IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

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

APPELLANTS,

v.

MARTIN COUNTY; DEPARTMENT OF COMMUNITY AFFAIRS; MARTIN ISLAND WAY, LLC; and ISLAND WAY, LLC,

APPELLEES.

Case No. 1DO9-4956

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APPELLEE DEPARTMENT OF COMMUNITY AFFAIRS' RESPONSE TO APPELLANTS' RESPONSE TO ORDER TO SHOW CAUSE

Appellee, Department of Community Affairs, hereby files its Response to Appellants' Response to Order to Show Cause.

Introduction and Summary of Argument

On June 21, 2010, the First District Court of Appeal rendered an Opinion in Case Number 1D09-4956 ("Opinion"), ruling that the Appellants 1000 Friends of Florida and Martin County Conservation Alliance ("MCCA") "have not demonstrated that their interests or the interests of a substantial number of (their) members are adversely affected by the challenged order so as to give them

standing to appeal" pursuant to Section 120.68, *Florida Statutes*.[1] Section 120.68 provides that "a party who is adversely affected by final agency action is entitled to judicial review."[2]

On June 21, 2010, the Court issued an Order to Show Cause ordering the Appellants "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 is clearly not present." Appellants filed their Response to Order to Show Cause on June 30, 2010.

Appellee Department of Community Affairs ("Department") did not seek sanctions in this appeal against the Appellants. The Department respectfully submits that sanctions are not appropriate in the present case. Under Section 57.105(1), *Florida Statutes*, sanctions are appropriate where a party knew or should have known that a claim "was not supported by the material facts necessary to establish the claim or defense; or would not be supported by the application of then-existing law to those material facts."[3]

In the case at bar, although the Department filed a Notice of Limited Joinder in the Answer brief filed by Martin County with respect to Issues II, III, IV, and V, the Department did not join in Issue I opposing Appellant's Section 120.68,

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[1] June 21, 2010, Opinion in Case No. 1D09-4956, District Court of Appeal First District, State of Florida.
[2] Section 120.68(1), *Florida Statutes*.
[3] Section 57.105(1), *Florida Statutes*.

Florida Statutes, standing because material facts in the record provide at least arguable grounds for the Appellants' standing to appeal as "adversely affected" parties.

Standing In General

Under Section 120.68(1), *Florida Statutes*, "a party who is adversely affected by final agency action is entitled to judicial review."[4] In order for a party to have standing to appeal as an adversely affected party, the party must have direct impact or a "reasonably foreseeable future" impact which will result from a final agency action.[5] See Board of Commissioners of Jupiter Inlet District v. Thibadeu, 956 So. 2d 529 at 534 (Fla. 4th DCA 1007). See also Indian Trail Improvement District v Department of Community Affairs, 946 So. 2d 640 at 641 (Fla. 4th DCA 2007). In Thibadeu, a special inlet district sought appellate review of a dock permit which was issued by the Department of Environmental Protection. The court found that the special inlet district was not an adversely affected party as it did not own property adjoining the land for which the permit was issued and thus, the district did not experience a direct impact from the issuance of the permit so as to be adversely affected.[6] In Indian Trial Improvement District, a special

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[4] Section 120.68(1), *Florida Statutes*.
[5] Indian Trail Improvement District v Department of Community Affairs, 946 So. 2d 640 at 642 (Fla. 4th DCA 2007).
[6] See Board of Commissioners of Jupiter Inlet District v. Thibadeu, 956 So. 2d 529 (Fla. 4th DCA 1007).

taxing district appealed a decision of the Department of Community Affairs to approve a county comprehensive plan amendment. The county argued that the district must show a direct impact on real property in order to be an adversely affected party with standing to appeal. The court held that in order to prove an adverse affect, a party is not required to prove a direct impact on real property, but must demonstrate that there are "reasonably foreseeable future impacts" which the party will suffer as a result of the final agency action.[7]

In the case at bar, there is evidence in the record that the Appellant associations have members who own or use and enjoy property which will be impacted by the amendments at issue. Additionally, the record shows that the members will suffer reasonably foreseeable future impacts to their use and enjoyment of such property as a result of the amendments at issue. Therefore, under Thibadeu and Indian Trail Improvement District, there is a good faith argument that the Appellant associations are adversely affected parties so as to have standing to appeal the amendments at issue.

It is well established that an association whose members are injured has standing to represent those members in an appellate proceeding under Section

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[7] See Indian Trail Improvement District v. Department of Community Affairs, 946 So. 2d 640 (Fla. 4th DCA 2007).

120.68(1), *Florida Statutes*.[8] However, an association's general interest in protecting its members' use and enjoyment of land is not sufficient to establish that an association's interests are adversely affected so as to confer appellate standing.[9] In Florida Chapter of the Sierra Club v. Suwannee American Cement Company, 802 So. 2d 520 (Fla. 1st DCA 2001), the court held that a citizen organization and environmental association lacked standing, under Section 120.68(1), *Florida Statutes*, to appeal a Department of Environmental Protection Final Order permitting the construction of a cement plant because neither association demonstrated that it would be adversely affected by the final agency action.[10] Because the organization failed to assert any basis for standing beyond its standing to appear in an administrative proceeding, the court held that the organization did not have standing to appeal the final order. In regard to the environmental association's standing, the court declined to find appellate standing as the association failed to provide evidence that any of its members were adversely affected by the construction of the cement plant.[11]

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[8] See Florida Chapter of the Sierra Club v. Suwanee American Cement Company, Inc., 802 So. 2d 520 at 522 (Fla. 1st DCA 2001), citing Sierra Club v. Morton, 405 U.S. 727 (1972). See also NAACP, Inc. v. Florida Board of Regents, 863 So. 2d 294 (Fla. 2003).

[9] See Id. at 521 citing Legal Environmental Assistance Foundation v. Clark, 668 So. 2d 982, 987 (Fla. 1996).

[10] See Id. at 521.

[11] See Id. at 523 citing Challancin v. Florida Land & Water Adjudicatory Commission, 512 So. 2d 1288 at 1293(Fla. 4th DCA 1987).

In the present case, unlike Florida Chapter of the Sierra Club, both Appellant associations have introduced evidence that their individual members regularly use an enjoy land which is subject to the comprehensive plan amendments at issue in the case. There is also evidence in the record that these members believe that the amendments at issue will adversely affect their use and enjoyment of the affected lands. Therefore, evidence in the record establishes a good faith argument that the Appellant associations have appellate standing in this case.

Associational Standing

In order to qualify for associational standing under Chapter 120, *Florida Statutes*, an association must demonstrate that: 1) a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule; 2) the subject matter of the rule is within the association's general scope of interest and activity; and 3) the relief requested is of the type appropriate for an association to receive on behalf of its members. Florida Homebuilders Assoc. v. Department of Labor and Employment Security, 412 So. 2d 351 (Fla. 1982).[12] There is evidence in the record below that the subject matter of the comprehensive plan amendments is within the Appellant associations' general scope of interest and activity. Both associations have a history of expending time

[12] While Florida Homebuilders Assoc. and the cases that follow address standing in Section 120.57, *Florida Statutes*, proceedings, the general principles on associational standing are applicable to appellate standing under Section 120.68, *Florida Statutes*.

and efforts to further smart land use planning through advocacy and education relative to the Martin County Comprehensive Plan.[13] The relief requested, that the amendments be declared not in compliance, is appropriate for the Appellant associations to receive on behalf of their members.

In regard to the first prong of the associational standing test, there is no bright line rule for determining what constitutes a substantial number of members of an association. Rather, courts have held that the determination is to be made on a case-by-case basis with the focus being on the number of members substantially affected by the disputed action. See Hillsborough County v. Florida Restaurant Assoc., 603 So. 2d 587 (Fla. 2d DCA 1992). In Hillsborough County, the court rejected a claim that an association did not have standing because only thirty-seven (37) of its two thousand seven hundred and sixty-six (2,766) members were directly affected. The court reached this conclusion based on the fact that thirty-seven members represented forty-one percent of the membership in the County where the government regulation at issue was directly applicable. Courts have found associational standing where as few as three (3) members would be affected by the action, even though that was "only a small fraction of the owners represented by the association." Federation of Mobile Home Owners of Florida, Inc. v. Department of Bus. Reg., 479 So. 2d 252, 254-255 (Fla. 2d DCA 1985).

[13] Transcript, Vol. III at 360, 363-365, 367-368, 379-378, 384-385, 386-387, 408; Transcript, Vol. VI at 763-764.

In the present case, six (6) members of Appellant MCCA testified that they regularly use and enjoy areas within the Agriculture designation for outdoor and recreational activities and that their use and enjoyment of these areas will be adversely affected by the amendments at issue. Additionally, five (5) members of Appellant 1000 Friends of Florida testified that they regularly use and enjoy areas within the Agricultural area for outdoor and recreational activities and that such use and enjoyment will be adversely affected by the amendments at issue. Therefore, under Federation of Mobile Home Owners of Florida, Inc. and Florida Chapter of the Sierra Club, a substantial number of the Appellant associations' members may be substantially and adversely affected by the amendments at issue. Material facts in the record provide a good faith basis for the Appellants' assertion that they have standing to appeal under Section 120.68, *Florida Statutes*.

Standing In Relation To Cases Cited In Opinion

The Opinion cites several cases as support for the finding that the Appellants do not have standing to appeal, including O'Connell v. Florida Department of Community Affairs, 874 So.2d 673 (Fla. 4th DCA 2004) and Florida Wildlife Federation v. St. Johns County, 909 So.2d 347 (Fla. 1st DCA 2005). These cases are distinguishable from this appeal. In O'Connell, the court found that an appellant association did not have standing to appeal where the association did not assert that its members own property which "is located near the sites affected by

the amendments or how they would be adversely affected by the amendments."[14] In Florida Wildlife Federation, the court cited Melzer v. Florida Department of Community Affairs, 881 So. 2d 623 (Fla. 4th DCA 2004) the record contained no evidence that members of the association owned land or used and enjoyed lands which would be impacted by the comprehensive plan amendments at issue in the case.

The record below provides facts, which were found to be lacking in O'Connell and Melzer, to at least arguably support the Appellants' standing to appeal. For example, the record contains evidence that Appellants have members who live or own property in Martin County and Appellants' members regularly use and enjoy areas within the Agricultural area which they believe will be adversely affected by the amendments at issue. Specifically, Greg Braun testified that Audubon of Martin County, a member organization of Appellant MCCA, would be adversely affected by future projects authorized under the amendments because birds that the organization enjoys will likely relocate or be killed as a result of the amendments' fragmentation of the birds' habitats and increases in traffic.[15] Additionally, Joe Florio, a member of both of the Appellant associations, testified that he uses and enjoys property which will be affected by the amendments at issue

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[14] O'Connell v. Fla. Dep't of Cmty. Affairs, 874 So.2d 673 at 676 (Fla. 4th DCA 2004)

[15] Transcript, Vol. V at 588-589,

and that he believes that his viewing of fauna will be negatively impacted by the type of development permitted by the LPIA Amendment.[16] These material facts provide at least a good faith argument that the Appellants are adversely affected so as to have standing to appeal.

Conclusion

In conclusion, the Department respectfully submits that sanctions are not appropriate under Section 57.105(1), *Florida Statutes*. The record below contains material facts necessary to establish a good faith argument that the Appellants are adversely affected by the comprehensive plan amendments at issue and that therefore, there is a good faith argument that the Appellants have standing to appeal under Section 120.68, *Florida Statutes*.

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[16] Transcript, Vol. VI at 764-765.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed this 12th day of July, 2010 and served via U.S.Mail to the following parties:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this response was prepared in Time New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

By: L. Mary Thomas, Esq.