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

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

CASE NO. 1D09-4956

Appellants,

v.

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

Appellees.
_____________________________/

Opinion filed November 4, 2011.

An appeal from the Department of Community Affairs.
Charles Gauthier, Director, Division of Community Planning.

Richard Grosso, Jason Totoiu, and Robert Hartsell of Everglades Law Center, Inc., Ft. Lauderdale, for Appellants.

Stephen Fry, County Attorney, and David A. Acton, Senior Assistant County Attorney, Stuart, for Appellee Martin County.

Richard Shine and L. Mary Thomas, Assistant General Counsels, Department of Community Affairs, Tallahassee, for Appellee Department of Community Affairs.

William L. Hyde of Gunster, Yoakley & Stewart, P.A., Tallahassee, for Appellees/Intervenors Martin Island Way, LLC, and Island Way, LC.

ON MOTION FOR REHEARING

THOMAS, J.

This cause is before us on Appellants' motion for rehearing and motion for rehearing en banc. We deny Appellants' motions, withdraw our order of December 14, 2010, and substitute the following in its place.

We previously dismissed this appeal, holding "[t]he appellants have not demonstrated that their interests or the interests of the substantial number of members are 'adversely affected' by the challenged order, so as to give them standing to appeal." Martin County Conservation Alliance v. Martin County, Dep't of Cmty. Affairs, 35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010) (quoting § 120.68, Fla. Stat. (2009)). We then ordered Appellants and their counsel to show cause why sanctions should not be imposed upon them pursuant to section 57.105(1), Florida Statutes, for filing an appeal where standing was clearly not present.

Upon our own initiative, we now hold that this appeal was filed in violation of section 57.105(1), Florida Statutes. We impose sanctions against Appellants and their counsel 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. We award attorneys' fees to Martin County, the Department of Community Affairs, Martin Island Way, LLC and Island Way, LC, as required by

the statute, to reimburse Appellees for the fees expended by them to defend this meritless appeal. Under the statute, the legislature has expressed its unequivocal intent that where a party files a meritless claim, suit or appeal, the party who is wrongfully required to expend funds for attorneys' fees is entitled to recoup those fees.

Based on the facts of this case and the applicable law on appellate standing under section 120.68, Florida Statutes, we find that under section 57.105, Appellees are clearly entitled to recoup their attorneys' fees. Appellants' appeal was dismissed by this court, because they failed to assert or establish material facts and controlling law demonstrating they are a "party who is adversely affected by final agency action." § 120.68(1), Fla. Stat.; see Legal Envtl. Assistance Found., Inc. v. Clark, 668 So. 2d 982, 986-87 (Fla. 1996); Fla. Chapter of the Sierra Club v. Suwannee Am. Cement Co., Inc., 802 So. 2d 520 (Fla. 1st DCA 2001); Daniels v. Fla. Parole & Probation Comm'n, 401 So. 2d 1351 (Fla. 1st DCA 1981). Under the legislatively designed structure of chapter 120, Appellants were afforded broad standing to raise all issues before an administrative law judge and the agency; having failed to factually establish how an adverse ruling harmed their interests, Appellants were not afforded further appellate review.

Because Appellants pursued appellate review without any foundation in law or fact, they are properly subject to sanctions under section 57.105, Florida

Statutes. Appellants' asserted basis for standing on appeal, that a future circuit court may interpret the land use plan amendments at issue differently than Martin County or the Department to somehow result in future adverse impact, is speculative and completely without merit in law and fact to establish appellate standing.

Section 57.105 does not require a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in material facts or then-existing law. See Long v. AvMed, Inc., 14 So. 3d 1264, 1265 (Fla. 1st DCA 2009) (noting section 57.105 does not require a party to show complete absence of a justiciable issue of fact or law).

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 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, Appellees 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. Regardless of whether the positive policy implications of the statute outweigh any negative impacts, however, that decision has properly been made by the appropriate branch -- the legislature.

We are not at liberty to disregard this legislative mandate that courts "shall" impose sanctions in cases without foundation in material fact or law. In Westwood Baptist Church, we noted our prior case law finding that "the word 'shall' in section 57.105 evidences 'the legislative intent to impose a *mandatory* penalty . . .

to discourage baseless claims, by placing a price tag on losing parties who engage in these activities.'" 953 So. 2d at 685 (quoting Albritton v. Ferrera, 913 So. 2d 5, 8-9 (Fla. 1st DCA 2005) (emphasis in original)). We also stated in that decision that "[w]e again remind the bar that section 57.105 expressly states courts 'shall' assess attorney's fees for bringing, or failing to dismiss, baseless claims or defenses." Id.

As to the constitutional concerns regarding access to courts, raised by the dissent, this issue was not raised by Appellants; thus, we decline to address it here. We note, however, that no appellate court has found that an application of sanctions for filing a meritless appeal under section 57.105 violates the Florida Constitution. Appellants engaged in substantial and lengthy administrative litigation, exercising their broad standing rights under chapter 120 to challenge the plan amendments at issue. The issues raised below were thoroughly reviewed by an Administrative Law Judge, who made extensive factual findings that were further reviewed by the Department of Community Affairs. In other words, at no time were Appellants denied access to the applicable legal process. Instead, under well-established case law, Appellants could not show any real, defined adverse impacts from the ruling below to justify appellate litigation.

To further explicate our decision, we present the facts and the procedural history, followed by an analysis of sections 120.68 and 57.105, Florida Statutes.

Facts and Procedural History

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, by authorizing clusters of residential units on smaller lots than the current minimum, 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.

Significantly, the Land Protection Amendment requires future use of the 500-acre parcel to be modified through an additional amendment to the Plan in combination with a planned unit development agreement. The future amendment would address the permanently set aside portion of the parcel (minimum of 250 acres), while the planned unit development agreement would address the portion of the parcel that would contain the clustered development.

In addition, the Land Protection Amendment requires any clustered development to be fiscally neutral regarding public expenditures, specifies that lots

must be larger than two acres, and prohibits development in environmentally sensitive areas. The amendment further requires acknowledgment of a permanent restriction against any future density increase. Finally, a policy within the amendment mandates that Martin County must consider whether to require more than 50% of the tract be set aside to ensure the set-aside area fills gaps in natural systems, wildlife corridors, greenways and trails. In sum, under the Land Protection Amendment, more than 250 acres of any 500-acre tract will remain undeveloped for public purposes, rather than having the tract simply divided among residential lots with homes.

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. The Department requested a formal administrative hearing regarding the Land Protection Amendment, and Appellants intervened. 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 continued to challenge the Amendments' compliance. Appellees 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. Following the hearing, Appellant Martin County Conservation Alliance asserted in its proposed recommended order that at least two of its members own land within or adjacent to property designated for agricultural use in the Plan, and they regularly use and enjoy the areas for outdoor and recreational activities. Appellant 1000 Friends of Florida joined Martin County Conservation Alliance in arguing that, in their view, the amendments will undermine comprehensive land use planning or harm the environment. Appellants repeatedly asserted that the Land Protection Amendment increased density in the 500-acre parcels, and it was ambiguous or vague regarding the location or pattern of development and protection of natural resources; thus, the Amendment allegedly lacked predictability. Appellants further asserted that the lack of meaningful standards will cause haphazard planning by negotiation and by the whim of the Martin County Commission. Appellants claimed standing under section 163.3184(1), Florida Statutes, because they met the definition of "affected persons"; however, Appellants did not argue that they will be adversely affected if

the amendments are found to be in compliance. Appellants' 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. In his factual findings, the ALJ found that the Land Protection Amendment does not allow for more development than currently allowed by the Plan. The ALJ also found the amendments' goals are clear, leaving no basis to speculate that the Martin County Commission will make decisions to the contrary. For example, the Martin County Commission will be precluded from approving planned unit developments or agricultural uses on the most environmentally sensitive part of a tract, or ignoring the importance of environmentally sensitive and agricultural lands and the impact that development patterns have on them. The ALJ found that the Land Protection Amendment requires at least 50% of an entire tract to be set aside for one of three public purposes, when coupled with other requirements of the current growth management plan.

As to the Urban Services Amendment, the ALJ found it will allow owners of real property within the Secondary Urban Services District to apply for connection to regional water and sewer services, with all connection costs paid by the owner. The ALJ found no credible evidence to establish any likelihood that the

amendment will allow further extensions of water and sewer lines from the Secondary Urban Services District to properties outside the Urban Service Districts. Finally, the ALJ found Appellants' testimony "was speculative at best and depended upon an unproven assumption that the county would violate the explicit provisions of the [amendment]."

The ALJ concluded that Appellants did not prove the amendments are contrary to Florida standards regarding comprehensive plans. Important to our analysis, the ALJ held that Appellants failed to prove that: 1) the amendments do not provide meaningful and predictable standards; 2) the amendments promote urban sprawl; 3) the amendments are not based on data and analysis; and 4) the Land Protection Amendment is inconsistent with the Plan.

Appellants filed 25 exceptions to the recommended order. They did not challenge the benefits of extending water and sewer service, 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' exceptions. Appellants 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, 35 Fla. L. Weekly at D1386.

Analysis

Standing Under Section 120.68, Florida Statutes

Appellants' appeal was dismissed because they failed to assert that they are a "party who is adversely affected by final agency action." § 120.68(1), Fla. Stat. To establish the foundation for *appellate* standing under section 120.68, it was incumbent upon Appellants, at the very least, to present evidence below of a reasonable possibility that the plan amendments, as interpreted, will lead to increased density, environmental degradation, or some other relevant, concrete evidence of harm that could adversely affect them.

Instead of directly addressing standing on appeal in their Initial Brief, Appellants 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, Appellants essentially conceded they could assert no past or current adverse affect from the Department's final order, but instead based their appeal on speculation.

Appellants' speculation regarding future judicial interpretations of either amendment is not ripe for review at this time. If such were a reasonable basis for appellate standing under section 120.68, anyone could appeal any administrative

ruling he or she disagreed with on the mere claim that future courts or political decisions could adversely affect them.

As this court stated nearly 30 years ago,

> [t]he fact that a person may have the requisite standing to appear as a party before an agency at a de novo proceeding does not mean that the party automatically has standing to appeal. The [Administrative Procedures Act's] definition of a party recognizes the need for a much broader zone of party representation at the administrative level than at the appellate level . For example, in rulemaking, a large number of persons may be invited or permitted by the agency to participate as parties in the proceeding, so as to provide information to the agency . . . . . . [A] person who participates in such a proceeding by authorization of a statute or rule, or by permission of an agency, many not necessarily possess any interests which are adversely, *or even substantially,* affected by the proposed action.

Daniels, 401 So. 2d at 1354 (citation omitted), *affd sub nom*, Roberson v. Fla. Parole & Probation Comm'n, 444 So. 2d 917 (Fla. 1983).

In Daniels, we found that an inmate who contends his parole release date was erroneously calculated has adequately established that his substantial interests were adversely affected by final agency action. 401 So. 2d 1354-55. "There can be little question that a determination affecting when an inmate may be returned to society is perhaps the most crucial action affecting his prison life." Id. at 1355. In Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982, 986-87 (Fla. 1996), the supreme court agreed with this court's holding in Daniels and held that "LEAF must therefore still demonstrate that it will be adversely affected by the Commission's decision."

Instead of arguing that this precedent should be overturned or reconsidered, Appellants argue that associational standing satisfies the requirements of section 120.68. Appellants' reliance on Reily Enterprises v. Florida Department of Environmental Protection, 990 So. 2d 1248 (Fla. 4th DCA 2008), is unavailing. There, the ALJ made a specific factual finding that established standing; here, Appellants can point to no such finding, even though the ALJ found associational standing existed at the administrative hearing. In fact, Reily cites to our decision in Florida Chapter of the Sierra Club as an example of a case where assertions of appellate standing without adverse impacts must fail. Reily, 990 So. 2d at 1251.

We disagree with Appellants that the law on standing is so fact specific and subjective that such a dispute can never be the subject of sanctions. Although Appellants presented admissible evidence below that a few of their members had legitimate environmental interests in challenging the comprehensive plan amendments under section 163.3184(1), Florida Statutes, they failed to present any competent evidence that the amendments, if implemented, would adversely affect them. In Sierra Club, 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. Furthermore, Appellants had the responsibility to request that the ALJ make some findings in this regard, and if the judge refused, Appellants could raise

this on appeal in asserting the need for a remand.

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. The ALJ found that the Land Protection Amendment does not allow for more development and that it will be easier and less costly for Martin County to acquire large tracts of property for conservation projects. Appellants cannot now claim that the amendments will increase development density or otherwise adversely affect their identified environmental interest when they made no credible factual claims to the contrary.

Appellants also argue in their response to the show cause order that Audubon of Martin County will be negatively impacted by future projects authorized by the Land Protection Amendment, because subdividing the property into smaller tracts of land will cause habitat fragmentation, thus making the property less desirable for species that require large tracts of land. The facts, however, are just the opposite. The Land Protection Amendment will not increase density or cause habitat fragmentation; the amendments help ensure consolidation of development on large parcels, and further benefit the public by providing for permanent preservation of open space, environmentally sensitive lands, and

continued use of agricultural land.

According to Appellants' counsel, the challenged amendments could have caused environmental harm, but were determined not to, as a result of legal interpretations they in good faith believed were flawed. We find this statement supportive of our conclusion that their appeal is without merit. Cf. Peace River v. IMC Phosphates Co., 18 So. 3d 1079, 1084 (Fla. 2d DCA 2009) (standing established on appeal even where proof offered is insufficient to succeed on merits of claim in administrative proceeding, where party offered undisputed evidence that proposed mining permit *could* affect complaining party's substantial interests, but ALJ found that proposed permit would not adversely affect river). Unlike in Peace River, Appellants offered no evidence below that the plan amendments will adversely affect their legally protected interests, because the evidence cannot show any density increase or other purported environmental adverse affects. Most significantly, Appellants do not and cannot claim that the ALJ's factual findings are unsupported by competent, substantial evidence.

In addition, Appellants' interest in access to the affected property is without merit, as well. No serious argument has been made that unauthorized entry onto private property is an interest that can be adversely affected by a land use change which will enhance the open spaces of the property. Appellants assert the law on standing is not the subject of clear, black-letter law, but rather is determined on a

case-by-case basis, depending on the specific facts. This assertion, even if correct, is of no assistance to Appellants, as they have completely failed to show that their interests are adversely affected by the amendments.

As Appellee Martin Way notes, "none of [Apppellants'] testimony established that any of the members of the Appellants' organizations were 'adversely affected' by these comprehensive plan amendments. It was an utter failure of proof that created this problem for Appellants on appeal." Even if the unlikely scenarios Appellants predict come to pass regarding future development orders, Appellants and other parties can challenge such actions under chapter 163 in circuit court. See, e.g, Nassau County v. Willis, 41 So. 3d 270, 276-78 (Fla. 1st DCA 2010) (explaining section 163.3215, Florida Statutes, created broad and liberal standing threshold for persons with environmental interests to show they are aggrieved or adversely affected to challenge development). Appellants argue that the test for standing under section 120.68 is similar to the statutory test established in section 163.3215, which confers standing to challenge development orders as inconsistent with comprehensive plans. Appellants concede that standing is "liberalized" under section 163.3215, but argue that the statutes are similar enough to make their appeal sufficiently credible so as to avoid sanctions. We reject Appellants' argument.

As noted in Nassau County, standing under section 163.3215 is broadly

granted, but even under that test, a party must show an adverse effect on their interests, as defined by that statute. 41 So. 3d at 276-78. There, for example, the county's development order dramatically increased density. Furthermore, we explained in detail in Nassau County how that statute provides more standing than previously existed at common law. Id. at 276-78. By contrast, section 120.68 narrowly provides standing only to parties whose legitimate interests are adversely affected in some concrete manner.

In conclusion, Appellants' basis for standing on appeal is speculative and insufficient to establish standing on appeal. Appellant's response to our order to show cause further failed to adequately address standing under section 120.68.

Application of Section 57.105, Florida Statutes

Because Appellants have advanced an argument unsupported by material facts or law necessary to establish standing to appeal, sanctions must be issued. Section 57.105 provides the following relevant language authorizing the award of attorneys' fees in administrative appeals:

> (1) Upon the court's own initiative . . . the court *shall* award a reasonable attorney's fee . . . to be paid by to the prevailing party . . . on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney *knew or should have known* that a claim or defense . . .
>
> (a) Was *not supported by the material facts necessary to establish the claim or defense;* or

> (b) Would not be supported *by the application of then-existing law to those material facts*.

§ 57.105(1), Fla. Stat. (emphasis added); Gopman v. Dep't of Educ., 974 So. 2d 1208, 1210 n.2 (Fla. 1st DCA 2008) (citing E. Indus. Inc. v. Fla. Unemployment Appeals Comm'n, 960 So. 2d 900, 901 (Fla. 1st DCA 2007)).

Section 57.105 applies to all who file appeals in Florida's courts, including parties who have prevailed in the lower tribunal, if their legal position was without merit under the law or facts applicable to the case. The fact that a case was zealously litigated below, including extensive testimony and trial exhibits, does not shield a party from sanctions when a meritless appeal is filed. Were we to determine that complex cases are immune from sanctions under section 57.105, we would be abdicating our duty and violating Article II, section 3 of the Florida Constitution.

Appellants and their counsel filed a meritless appeal, able to assert only that the amendment *might* lead to negative results *if* a different decisionmaker reads the amendments in an absurd and literal manner, differently than now interpreted, and such a decision *can* be adverse to Appellants' environmental mission. Appellants made no attempt to justify appellate standing under section 120.68 in their Initial Brief, and did not cite or recognize long-established case law in their Reply Brief. See Legal Envtl. Assistance Found., 668 So. 2d at 986-87 (environmental group lacked appellate standing to challenge portion of order where group could not be

adversely affected by portion of utility order); Sierra Club, 802 So. 2d at 521 (citing Legal Envtl. Assistance Found., 668 So. 2d at 987, and Daniels, 401 So. 2d at 1351). 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.

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. See AvMed, 14 So. 3d at 1265 (noting section 57.105 does not require a party to show complete absence of a justiciable issue of fact or law) (citing Gopman, 974 So. 2d at 1210, and Wendy's of N.E. Fla., Inc. v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003)).

As discussed above, 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. Wendy's, 865 So. 2d at 523 (reiterating that this statute was amended as part of the Tort Reform Act to reduce frivolous litigation and decrease cost in the civil justice system by broadening available remedies).

We note further that Appellants did not make a good faith argument for a change in law pursuant to section 57.105(3). Although such a finding is not required here, their failure to comply with this provision is further reason to impose sanctions. When Appellants did not address standing in their Initial Brief, it is not tenable to assert that they should be held harmless under section 57.105(3). See Mercury Ins. Co. of Fla. v. Coatney, 910 So. 2d 925 (Fla. 1st DCA 2005) (explaining it was insufficient to argue in Reply Brief that good faith effort was made to propose change in existing law).

Thus, we hold that the imposition of sanctions requiring Appellants and their attorneys to reimburse Appellees for their attorneys' fees and costs in defending this appeal is only appropriate. The same sanction must provide for reimbursement of attorneys' fees and costs for the intervenors, Martin Island Way, LLC, and Island Way, LC, because they jointly filed the Answer Brief with Appellees. Appellants have not asserted that the intervenors are not entitled to fees if this court imposes sanctions.

Conclusion

We impose a sanction of an award to Appellees of all appellate fees and costs "to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney . . . ." § 57.105(1), Fla. Stat. Appellees are the prevailing parties in this case. Included in this award are any fees incurred by the

Department of Community Affairs, Martin County, and the intervenors, Martin Island Way and Island Way.

No motion for rehearing will be allowed.

HAWKES, J. CONCURS; VAN NORTWICK, J., DISSENTS WITH WRITTEN OPINION.

Van Nortwick, J., dissenting.

When our panel first considered this appeal, I agreed that the evidence introduced below by Martin County Conservation Alliance (MCCA) and 1000 Friends of Florida, Inc., appellants, was not sufficient to establish appellate standing under section 120.68, Florida Statutes (2009). Martin County Conservation Alliance v. Martin County, 35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010). I respectfully, but strongly, disagree with the majority, however, that the failure to adequately demonstrate standing in this case warrants the imposition of the sanction of attorney's fees under section 57.105, Florida Statutes (2009).[1] In my view, this case is not close to providing a basis to impose sanctions

[1] Because I believe the order imposing sanctions against appellants and their counsel makes this case of exceptional importance and conflicts with our case law, I moved for en banc consideration of this case pursuant to rule 9.331, Florida Rules of Appellate Procedure, and section 6.2 of this court's Internal Operating Procedures. Six judges voted for en banc consideration, eight judges voted against, and one judge was recused. In addition, based on my additional research and consideration undertaken in addressing the issues raised by the sanction order, I have become concerned that the dismissal of this appeal for lack of standing was erroneous. In Florida Chapter of the Sierra Club v. Suwannee American Cement Co., Inc., 802 So. 2d 520 (Fla. 1st DCA 2001), this court dismissed an appeal taken by an environmental organization and local citizens group because the environmental group had not alleged facts that any of its individual members would be adversely affected and because the local citizens group premised its claim of appellate standing on its authority to appear at the underlying administrative proceeding. Here, the allegations of injury are much more particularized, as detailed in the dissent. For the same reason, I believe the case before us is also distinguishable from Legal Environmental Assistance Foundation, Inc. v. Clark, 668 So. 2d 982 (Fla. 1996), a case on which Sierra Club relied.

under section 57.105(1) or section 120.595(5).[2] The record reflects that there are material facts that support appellate standing which are more than sufficient to demonstrate that the assertion of appellate standing was not so without record basis to justify the imposition of sanctions. In addition, the erroneous standard applied in the sanction order conflicts with precedent of this court and other District Courts of Appeal under section 57.105. Further, the sanction order creates precedent that will severely chill appellate advocacy, especially for non-profit environmental organizations like the appellants here. Accordingly, I dissent to the order imposing sanctions.

Standards for Imposing Sanctions under Section 57.105(1)

Section 57.105(1) authorizes a sanction when the losing party's attorney knew or should have known

> that a claim or defense when initially presented to the court or at any time before trial:

[2] Section 120.595(5), Florida Statutes (2009), provides, in pertinent part, that "[w]hen there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process. . . ." Under this statute, we have held that an appeal is frivolous if it presents no justiciable question and is so "devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed." Procacci Commercial Realty, Inc. v. Dep't of Health & Rehabilitative Servs., 690 So. 2d 603, 609 (Fla. 1st DCA 1997) (quoting Treat v. State ex. rel. Mitton, 121 Fla. 509, 510-511, 163 So. 883, 883-884 (1935)); see also Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 736 (Fla. 1st DCA 2004). Thus, the standard under section 120.595(5) imposes a greater burden than the standard under section 57.105.

> (a) Was not supported by the material facts necessary to establish the claim or defense; or
> (b) Would not be supported by the application of then-existing law to those material facts.

Under the current version of the statute, the standard for sanctions under section 57.105 is no longer "frivolousness." However, in applying revised section 57.105, Florida appellate courts have recognized that, while the 1999 revision expands the circumstances in which fees may be awarded under section 57.105, the statute "still is intended to address the issue of frivolous pleadings." Read v. Taylor, 832 So. 2d 219, 222 (Fla. 4th DCA 2002); see also Connelly v. Old Bridge Village Co-Op, Inc., 915 So. 2d 652, 656 (Fla. 2d DCA 2005); Pappalardo v. Richfield Hospitality Serv., Inc., 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001). The sanction order here essentially holds that an appeal which lacks standing warrants sanctions as a matter of course. The standard imposed by the sanction order is essentially a "meritless" standard – that is, the party sanctioned has simply lost on the merits or on standing - and such a standard is no more capable of precise definition than "frivolousness" under the prior version of the statute. See Visoly v. Security Pacific Credit Corp., 768 So. 2d 482, 491 (Fla. 3d DCA 2000) ("We recognize that to some extent, the definition of 'frivolous' is incapable of precise determination.").

In seeking to define when a claim or defense is "not supported by the

material facts . . . or . . . the application of then-existing law" under section 57.105, Florida courts have applied standards that maintain a high barrier to the imposition of sanctions. For example, in Cowgill v. Bank of America, 831 So. 2d 241, 242 (Fla. 2d DCA 2002), while the Second District affirmed a summary judgment in favor of Cowgill based on the application of the statute of limitations, it reversed an order imposing sanctions under section 57.105(1) "because the Appellant's claim was arguably supported by material facts and then-existing law" (emphasis added); see also Stagl v. Bridgers, 807 So. 2d 177, 177 (Fla. 2d DCA 2002) ("An award of attorney's fees pursuant to section 57.105 is appropriate only when the action is 'so clearly devoid of merit both on the facts and the law as to be completely untenable.'") (quoting Brinson v. Creative Aluminum Prods., 519 So. 2d 59, 60 (Fla. 2d DCA 1988)). Similarly, in Goldfisher v. Ivax Corp., 827 So. 2d 1110, 1111 (Fla. 3d DCA 2002), the Third District held that the appellee could not recover appellate attorney's fees under section 57.105 because, although the appellant "was not victorious . . . neither his action nor subsequent appeal, were totally without merit." (Emphasis added; citing Concrete & Lumber Enters. v. Guaranty Bus. Credit Corp., 829 So. 2d 247 (Fla. 3d DCA 2002)).

In DeVaux v. Westwood Baptist Church, 953 So. 2d 677, 683-685 (Fla. 1st DCA 2007), a case relied upon by the majority, we discussed the standards applicable to awarding fees under section 57.105(1). In DeVaux, we

acknowledged that "the definition of 'frivolous' is incapable of precise determination." Id. at 683 (quoting Wendy's of N.E. Florida, Inc. v. Vandergriff, 865 So. 2d 520, 524 (Fla. 1st DCA 2003) (quoting Visoly, 768 So. 2d at 491)). We looked to the Restatement for definitional guidance. The Restatement establishes an objective and strict standard, explaining that "[a] frivolous position is one that a lawyer of ordinary competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." Restatement Third of Law Governing Lawyers, § 110, cmt. d. (2000). In addition, in Wendy's, 865 So. 2d at 524 (quoting Visoly, 768 So. 2d at 491), we explained that

> there are established guidelines for determining when an action is frivolous. These include where a case is found: (a) to be completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (b) to be [contradicted] by overwhelming evidence; (c) as having been undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (c) [sic] as asserting material factual statements that are false.

These cases establish rigorous standards that must be applied before awarding sanctions under section 57.105 which restrain a court's authority to levy sanctions. Applying these standards to the facts before us, in my view, it cannot be said that the appellants' standing arguments here are "completely untenable," Stagl, 807 So. 2d at 177, "completely lacking in merit," Wendy's, 865 So. 2d at 524, or that appellants are asserting a position that "a lawyer of ordinary

competence would recognize as so lacking in merit that there is no substantial possibility that the tribunal would accept it." DeVaux, 953 So. 2d at 683. Simply put, the sanction order here applies such a liberal standard that, if sustained, the precedent established will increase the use of sanctions under section 57.105 in contravention of the intent of the statute.

There are good reasons to apply section 57.105 with restraint. In Bridgestone/Firestone, Inc. v. Herron, 828 So. 2d 414, 419 (Fla. 1st DCA 2002), we cautioned that:

> The courts must apply section 57.105 . . . carefully to ensure that it serves the purpose for which it was intended [to decrease the cost of employing the civil justice system]. If an order dismissing a claim or striking a defense routinely leads to a motion for attorney's fees, the point of the statute would be subverted and, in the end, it might even have the reverse effect of making civil litigation more expensive. The need to adjudicate multiple fee claims in the course of a single case could create conflicts between lawyers and their clients, and it could take time away from the court's main objective; that is, to resolve the controversy presented by the case.

Appellants' Assertions of Appellate Standing

It is undisputed that the appellants possessed standing to appear in the administrative proceeding below. See § 120.569, Fla. Stat. (2009). But, as we have explained:

> The fact that a person may have the requisite standing to appear as a party before an agency at a de novo proceeding does not mean that the party automatically

> has standing to appeal. The APA's definition of a party recognizes the need for a much broader zone of party representation at the administrative level than at the appellate level. . . . [A] person who participates in [an administrative] proceeding by a statute, rule, or by an agency's permission, may not necessarily possess any interests which are adversely, or even substantially, affected by the proposed action.

Daniels v. Fla. Parole & Probation Comm'n, 401 So. 2d 1351, 1354 (Fla. 1st DCA 1981), aff'd sub. nom., Roberson v. Fla. Parole & Prob. Comm'n, 444 So. 2d 917 (Fla. 1983), abrogated on other grounds, Griffith v. Fla. Parole & Probation Comm'n, 485 So. 2d 818 (Fla. 1986). Under section 120.68(2), standing at the appellate level exists "if four conditions are satisfied: '(1) the action [was] final; (2) the agency is subject to the provisions of the [Administrative Procedure] Act; (3) [the person seeking review] was a party to the action which he seeks to appeal; and (4) [the party] was adversely affected by the action.'" Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 652 (Fla. 1st DCA 2009) (quoting Daniels, 401 So. 2d at 1353). The fourth requirement is the only standing element at issue here. We are obligated to accept the material facts supporting standing as true and construe them in favor of the challenged party. Sun States Utils., Inc. v. Destin Water Users, Inc., 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997).

In this proceeding, the appellants challenged Martin County ordinances that would have amended the Martin County Comprehensive Growth Management Plan. Before the administrative law judge (ALJ), the appellants introduced

substantial evidence seeking to show that the amendments to the Plan would adversely impact appellants and their members. For example, the record reflects that members of both organizations testified that they regularly use and enjoy areas within the agriculture area included within the Plan amendments for outdoor and recreational activities such as bird watching, hiking, boating and kayaking. The appellants further asserted that the Plan amendments would modify the agriculture areas within the Plan by allowing subdivision development which would adversely affect their use of the land. A representative of Martin County Audubon Society, a member organization of MCCA, testified that the Audubon Society regularly uses such areas for field trips and educational excursions to watch bird species with unique habitat requirements. Further, the Audubon Society representative testified that the organization would be adversely affected by future projects authorized under the Plan amendments that will cause those tracts to become subdivided into smaller residential lots and fragment current agricultural lands.

Although the ALJ rejected the arguments of the appellants and found that, under the Plan amendments, development density would remain static and fragmentation will be decreased, those findings are not a basis for concluding that no material facts support an assertion of standing under section 120.68. The sanction order reasons that, since the ALJ found that the Plan amendments will not increase density, the appellants cannot establish that they are adversely impacted

for the purposes of appellate standing. This conclusion erroneously merges issues relating to standing and the merits of this case. As the court explained in Reily Enterprises LLC v. Florida Department of Environmental Protection, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008), the facts supporting standing should be considered separately from the merits. Considering the facts supporting standing together with the merits confuses standing and the merits "such that a party would always be required to prevail on the merits to have had standing." Id. Although Reily addressed standing in the administrative proceeding under section 120.569(1), Florida Statutes, its reasoning applies equally to appellate standing under section 120.68. See also St. Martin's Episcopal Church v. Prudential-Bache Sec., Inc., 613 So. 2d 108, 110 n.4 (Fla. 4th DCA 1993) ("the concept of standing should not be confused with the elements or merits of the claim"); Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co., 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009) (explaining that standing "does *not* depend on the elements or merits of the underlying claim"); Sun States Utils., Inc. v. Destin Water Users, Inc., 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1997) ("Standing should not be confused with the merits of a claim."); St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt., 54 So. 3d 1051, 1054-55 (Fla. 5th DCA 2011). Further, since we based our decision solely on appellate standing, we have not even addressed the merits of the issues raised in this appeal.

As a general proposition, "[s]tanding is a legal concept that requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." Hayes v. Guardianship of Thompson, 952 So. 2d 498, 505 (Fla. 2006); see also Hutchison v. Chase Manhattan Bank, 922 So. 2d 311, 315 (Fla. 2d DCA 2006); Gen. Dev. Corp. v. Kirk, 251 So. 2d 284, 286 (Fla. 2d DCA 1971) ("Standing is, in the final analysis, that sufficient interest in the outcome of litigation which will warrant the court's entertaining it."). Thus, standing depends on the nature of the injury asserted as well as the purpose and scope of the administrative proceeding. Agrico Chem. Co. v. Dep't of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981); Friends of the Everglades, Inc. v. Bd. of Trs. of the Internal Improvement Trust Fund, 595 So. 2d 186, 189 (Fla. 1st DCA 1992); see also Hayes, 952 So. 2d at 505. It does not depend on the elements or merits of the underlying claim. See St. Martin's Episcopal Church, 613 So. 2d at 110 n.4 (Fla. 4th DCA 1993). Therefore, standing - - a forward-looking concept - - cannot disappear based on the ultimate outcome of the proceeding. See Hamilton County Bd. of County Comm'rs v. State, Dep't of Envtl. Regulation, 587 So. 2d 1378, 1383 (Fla. 1st DCA 1991) (rejecting the Department's argument that standing had "ceased to exist" based on amendments to the permit application proposed during the hearing and incorporated into the final permit).

The sanction order asserts that appellants essentially conceded they could claim no past or current adverse effect from the Department's final order, but instead based their appeal on speculation. (Order at p. 12). I do not believe the briefs or record can fairly be read to support such a conclusion. Certainly, simply rearguing the facts previously presented to a lower tribunal might justify sanctions on appeal. See Procacci Commercial Realty, Inc. v. Dep't of Health and Rehabilitative Servs., 690 So. 2d at 603, 609 (Fla. 1st DCA 1997). But that is not the situation here. As the briefs make abundantly clear, the essence of appellants' arguments on appeal are not factual arguments. To the contrary, on appeal appellants contend that the Plan provisions found by the agency to adequately protect the environment and farmland are either unlawfully vague or were misinterpreted by the agency as a matter of law. Yet, the majority justifies sanctions because appellants have not shown that the ALJ's factual findings are unsupported by competent substantial evidence. The majority states:

> According to Appellant's counsel, the challenged amendments could have caused environmental harm, but were determined not to, as a result of legal interpretations they in good faith believed were flawed. We find this statement supportive of our conclusion that their appeal is without merit. . . . Appellants do not and cannot claim that the ALJ's factual findings are unsupported by competent, substantial evidence.

(Order at p. 16). Again, on page 20, the majority focuses exclusively on the failure of appellants to raise an issue of fact. The majority observes that "no possible

view of the evidence presented at the final hearing below would support a reasonable conclusion that appellants had standing to appeal." The majority's repeated reference to appellants' failure to raise a fact question on appeal suggests they misapprehend the nature of appellants' appeal.

Further, the majority dismisses appellants' claim of adverse impact as mere speculation: "Appellants and their counsel filed a meritless appeal, able to assert only that the amendment *might* lead to negative results *if* a different decision-maker reads the amendments in an absurd and literal manner, differently then now interpreted, and such a decision *can* be adverse to appellants' environmental mission." (Order at p. 19; italics in original). In fact, arguing for a different interpretation of the law, such as the Land Protection Amendment appellants challenge here, is the quintessential relief sought by an appeal which raises an error of law.

The case before us produced over a thousand pages of record and a recommended order of 53 pages. Over a dozen witnesses gave live testimony, eight of whom testified as to facts supporting the standing of the appellants. It is significant to me that counsel for the Department of Community Affairs, one of the appellees, has asserted that appellants should not be sanctioned under section 57.105(1). The majority's conclusion that appellants' assertion of appellate standing was "meritless," so as to warrant sanction, fails to acknowledge the

complexity of this appeal and ignores that the standing question presented here was a close call.

Appellant MCCA and appellate counsel Richard Grosso have participated in prior appeals challenging development orders which were dismissed for lack of standing: O'Connell v. Florida Department of Community Affairs, 874 So. 2d 673 (Fla. 4th DCA 2004), and Melzer v. Florida Department of Community Affairs, 881 So. 2d 623 (Fla. 4th DCA 2004). In both O'Connell and Melzer, the appellant presented substantially less evidence to support standing than was introduced in the case before us. In O'Connell, the court found that "none of the individual Appellants have stated how the amendments will adversely affect them," that "MCCA has also failed to assert how its members will be adversely affected by the amendments," that appellants "state that they or their members own property in Martin County; however, they have not asserted that their property is located near the sites affected by the amendments or how they would be adversely affected by the amendments," and, finally, that MCCA's interest "is only a general interest in maintaining the quality of life in Martin County. . . ." 874 So. 2d at 676-77. In Melzer, the court found that the only standing facts in the record were that appellants "are residents of Martin County." 881 So. 2d at 624. Further, in Melzer, there was no record evidence of use and enjoyment of lands that could be impacted by the comprehensive plan amendments at issue in that case. As

discussed above, here appellants introduced substantially more evidence of their use and enjoyment of the affected lands and the adverse impact of the administrative action on their organizations and members - - the facts on which appellate standing is based - - than was the case in O'Connell and Melzer. Despite the conclusion by the respective appellate panels of the Fourth District that each of these appeals required dismissal for lack of appellate standing, neither panel found that the legislative mandate in section 57.105(1) required the imposition of sanctions based on a dismissal on this ground. The low threshold for imposition of sanctions set by the majority in the sanction order obviously applies a different standard than was applied by the Fourth District.

Chilling Effect of Sanction Order

The legislature enacted section 57.105 to "discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing the price tag of attorney's fee awards on the losing parties." Carnival Leisure Indus., Ltd. v. Holzman, 660 So. 2d 410, 412 (Fla. 4th DCA 1995). As the sanctions order notes, applying sanctions in the appropriate cases "will protect this court's ability to serve litigants with meritorious cases, will encourage lawyers to give thoughtful consideration as to whether there are non-frivolous grounds for an appeal before filing, and will discourage lawyers from raising meritless appellate arguments on the chance that they will 'stick.'" DeVaux, 953 So. 2d at 685.

Notwithstanding the positive purpose of the statute, I am deeply concerned that, by imposing sanctions in a case such as this, we will necessarily have a "chilling effect" on innovative legal argument and appropriate zealous representation, especially in complex and evolving areas of the law. If excessive use of sanctions chills vigorous advocacy, attorneys will not accept close cases, access to the courts will be restricted, and wrongs will not be addressed. Moreover, the precedent being set by this order will unduly discourage participation in the appellate process. This sanction order holds, in effect, that where a final order has found that the appellants would not be adversely affected by a development an assertion of appellate standing to challenge such order will inevitably result in section 57.105 sanctions. Such a liberal use of section 57.105 will lead to the intolerable development that only those with deep pockets, who can run the risk of sanctions if they lose, will seek appellate redress. Parties such as an average citizen, small business, or nonprofit organization, in good faith seeking review of a ruling that is reasonably believed to be erroneous, could be coerced into forgoing an appeal because they would be unable to risk their financial existence to potential sanctions. This chilling effect is especially present in cases in which a local nonprofit environmental organization, such as MCCA, challenges a development order impacting its community. In my view, such a chilling effect will not only reduce the ability of citizens to challenge environmentally adverse

real estate development, but may constitute a denial of the guarantee of access to courts provided in Article I, section 21 of our State's Constitution: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has recognized that the right to appeal an administrative order is implied by both the due process clause of article I, section 9, of the Florida Constitution, and the access to courts provision in article I, section 21. Scholastic Sys., Inc. v. LeLoup, 307 So. 2d 166 (Fla. 1974); see Padovano, Appellate Practice, § 4.5, n.3 (West 2011 ed.). Financial barriers should not stand in the way of access to courts. Psychiatric Assocs. v. Siegel, 610 So. 2d 419, 424-25 (Fla. 1992), *receded from on other grounds in* Agency for Health Care Admin. v. Assoc. Indus. of Fla., Inc., 678 So. 2d 1239 (Fla. 1996).

After the initial sanction order was issued in this case, in addition to the motions for rehearing en banc filed by appellants, the Florida Wildlife Federation, Florida Chapter of American Planning Association, at the Florida Audubon Society all sought leave to appear as amicus curiae to file briefs in support of appellants. The majority denies these motions. I would grant the motions. In my view, we can only benefit from the views of these amicus curiae which will be affected by the precedent established by this sanction order. Accordingly, I also dissent to the denial of these motions.