STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HIGHLANDS HOMEOWNERS' ASSOCIATION, INC.,	)	
Petitioner,	)	
vs.	)	Case No. 06-3946GM
DEPARTMENT OF COMMUNITY AFFAIRS and CITY OF WINTER SPRINGS,	)	
Respondents,	)	
and	)	
KEEWIN REAL PROPERTY COMPANY, INC.,	)	
Intervenor.	)	

FINAL ORDER

This matter came before the undersigned on the City of Winter Springs (City's) Renewed Motion for Sanctions and Keewin Real Property Company, Inc.'s (Keewin's) Renewed Motion for Sanctions, Fees and Costs (Renewed Motions). In lieu of a formal evidentiary hearing, the parties have submitted a stipulated record. The parties are represented as follows.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether the City and Keewin are entitled to sanctions under Sections 120.569(2)(e) and 163.3184(12), Florida Statutes (2006)[1].

PRELIMINARY STATEMENT

This matter began on June 12, 2006, when the City adopted a large scale plan amendment (Ordinance No. 2005-29), which changed the land use designation on the Future Land Use Map of the City's Comprehensive Plan (Plan) on seven vacant parcels of property totaling 47.27 acres from Industrial to Medium Density Residential (MDR). At that time, the property was subject to a purchase contract by Keewin, an intervenor in the underlying case.

After the Department of Community Affairs (Department) determined that the amendment was in compliance, on August 25, 2006, an initial Petition was filed by Petitioner with the Department challenging the proposed change. That filing was apparently dismissed by the Department without prejudice, and an Amended Petition for Administrative Hearing (Amended Petition) was filed on September 25, 2006, challenging the plan amendment on the grounds the new land use would result in increased traffic, school overcrowding, inadequate open space and recreation land and facilities, and reduced industrial zoning, and it would violate various provisions within Florida Administrative Code Rule Chapter 9J-5 and Section 163.3177(3) and (6), Florida Statutes. The Amended Petition was forwarded by the Department to the Division of Administrative Hearings (DOAH) on October 11, 2006, and was assigned DOAH Case No. 06-3946GM, the underlying case in this matter.

Although the final hearing was originally scheduled on February 20 and 21, 2007, Keewin's Motion for Expedited Hearing filed on October 31, 2006, was granted, and the final hearing was rescheduled to November 29 and 30, 2006, in Winter Springs, Florida.

On November 28, 2006, or the day before the final hearing, Keewin filed a Motion for Sanctions, Fees and Costs under

Sections 120.569(2), 120.595(1), and 163.3184(12), Florida Statutes. On the same day, and relying on the same statutes, the City filed a Motion for Sanctions Against Petitioner.

After a final hearing on the compliance issue was conducted, the undersigned entered a Recommended Order on January 3, 2007, determining that the challenged plan amendment was in compliance. In the Recommended Order, the undersigned denied the City and Keewin's request for fees and costs under Section 120.595(1), Florida Statutes; however, jurisdiction was reserved for the purpose of allowing those parties to renew their requests under Sections 120.569(2)(e) and 163.3184(12), Florida Statutes, which require resolution by a separate final order, within thirty days after the final order was entered by the Department.

A Final Order adopting the Recommended Order was entered by the Department on February 16, 2007. On March 14, 2007, the City filed its Renewed Motion, while Keewin filed its Renewed Motion on March 16, 2007. On March 22, 2007, Petitioner filed a Motion to Strike and Response to the two Renewed Motions.

In a status conference conducted on April 20, 2007, the parties agreed to waive a formal evidentiary hearing and to submit a stipulated record and proposed final orders. The

original record in the underlying case was filed by the Department on May 7, 2007.

On May 17, 2007, Petitioner's original counsel filed a Joint Stipulation for Substitution of Counsel requesting authorization to withdraw as counsel for Petitioner and to substitute new counsel. This request was granted by Order dated May 31, 2007, as amended on June 1, 2007. The latter Order provided that counsel's withdrawal did not relieve him from responsibility for sanctions, if found to be appropriate.

On June 21, 2007, the City and Keewin filed a Joint Proposed Recommended Order, while Petitioner filed a Proposed Final Order. Both filings have been considered by the undersigned in the preparation of this Final Order.

On July 19, 2007, Petitioner filed a Response to Requested Fees and Costs (Response), which objects to the reasonableness of the fees and costs requested by the City and Keewin. (Pending the outcome of the entitlement issue in this phase of the case, the parties were encouraged to informally resolve the reasonableness of the requested attorney's fees if sanctions were later determined to be appropriate.) On July 26, 2007, a Motion to Strike the Response was filed by the movants. Because the amount of fees and costs, if warranted, is not before the undersigned at this juncture, the Response is rendered moot.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. The Highlands is a large, master-planned community consisting of almost 1,400 residential units on 550 acres located just east of Keewin's property within the City in Seminole County, Florida. Petitioner is a not-for-profit corporation (association) which represents the members of the Highlands. A smaller subdivision (Wildwood) lies between much of the association's property and Keewin's property; however, the southwestern and southeastern corners of the two properties abut one another.

2. The association owns and maintains five parks and various recreational facilities plus extensive nature trails. In addition, there is a small network of roads, including Shepard Road and Sheoah Boulevard, which provide access through and between the two properties. There is also an elementary school, Highlands Elementary School, located just north of the properties and in which both Keewin's property and the association are zoned.

3. In late 2005, the City began its review of an application by Keewin to change the land use on its property from Industrial to MDR. The MDR classification allows up to

nine dwelling units per acre. No changes to the Plan's text were proposed. (A companion zoning change was also being considered but is not relevant to the issues here.) If the change became effective, a maximum of 425 town home units could be built on the property; however, the applicant represented to the City that it intended to construct only 324 units. A formal vote for the purpose of transmitting the amendment to the Department for its initial review was scheduled by the City for February 13, 2006.

4. Based upon information from its members and public records, Petitioner became aware of the pending application. At a meeting of its Board of Directors on January 13, 2006, the association voted to oppose the application and to hire counsel to represent it in this matter. According to the minutes of the meeting, this decision was based upon concerns expressed by members concerning potential adverse impacts to the association's "recreational amenities, neighborhood roads, school capacities, and other concerns [not specifically identified]." The association's counsel was not yet retained or in attendance at this meeting. The association also scheduled a meeting for all association members at a later date to discuss the ramifications of the proposed land use change and project.

5. At the January 13, 2006 meeting, Helga R. Schwarz, secretary and member of the Board of Directors, was appointed by the Board of Directors to be its liaison with outside counsel and to act as the association representative who would attend all City meetings and speak on behalf of the association at those meetings. (Ms. Schwarz had been attending City meetings since early November 2005, when the City Planning and Zoning Board first began conducting hearings on the matter.) Pursuant to that directive, she contacted Clayton & McCulloh, a Maitland law firm, and authorized it to represent the association at the February 13, 2006 City meeting (when a formal vote would be taken) and other subsequent related matters.

6. Until June 1, 2007, when it was authorized to withdraw as counsel, Clayton & McCulloh represented the association in this matter. On February 7, 2006, or a week before the City formally voted to transmit the amendment to the Department, the law firm sent a letter to the City outlining in detail its objections to the land use (and zoning) change. These objections included traffic congestion and overcrowding roads, overcrowding schools, inadequate open space and recreation facilities, and negative impact on property values. Except for the latter issue, all issues were later included in the association's Amended Petition filed with the Department on

September 25, 2006. Notwithstanding the association's objections, the City adopted the amendment.

7. Upon receipt of the amendment transmittal package, which included the association's letter of February 7, 2006, to the City, the Department initially expressed some concerns in its Objections, Recommendations, and Comments (ORC) report regarding the lack of a public facilities analysis; school overcrowding; a lack of data and analysis demonstrating the need for additional MDR land; land use compatibility; and inconsistency with certain provisions within the State Comprehensive Plan. (The association's Amended Petition contained some of these same concerns.) After the City provided further information, however, the Department's objections were satisfied, and the City formally adopted the land use change on June 20, 2006. A Department staff report dated July 14, 2006, summarizes the additional information provided by the City. On August 4, 2006, the Department published notice of its intent to find the plan amendment in compliance.

8. Ms. Schwarz then authorized the association's counsel to file a petition challenging the plan amendment, which was filed by counsel on August 25, 2006. That pleading is not of record, and its content and basis for dismissal are unknown. However, an Amended Petition, also prepared and signed by

counsel, was filed on September 25, 2006, which included the concerns raised at the January 13, 2006 meeting of the Board of Directors. (These were also expressed in counsel's letter to the City dated February 7, 2006.) In addition, the pleading added three more issues: a lack of compatibility between Keewin's MDR property and adjoining properties, reduced industrial zoning within the City, and a violation of various Department rules and governing statutes.

9. An association representative acknowledged that, except for consulting with its attorney, no member of the association retained or consulted any land planners, engineers, or other experts in the field prior to the Amended Petition being filed. Also, the association concedes that it did not contact any City representatives regarding the proposed amendment. At a minimum, however, based on testimony that the association relied on City "public records" to verify that an application had been filed by Keewin, it is reasonable to infer that the association had access to Keewin's application package that was filed with the City in late 2005 and documents of the City Planning and Zoning Board (which apparently recommended denial of the application).

10. On the other hand, the City and Keewin have not shown whether counsel for the association contacted any experts, the City staff, or Department representatives prior to preparing and

signing the amended pleading. Likewise, they have not shown whether association counsel reviewed copies of any pertinent documents, such as the amendment transmittal package sent by the City to the Department in February 2006, the Department's ORC report dated April 20, 2006, the supplemental information provided by the City in response to the ORC, or the final Department staff report issued on July 14, 2006. However, the Amended Petition refers to the information supplied by the City in response to the ORC, and the pleading relies upon some of the same rules cited in the Department's ORC as being potentially violated. This suggests that at a minimum, before signing the pleading counsel reviewed those documents and more likely than not had access to Keewin's application and the Planning and Zoning Board's file.

11. In at least two respects, a reasonable inquiry by counsel prior to filing the Amended Petition would have revealed that two issues lacked merit. First, even though trespass, vandalism, and unauthorized use of recreational facilities are briefly mentioned in the pleading, they are not compliance criteria under Section 163.3184(1)(b), Florida Statutes. This could be easily confirmed by a review of the Florida Statutes or relevant Department rules. However, these concerns were only a very minor part of the filing and are not included in the broad

allegation entitled "Inadequate Open Space and Recreation Land and Facilities." See Amended Petition, paragraphs 6.(c) and 8.(c). Second, a review of the information supplied by the City to the Department in response to the ORC would have revealed that the City is not required to have a level of service standard in its Plan for school facilities. (See, e.g., Findings of Fact 31-37 and 55, Recommended Order, January 3, 2007.) Moreover, the school concurrency requirements found in Section 163.3177(12), Florida Statutes, do not become operative until December 2008. At the same time, however, the Department's staff report dated July 14, 2006, indicated that the map change would result in a "moderate increase in elementary school students" by adding 38 new students into Highlands Elementary School and cause it to be at "overcapacity" by 14 students. See Respondent's Exhibit 25, page 3. To this extent, the allegation concerning school overcrowding was arguably still a plausible concern when the pleading was filed.

12. The final hearing was originally scheduled to be heard on February 20 and 21, 2007, or approximately five months after the Amended Petition was filed with the Department. Keewin was granted intervenor status on October 23, 2006, and on October 31, 2006, it filed a Motion for Expedited Hearing under Section 163.3189(3), Florida Statutes. (That statute provides

that absent extraordinary circumstances, upon request by any party, an expedited hearing must be held within thirty days of the filing of the request.) Consistent with that statute, and over the objection of Petitioner, on November 1, 2006, a Notice of Hearing was issued rescheduling the final hearing to November 29, 2006. This meant that Petitioner (and the other parties) had less than thirty days to retain experts, conduct discovery, and prepare for hearing; a part of that time was consumed by the Thanksgiving holidays.

13. At hearing, there was evidence that Petitioner intended to retain several experts to testify in support of its allegations if the hearing had been held in late February 2007. This was corroborated by Petitioner's former counsel in a status conference conducted on November 10, 2006, for the purpose of scheduling an expedited discovery schedule. (An Order memorializing the expedited schedule was entered on November 13, 2006.) During that conference call, counsel represented that due to the time constraints – - the hearing was then less than three weeks away - - it would be difficult, if not impossible, to secure experts who would be willing to review the relevant material and then testify on such short notice.

14. Under the expedited discovery schedule, the parties were instructed to exchange final witness lists by November 15,

2006, or five days after the status conference, and to complete all depositions by November 22, 2007, or the day before Thanksgiving holidays began. See Order dated Nov. 13, 2006. By letter dated November 15, 2006, Petitioner's counsel identified Harry A. Burns, Jr., as an expert witness on traffic issues (even though he had not yet been formally retained), and a number of potential fact witnesses, including the City Planner, two City Commissioners, and a member of the City Planning and Zoning Board. (Once the City officials were listed as potential witnesses, the City immediately filed a Motion in Limine and Motion to Quash the subpoenas issued to those officials. Apparently, subpoenas were never served.) Counsel also identified one other potential expert, a land planner, who ultimately was not retained, presumably because of time constraints. During the abbreviated discovery period, Petitioner propounded one set of interrogatories to the City regarding the issues raised in its Amended Petition, and its counsel deposed the City Planner.

15. As it turned out, Petitioner was able to retain only one expert to testify at the final hearing, Mr. Burns, a professional engineer in Gainesville, Florida, who addressed only one of the issues (traffic) raised in the Amended Petition. Mr. Burns was retained a day before his deposition was taken on

November 22, 2007, or one week before the hearing, and as of that date, he had not done any analysis nor formulated any opinions. As the City and Keewin point out, when his deposition was taken, Mr. Burns did not have an opinion as to whether the traffic analysis was sufficient, he had not performed an analysis or developed any conclusions related to the traffic impact of the map change on the association, he had not conducted sufficient analysis to support any opinion, and he had no data to support Petitioner's safety allegations. Mr. Burns noted, however, that if a modeling and monitoring study were to be performed, which would enable him to determine the amount of traffic accessing association property, he would first need to purchase program information from Seminole County (at a cost of around $10,000.00), and then perform an analysis that would take a minimum of thirty days, if not longer, to complete, or long after the hearing had been concluded. Whether that analysis would have resulted in a different outcome on the traffic issue is unknown. If the land planner (identified in the witness list) had been retained, the impact, if any, of her testimony on the other issues is likewise unknown.

16. On November 28, 2006, or the day before the final hearing, and immediately after discovery had been concluded, the City and Keewin filed their requests for fees, costs, and

sanctions. (The City's filing indicates that sanctions were requested in part because it believed the association's Board of Directors had not legally authorized the association to initiate this matter.) However, as soon as the Amended Petition was filed on September 25, 2006, the movants should have known that vandalism, trespass, and unauthorized use of recreational facilities were not valid compliance issues, and that the school concurrency issue had been largely resolved during the Department's initial review process and was no longer a viable issue. Even so, the City and Keewin waited until the day before the final hearing to seek sanctions, and they filed no papers prior to that date seeking to limit the evidence, strike the offending allegations, or sanction the association and counsel for raising those two issues.

17. As noted above, at the final hearing, Petitioner presented the testimony of one expert, Mr. Burns, who addressed the traffic allegation. It also presented the fact testimony of Paige N. Hinton, the association president; Ms. Schwarz; and the community association's manager, Bonnie J. Hinton. Much of the latter three witnesses' testimony was focused on the issue of whether the Board of Directors had properly authorized the association to file a petition, an issue which the City and Keewin vigorously pursued for the first time during discovery

the week before the final hearing. Ms. Schwarz also testified concerning various acts of vandalism and trespassing which had occurred on the association's property during recent years, some of which was attributable to persons from the adjoining subdivision, Wildwood; however, these concerns were not relevant to a compliance determination. Finally, Ms. Hinton, the president of the Board of Directors, reiterated the Board's concerns from a lay perspective.

18. Petitioner's case was presented through cross-examination of the opposing parties' experts, Mr. Burns (as to the traffic issue), lay testimony by its representatives, and documentation (Petitioner's Exhibits 1-3, 14, 16-21, 25, and 26). On pages 5 through 10 of their Joint Proposed Recommended Order filed in support of the Renewed Motions, the City and Keewin have cited at great length and detail the shortcomings in Petitioner's evidentiary presentation regarding each issue raised in its Amended Petition. As noted in the Recommended Order in the underlying case, however, except for the issue of whether the map change violated certain Department rules and Section 163.3177, Florida Statutes, it is sufficient to say that "[Petitioner] did present some evidence, albeit minimal in some respects, in support of its position." Highlands Homeowners' Association, Inc. v. Department of Community Affairs et al.,

2007 Fla. ENV LEXIS 8 at *31, DOAH Case No. 06-3946GM (DOAH, Jan. 3, 2007). This finding (and all others in the Recommended Order) was affirmed by the Department in its Final Order. Highlands Homeowners' Association, Inc. v. Department of Community Affairs et al., 2007 Fla. ENV LEXIS 7 (Feb. 16, 2007).

19. The evidence does not directly show, nor can it be inferred, that the association, through its Board of Directors, or its counsel, filed the objection to the map change to simply delay the project, harass the developer, increase the cost of litigation, secure an economic or competitive advantage over Keewin, or for any other improper purpose. Rather, it is fair to say that the objections lodged in the Amended Petition were filed in good faith and continued to track in large part the original concerns of the association's residents from the outset – - that a change in land use and construction of at least 324 new town homes, and as many as 425, adjacent to the Highlands with the associated influx of new residents and vehicles would lead to increased traffic within the Highlands, particularly on Shepard Road and Sheoah Boulevard, overcrowding at the nearby Highlands Elementary School, and a burden on its open space and recreational facilities, each of which could, with appropriate proof, arguably constitute a ground for finding the map change not in compliance. Based upon these underlying facts, at least

some of the allegations in the Amended Petition represented a plausible view of the law at that time, and it was not unreasonable for counsel to file a pleading challenging the map change based upon the inquiry that he made. Moreover, the circumstances presented here give rise to an inference that the Amended Petition was filed to advance legitimate concerns about the land use change, and not for an improper purpose.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569(2)(e) and 163.3184(12), Florida Statutes.

21. In the absence of any evidence that the association played any role in drafting the pleading, choosing the allegations that were incorporated therein, or otherwise providing specific instructions to counsel on how to proceed, sanctions, if appropriate, should lie against counsel, and not the association, especially since counsel began representing the association and managing the case long before the initial pleading was filed.

22. Section 120.569(2)(e), Florida Statutes, provides as follows:

> (e) All pleadings, motions, or other papers filed in the proceeding must be signed by

> the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

23. Under this statute, signatures on pleadings certify that the signatory (the association's counsel) has read the document and that "based upon reasonable inquiry, it is not interposed for any improper purpose . . . ." "The signature certifies only that the paper is not interposed for an improper purpose." Mercedes Lighting and Electrical Supply, Inc. v. State, Department of General Services, et al., 560 So. 2d 272, 277 (Fla. 1st DCA 1990). The statute also authorizes the undersigned to impose an appropriate sanction, including a reasonable attorney's fee, for signatures which are in violation of this subsection. The Division of Administrative Hearings has jurisdiction to enter a final order in this type of controversy. See, e.g., Procacci Commercial Realty, Inc. v. Department of

Health Rehabilitative Services et al., 690 So. 2d 603, 606 (Fla. 1st DCA 1997).

24. Section 163.3184(12), Florida Statutes, is almost identical to the foregoing statute, but it also includes "economic advantage" and "competitive reasons" as other examples of a paper that is interposed for an improper purpose. Thus, it should be construed in the same manner as Section 120.569(2)(e), Florida Statutes.[2]

25. The proponents of the sanctions (the City and Keewin) have the burden of showing that the signer of the Amended Petition lacked reasonable legal justification for doing so. See, e.g., Friends of Nassau County, Inc. et al. v. Nassau County et al., 752 So. 2d 42, 51 (Fla. 1st DCA 2000)

26. The focus of a claim under Sections 120.569(2)(e) and 163.3184(12), Florida Statutes, is whether there was a reasonably clear legal justification for filing the Amended Petition, and not on the weakness or strength of the challenger's presentation at final hearing. See, e.g., Rustic Hills Phase III Property Owners Association v. Olson et al., DOAH Case No. 00-4792, Order Denying Sanctions Under Section 120.569(2)(e), July 31, 2001. "The key to invoking [sanctions] is the nature of the conduct of counsel and the parties, and not the outcome." Mercedes at 276. Thus, the issue is not whether

Petitioner would ultimately prevail on the merits of any of its claims. (Notwithstanding this conclusion, for the purpose of rendering a complete history of the case, this Final Order contains a number of findings relative to that issue.)

27. As has been repeated many times, an objective standard is used to determine whether a paper was filed for an improper purpose under Section 120.569(2)(e), Florida Statutes. Friends of Nassau at 51. The determination must be based on an objective evaluation of the circumstances existing at the time the Amended Petition was filed. Thus, the inquiry here is whether counsel could have reasonably concluded that a justiciable controversy existed under pertinent statutes and Department rules. Mercedes at 276. One way to decide this question is to determine whether "the pleading . . . was based on a plausible view of the law." Id.

28. Here, the movants have presented no direct evidence indicating the type or extent of inquiry made by counsel prior to signing the pleading. However, it can be reasonably inferred from the evidence that counsel reviewed, at a minimum, the application package, the information compiled by the City Planning and Zoning Board, the Department's ORC report, the supplemental information supplied by the City, and related rules and statutes. Based upon the totality of the circumstances, the

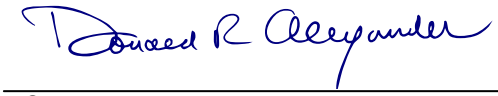
undersigned concludes that it was reasonable for counsel to conclude that a justiciable controversy existed at least as to some of the issues, that some of the allegations in the Amended Petition represented a plausible view of the law, and that he had reasonably clear justification to proceed. It should be further noted that the undersigned has already denied a request for sanctions under Section 120.595(1), Florida Statutes, on the ground the Amended Petition was not filed primarily for an improper purpose. Finally, a party seeking sanctions should give notice promptly to this tribunal and the offending party upon discovering a basis to do so. Mercedes at 277. Here, even though the City and Keewin knew, or should have known, at the time the Amended Petition was filed that at least a part of the school overcrowding issue and vandalism/trespass concerns were not viable issues to be litigated, they waited until the day before final hearing to seek sanctions against Petitioner for raising those issues. This delay in seeking sanctions as to those issues also militates against granting the Renewed Motions. See, e.g., Spanish Oaks of Central Florida, LLC v. Lake Region Audubon Society, Inc., 2006 Fla. Div. Adm. Hear. LEXIS 294 @ *48, DOAH Case No. 05-4644F (July 7, 2006).

29. Having failed to show entitlement to sanctions, the movants' Renewed Motions are denied.

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the Renewed Motions filed by the City and Keewin are denied.

DONE AND ORDERED this 15th day of August, 2007, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of August, 2007.

ENDNOTES

1/ All statutory references are to Florida Statutes (2006).

2/ Both provisions are "aimed at deterrence, not fee shifting or compensating the prevailing party." Department of Health & Rehabilitative Services v. S.G., 613 So. 2d 1380, 1384 (Fla. 1st DCA 1993)(quoting Mercedes at 276).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a notice of appeal with the Clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.