 861. Petitioners' argument on this point is thus based upon a gross mis-characterization of the district court's November 2011 order imposing sanctions.

This decision does not conflict with any rule of law announced or applied in any of the cases cited by Petitioners. Indeed, it is entirely consistent with the purpose of section 57.105(1) as stated by this Court: "to discourage baseless claims, stonewall defenses and *sham appeals* in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." *Whitten v. Progressive Casualty Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982), (emphasis added).

In *Whitten*, this Court addressed the earlier version of section 57.105(1), prior to the 1999 amendments that substantially changed the standard for granting fees and greatly expanded the statute's potential use. *See Boca Burger, Inc. v. Forum, supra,* 912 So. 2d at 570. *Accord, Connelly v. Old Bridge Village Co-op, Inc.*, 915 So. 2d 652, 656 (Fla. 2nd DCA 2005); *Mullins v. Kennedy*, 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003). Yet even after the amendments, it is still true that "[m]erely losing ... is not enough to invoke the operation of the statute." *Whitten*, 410 So. 2d at 506.

Here, the district court's November 2011 order imposing sanctions does not conflict with that rule of law because its imposition of sanctions was not based on Petitioners' "merely losing" through dismissal of their appeal for lack of standing in June 2010. The district court acted only after careful study of the record below,

consideration of the applicable law of appellate standing, and review of Petitioners' and Respondents' responses to the court's order to show cause why sanctions should not be imposed. Only then did the district court enter an order making the requisite finding that Petitioners and their attorneys (*all of whom participated in creating the record below*) knew or should have known they had failed to meet their burden of proving what they needed to establish in order to demonstrate standing to appeal.

This case is not in conflict with the decision in *Mason v. Highlands County,* 817 So. 2d 922 (Fla. 2nd DCA 2002). There, the trial court had dismissed Mason's complaint and granted the county's motion for attorney's fees, but made no findings. Here, the district court did *exactly* what the Second District Court of Appeal said was necessary, making the necessary findings required by section 57.105(1):

> "Here, Appellants and their counsel, who have experience in this area of the law, ignored controlling case law and filed an appeal where no evidence was presented in the administrative forum that the challenged agency action adversely affected Appellants' interests, as required to establish appellate standing under section 120.68. … [N]o possible view of the evidence presented at the final hearing below would support a reasonable conclusion that Appellants had standing to appeal."

73 So. 3d at 865. The district court's finding in this regard does not constitute an abuse of its discretion, notwithstanding the dissenting district court judge's opinion in this case. "If reasonable men could differ as to the propriety of the action taken by the … court, then the action is not unreasonable and there can be no finding of an abuse of

discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

The district court's November 2011 order imposing sanctions also is not in conflict with the decision in *Peyton v. Horner*, 920 So. 2d 180 (Fla. 2nd DCA 2006). There, an imposition of sanctions by the trial court was reversed because the district court found, *upon reviewing the record below*, that an assignment of rights to enforce deed restrictions on the defendants' property and other lots in the same development "was not artfully worded" and "susceptible to two interpretations." *Id.* at 183. The district court then found that the issue on which defendants had prevailed "was not so cut and dried that either the [plaintiff] or its attorney knew or should have known that it was not supported by the material facts necessary to establish standing." *Id.* at 184. Here, the First District Court of Appeal applied the same rule of law, but reached a different result due to the dissimilar factual circumstances.

> "We disagree with [Petitioners] that the law on standing is so fact specific and subjective that such a dispute can never be the subject of sanctions. Although [Petitioners] presented admissible evidence below that a few of their members had legitimate environmental interests in challenging the comprehensive plan amendments ..., they failed to present any competent evidence that the amendments, if implemented, would **adversely** affect them. In [*Florida Chapter of the*] *Sierra Club* [*v. Suwannee Am. Cement Co., Inc.*, 802 So. 2d 520 (Fla. 1st DCA 2001)], we held in clear terms that merely because members of an association might cite a general interest in the use of an affected natural resource, it must provide specific facts concerning a member who is individually **adversely** affected."

73 So. 3d at 862, (emphasis added). From the foregoing, and numerous similar

statements throughout the district court's order, it is as clear as can be that the imposition of sanctions was not "automatic" in this case, but was the result of a well founded exercise of the district court's discretion after finding a record that was devoid of evidence that any of the members of either Petitioner would be **adversely** affected by the enactment of either the Land Protection Amendment or the Urban Services Amendment.

4. The district court correctly found that Petitioners failed to prove by competent substantial evidence presented during the administrative hearing that there was a reasonable possibility that a substantial number of the members of either Petitioner would have their interests adversely affected by either Amendment.

Petitioners persist in their initial brief to emphasize and exaggerate the significance of the testimony and evidence they presented during the administrative hearing to establish the *interests* of the 9 members who testified. Yet from their arguments to this Court, it appears that Petitioners remain oblivious to the importance of the word "**adversely**" in section 120.68, Florida Statutes. To put it simply, Petitioners' protestations that they proved some of their members had "interests" is not disputed, but Petitioners' claims that they presented evidence proving that such interests of a substantial number of their members would be "**adversely** affected" are entirely untrue, and were properly rejected by the district court.

It is readily apparent from reviewing the record of testimony given during the

administrative hearing by the officers and members of the two Petitioners that they actually were attempting to prove both **(A)** that Petitioners *themselves* would be adversely affected, and thus have standing to appeal, **and (B)** that a substantial number of the members of each Petitioner would be adversely affected, and thus Petitioners would have so-called "associational standing" to appeal, too. *See Fla. Home Builders Ass'n v. Dep't of Labor & Employment Security*, 412 So. 2d 351, 353 (Fla. 1982); *NAACP, Inc. v. Fla. Bd. of Regents*, 863 So. 2d 294, 300 (Fla. 2003). It is also readily apparent from reviewing the testimony, however, that several of Petitioners' witnesses offered no testimony whatsoever about *any* adverse consequences *to them personally* from the Land Protection Amendment, and that **most** of Petitioners' witnesses (6 of 10) offered no testimony whatsoever about any adverse consequences *to them personally* from the Urban Services Amendment. Significantly, there was no testimony that any member of either Petitioner actually had any ownership interest in, occupied a residence on, or operated a business from any land that would be subject to either the potential clustering of residential development on such land pursuant to the Land Protection Amendment or that would be able to use public water and sewer services for the first time under the Urban Services Amendment.

It is important to note, furthermore, that the testimony of the executive director of Audubon of Martin County was only applicable to the possible standing of MCCA,

of which Audubon was an "organizational member," (Braun: Tr. Vol. V, 8), but not to the possible standing of 1000 Friends since there was no testimony about any affiliation of any kind between it and Audubon. Such testimony also applied only to Petitioners' challenge to the Land Protection Amendment, since no testimony was elicited from the witness about Audubon being adversely affected by the Urban Services Amendment, (Braun: Tr. Vol. V, 10). Finally, that witness' testimony is a perfect example of how Petitioners' actually failed to *prove* any **adverse** effects to their members. While Petitioners emphasize that the witness claimed (1) that future residential development of the large tracts of land near the Audubon-owned property pursuant to the Land Protection Amendment would result in the fragmentation of such property into smaller tracts and (2) that such fragmentation would adversely impact certain species of birds which require habitats consisting of large undeveloped swaths of land, (Braun: Tr. Vol. V, 14), Petitioners ignore the witness' admissions on cross-examination that the very same fragmentation could occur *even without <u>any</u> of the comprehensive plan changes enacted Land Protection Amendment* since current zoning already allows the adjoining landowners to subdivide their property into numerous residential lots of 5 acres each, (Braun: Tr. Vol. V, 24-25), resulting in *exactly* the same "fragmentation" that Petitioners are attributing *exclusively* to the Land Protection Amendment. Petitioners did not dispute this *already existing possibility* of

fragmentation at the hearing, nor offer any contrary evidence about it, nor contest the truth of it in any of their post-hearing pleadings on appeal.

The testimony on standing presented by Petitioners can best be summarized as subjective statements of personal belief that the future recreational experiences of the members *might* be – to borrow a term from *Florida Rock Properties v. Keyser*, 709 So. 2d 175 (Fla. 5th DCA 1998) – less "bucolic" than they have been in the past. The bulk of the testimony from the 9 witnesses who were members of either 1000 Friends or MCCA, or both, was very generalized and non-specific. The common thread was not that either Amendment would adversely affect any of them *personally*, but that *everyone in Martin County* would be harmed should either Amendment take effect. (*See, e.g.*, Fielding: Tr. Vol. VI, 211-212; Hurchalla: Tr. Vol. IV, 249-250.)

There is no basis for disturbing the finding of the district court that "no possible view of the evidence presented at the final hearing below would support a reasonable conclusion that Appellants had standing to appeal. This is precisely the type of litigation the Legislature meant to prevent when it amended section 57.105 in 1999." 73 So. 3d at 865.

The evidence offered by Petitioners in this case is very similar to that offered in two prior cases involving one of the Petitioners and the same attorney: *O'Connell v. Fla. Dep't of Community Affairs*, 874 So. 2d 673 (Fla. 4th DCA 2004), and *Melzer v.*

Fla. Dep't of Community Affairs, 881 So. 2d 623 (Fla. 4th DCA 2004). In both cases, MCCA was also a petitioner *and appellant*, represented by the same attorney who has represented it throughout this case. In each case, MCCA (and other appellants) sought judicial review of an administrative final order finding a challenged Martin County comprehensive plan amendment "in compliance," but each appeal was dismissed for lack of standing because MCCA failed to prove that it or a substantial number of its members would be *adversely* affected by the challenged amendments. Together, the *O'Connell* and *Melzer* cases established for the first time that the principles of appellate standing in administrative cases applied equally to appeals from final orders of the Department of Community Affairs finding comprehensive plan amendments "in compliance."

Although Petitioners certainly called more witnesses in this case to testify concerning *their interests* than MCCA did in either *O'Connell* or *Melzer*, Petitioners still failed to offer any proof that the challenged amendments would **adversely** affect such interests of the members, just as MCCA had failed to do in both previous cases. As the district court stated in the November 2011 order imposing sanctions:

"In Appellants' response to our order to show cause, they repeat their argument of legitimate interests in the administrative proceeding. Once again, this is not the issue; the relevant inquiry is whether these legitimate environmental issues were adversely affected, thus justifying an appeal under section 120.68."

73 So. 3d at 863. The district court's June 2010 decision dismissing Petitioners' appeal thus represents the "third strike" for MCCA and its attorney, who persist in appealing adverse administrative rulings that uphold the County's amendments to its comprehensive plan despite an inability to demonstrate that MCCA or a substantial number of its members would be adversely affected by the amendments in question.

Petitioners' attempts to distinguish the *O'Connell* and *Melzer* precedents from this case by characterizing the amendments in the earlier cases as enactments that addressed site-specific situations and characterizing the amendments in this case as enactments that addressed broader policy matters is in fact a difference without a legally significant distinction. *See also* Petitioners' Reply Brief below, 8-10, where such an argument was first made. The first fatal flaw in Petitioners' argument is that the comprehensive plan amendments involved in the *O'Connell* and *Melzer* cases were most certainly *not* "site-specific" changes. Both cases involved amendments that had prospective county-wide impact. The opinion in the *Melzer* case first addressed the purpose of the earlier amendment that was litigated in the *O'Connell* case:

> "[T]he record in *O'Connell* shows that the amendment determined that more land was necessary for commercial use **throughout the county** and adopted new methods for making decisions in the future to allow commercial use."

881 So. 2d at 624, (emphasis added). The opinion in the *Melzer* case then addressed the purpose of the amendment that was litigated in that case:

> "The comprehensive plan, prior to amendment, had stringent requirements for the protection of wetlands and other natural resources. The amendments give the county more flexibility in locating schools and other public facilities near those areas."

Id. It is plainly obvious, even from these brief excerpts, that the comprehensive plan amendments in both cases were far from just "site-specific" changes as Petitioners contend. Petitioners' argument in this case that it was advocating for a modification of the law based upon the "site specific" versus "general" character of comprehensive plan amendments was thus doomed to fail because it rested on the flawed assumption that there is any meaningful distinction between the nature of the plan amendments in this case and those involved in the *O'Connell* and *Melzer* cases.

5. The cases cited by Petitioners for interpretation of the word "adverse" (or something similar) in other statutes are inapposite to the review of the district court's November 2011 order imposing sanctions.

The district court's June 2010 decision dismissing Petitioners' appeal for lack of standing under section 120.68, Florida Statutes, is not under review in this case. Consequently, the district court's interpretation and application of the terms used in that statute when deciding whether Petitioners had standing are not at issue here.

Petitioners' argument that this Court should nevertheless consider whether their standing to appeal is "supported" by how other cases were decided when the issue of standing was raised under some *other statute* that also contains the word "adverse" (or something similar) is nothing more than an effort to re-visit the dismissal decision of

the district court rather than focus on the subsequent order imposing sanctions. How the word "adverse" (or something similar) was interpreted in a case under section 120.57, Florida Statutes, that involved an environmental permit or in a case under section 163.3215, Florida Statutes, that involved the consistency of a development order with the local comprehensive plan, is inapposite to what is now before this Court: review of the November 2011 order imposing sanctions under section 57.105(1), Florida Statutes, in a case where the order dismissing the appeal filed pursuant to section 120.68, Florida Statutes, has become final.

Petitioners' continued attempts to analogize standing under section 120.68 to standing under section 163.3215 are especially inappropriate. As the district court noted in its November 2011 order imposing sanctions, section 163.3215 was amended to provide more standing than previously existed at common law, creating a "broad and liberal standing threshold for persons with environmental interests to show they are aggrieved or adversely affected to challenge development." 73 So. 3d at 864, citing *Nassau County v. Willis*, 41 So. 3d 270, 276-278 (Fla. 1st DCA 2010). As the district court further noted, "by contrast, section 120.68 *narrowly* provides standing only to parties whose legitimate interests are adversely affected *in some concrete manner.*" *Id.*

Petitioners' invocation of cases involving standing under other statutes that have more liberalized standing requirements than section 120.68 should be disregarded.

II. THIS COURT LACKS JURISDICTION TO REVIEW THE JUNE 2010 ORDER OF THE DISTRICT COURT DISMISSING PETITIONERS' APPEAL FOR LACK OF STANDING

The decision of the First District Court of Appeal dismissing the appeal filed by Petitioners for lack of standing is not under review by this Court. Indeed, this Court lacks jurisdiction to review the dismissal or the basis for it because Petitioners failed to file any notice to invoke the discretionary jurisdiction of this Court within 30 days after that decision was issued by the district court on June 21, 2010, resulting in the dismissal of Petitioners' appeal becoming final on the 31st day (July 22, 2010). *See* Fla. R. App. P. 9.120(b); *State ex rel. Cantera v. District Court of Appeal, Third Dist.*, 555 So. 2d 360, 362 (Fla. 1990), ("An appellate court cannot exercise jurisdiction over a cause where a notice of appeal has not been timely filed."); *Roadrunner Const., Inc. v. Dep't of Financial Svcs.*, 33 So. 3d 78, 79 (Fla. 1st DCA 2010), ("failure to initiate an appellate proceeding within the time set by the supreme court divests the appellate court of jurisdiction."); *Breakstone v. Baron's of Surfside, Inc.*, 528 So. 2d 437, 439 (Fla. 3rd DCA 1988), ("jurisdiction to entertain an appeal is invoked *solely* by the notice of appeal which must timely seek review of an appealable … order or orders.").

This Court may not grant Petitioners request that it "reach the standing issue due to its public importance," because to do so would be unconstitutional. *See Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93 fn.1 (Fla. 1995), ("Allstate argues that the case

below presents an issue of great public importance … . This Court does not have jurisdiction to review cases that a *party* deems to present an issue of great public importance. This Court may only review questions of great public importance that are certified by a district court of appeal. Art. V, §3(b)(4), Fla. Const. The *Allstate* court did not certify a question."), (emphasis original). In this case, the First District Court of Appeal also has not certified a question of great public importance. Petitioners *never* filed a motion asking the district court to do so, either after dismissal of their appeal in June 2010 or after issuance of the order imposing sanctions on them in November 2011.

III. THIS COURT SHOULD REJECT THE ARGUMENTS ADVANCED BY PETITIONERS AND AMICUS CURIAE THAT THE NOVEMBER 2011 ORDER OF THE DISTRICT COURT IMPOSING SANCTIONS WILL HAVE A "CHILLING EFFECT" ON PROSPECTIVE APPELLANTS OR THEIR ATTORNEYS PURSUING MERITORIOUS APPEALS, OR VIOLATE APPELLANTS' CONSTITUTIONAL RIGHTS

Petitioners and amicus curiae contend that this Court should somehow include in its evaluation of whether the district court abused its discretion when entering the November 2011 order imposing sanctions the consideration of a policy question: whether affirming the district court's order will have what they and the dissenting judge below call a "chilling effect" that will deter parties or attorneys from pursuing legitimate claims, defenses, or appeals. Virtually the same argument has been made before in cases involving sanctions and has been rejected consistently by this Court and

the several district courts as affording any basis for the reversal of the sanctions imposed in any particular case.

Sanctions have been available to courts to utilize when they are confronted with frivolous litigation and appeals and have actually been imposed by courts for a very long time, perhaps for as long as there has been an American judicial system. *See e.g. Young v. Hector*, 884 So. 2d 1025, 1028 (Fla. 3rd DCA 2004); *Visoly v. Security Pacific Credit Corp.*, 768 So. 2d 482, 489-492 (Fla. 3rd DCA 2000). Section 57.105 is only one of the several statutory provisions that formalizes how the execution of that practice must occur in Florida. For prospective appellants and their attorneys, the ever-present possibility of *sua sponte* imposition of sanctions is nothing new, and certainly did not spring into existence when the district court issued its November 2011 order imposing such sanctions on Petitioners and their attorneys.

The unwarranted speculation concerning the impact that *this particular decision* may have upon the continuation of the robust and zealous advocacy widely practiced in Florida was addressed – and correctly dismissed – by the district court in its November 2011 order imposing sanctions:

> "The Florida Supreme Court has recognized that courts will not adversely affect legitimate advocacy by imposing sanctions under section 57.105, Florida Statutes. *See Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 569 (Fla. 2005), ("allowing appellate courts to impose sanctions on appellees ... ***will not chill representation,*** but instead will emphasize that counsels' obligations as officers of the court override their obligations to zealously

represent their clients."), (emphasis added). Thus, we respectfully disagree with the dissent's policy concerns that such sanctions would unduly chill zealous advocacy, just as this court rejected such concerns in *de Vaux v. Westwood Baptist Church*:

> This case is not an instance of a court chilling creative lawyering. Certainly, lawyers are expected to be zealous advocates for the interests of their clients. They are also officers of the court, however, even though these two roles may sometimes appear to be in conflict. ... A lawyer who files a ... *meritless appeal* ... without informing the client of the weakness of the claim is violating both a duty to serve the client's interests and a duty to the judicial system.
>
> We believe that applying sanctions in cases such as this will protect this court's ability to serve litigants with meritorious cases ... and will discourage lawyers from raising meritless appellate arguments on the chance that they will 'stick.'"
>
> 953 So. 2d 677, 684-85 (Fla. 1st DCA 2007), (citations and footnotes omitted; emphasis added)."
>
> Furthermore, as does the dissent, we find positive policies embodied in the statute, because the statute protects those who are wrongfully required to pay attorneys' fees for meritless legal actions. Here, [Respondents] were wrongfully required to defend an appeal that should never have been filed. Although the imposition of sanctions does impose a cost on one party, it does so to protect the wronged party."

73 So. 3d at 858-859, (emphasis added).

The briefs filed by the some amicus curiae also seem to suggest that they believe the authority of Florida's courts to impose sanctions pursuant to section 57.105(1) should somehow depend upon certain characteristics of the appellants or petitioners, or should vary depending upon the type of litigation at issue. It is unclear, however, how

the moral character, physical impairments, or financial status of a particular litigant, or the civic worthiness of his or her cause, can be allowed in our judicial system to have any influence upon the extent of his or her liability for being sanctioned for initiating frivolous litigation or pursuing appeals without legal or factual merit. If such concerns about appellants and petitioners are truly valid, then why should we not also look to the characteristics of the prospective appellees and respondents who will be involuntarily brought before our appellate courts because of the actions of the appellants and petitioners (and their attorneys)? It seems doubtful that amicus curiae seriously want our courts to begin engaging in some sort of "balancing test" that evaluates who should be sanctioned and who should not on the basis of each party's personal characteristics or wealth, rather than continue the current practice of decisions about sanctions being based only on the merits (or lack of merits), the presence of evidence in the record (or absence of it), and the acts (or omissions) of the parties and/or their attorneys.

The constitutional concerns raised by Petitioners now, (*see* Pet'rs Init. Br., 11-12), by the dissent below, (73 So. 3d at 871-872), and by certain amicus curiae were not raised by Petitioners in their response to the district court's order to show cause. The district court therefore declined to address them, (73 So. 3d at 859), a matter which Petitioners did not raise as part of the basis for alleged holding conflict that would confer jurisdiction upon this Court, (*see* Pet'rs Juris Br.).

CONCLUSION

The First District Court of Appeal did not abuse its discretion when entering its post-dismissal order of November 2011 imposing monetary sanctions on Petitioners and their attorneys. The order is a well-founded and well-reasoned imposition of sanctions under section 57.105(1), Florida Statutes. It is not an "exceptional" ruling nor likely to discourage meritorious appeals by other parties. Due to the absence of any holding conflict between the order under review and prior decisions of this Court and other district courts of appeal, this Court should either affirm the November 2011 order imposing sanctions or conclude that, upon further consideration, jurisdiction was improvidently granted and the case therefore must be discharged.

CERTIFICATE OF SERVICE

It is hereby certified by the undersigned attorney that a true and correct copy of this document has been served by pre-paid first class United States mail to each of the persons named below this 19th day of July, 2012.

CERTIFICATE OF COMPLIANCE

It is hereby certified by the undersigned attorney that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

STEPHEN FRY, COUNTY ATTORNEY
(Florida Bar No. 380881)
sfry@martin.fl.us
Martin County Administrative Center
2401 SE Monterey Road
Stuart, FL 34996-3322
Telephone: (772) 288-5438
Facsimile: (772) 288-5439

By: 
DAVID A. ACTON,
Senior Assistant County Attorney
(Florida Bar No. 246859)
dacton@martin.fl.us

Copy: *Attorney for Petitioners*
Richard Grosso, Esq.
Shepard Broad Law Center
Nova Southeastern University
3305 College Ave.
Ft. Lauderdale, FL 33314-7721

Attorney for Respondent D.E.O.
David L. Jordan, Assistant General Counsel
Department of Economic Opportunity
107 E. Madison St., MSC 110
Tallahassee, FL 32399-4128

Attorneys for Respondents Martin Island Way, LLC & Island Way, LC
Jack J. Aiello, Esq.
Brian M. Seymour, Esq.
Gunster, Yoakley & Stewart, P.A.
777 S. Flagler Dr., Suite 500 East
West Palm Beach, FL 33401-6194

Attorneys for American Planning Association, Florida Chapter
David A. Theriaque, Esq.
S. Brent Spain, Esq.
433 N. Magnolia Dr.
Tallahassee, FL 32308

Attorneys for Florida Legal Services, Inc., et al
Kathy Grunewald, Esq.
Cindy Huddleston, Esq.
Florida Legal Services, Inc.
2425 Torreya Dr.
Tallahassee, FL 32303
and
Valory Greenfield, Esq.
Florida Legal Services, Inc.
3000 Biscayne Blvd., Suite 102
Miami, FL 33137
and
Christopher M. Jones, Esq.
Peter M. Sleasman, Esq.
Florida Institutional Legal Services, Inc.
14260 W. Newberry Rd., No. 412
Newberry, FL 32669
and
Randall C. Berg, Esq.
Florida Justice Institute, Inc.
100 SE 2nd St.
Miami, FL 33131
and
Jodi Siegel, Esq.
Southern Legal Counsel, Inc.
1229 NW 12th Ave.
Gainesville, FL 32601

Continued on next page

Attorneys for Disability Rights Florida
Edith E. Sheeks, Esq.
Disability Rights Florida, Inc.
2728 Centerview Rd., Suite 102
Tallahassee, FL 32301
And
David A. Boyer, Esq.
Disability Rights Florida, Inc.
1930 Harrison St., Suite 104
Hollywood, FL 33020

Attorney for Florida Wildlife Federation
Thomas W. Reese, Esq.
2951 61st Ave. S.
St. Petersburg, FL 33712