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, LC,

Appellees.
_____/

CASE NO. 1D09-4956

Opinion filed December 14, 2010.

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.

ORDER

PER CURIAM.

We previously dismissed this appeal, finding "[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). We then issued an order to Appellants and Appellants' counsel, stating, "Appellants are ordered to show cause why sanctions should not be imposed upon them pursuant to section 57.105(1), Florida Statutes, for the filing of an appeal for *which standing clearly is not present*." (Emphasis added.) We now hold that this appeal was filed in contravention of section 57.105(1), Florida Statutes, and we impose sanctions against Appellants and their counsel for the following two reasons.

The first reason we find that sanctions must be awarded under section 57.105, Florida Statutes, is because we have also determined to award attorney's fees and costs to Intervenors Martin Island Way, L.L.C., and Island Way, under section 120.595(5), Florida Statutes. That statute authorizes judicial discretion to award 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[.]" Because we have found that this appeal was frivolous, then by logical necessity, we must also conclude that this appeal was without merit under section 57.105, as that statute does not require a finding of frivolousness, but only a finding that the claim lacked a basis in "material facts" or then-existing law. Long v. AvMed, Inc., 14 So. 3d 1264, 1265 (Fla. 1st DCA 2009) ("Importantly, section 57.105 'does not require a party seeking fees to show the complete absence of a justiciable issue of fact or law, but permits fees to be recovered for any claim or defense that is insufficiently supported.'") (citing Gopman v. Dep't of Educ., 974 So. 2d 1208, 1210 (Fla. 1st DCA 2008), and Wendy's of N.E. Fla., Inc. v. Vandergriff, 865 So. 2d 520, 523 (Fla. 1st DCA 2003)).

The second reason we impose sanctions under section 57.105 is that this appeal is nothing more than an attempt to retry facts determined adversely to Appellants. Thus, there are no "material facts" supporting an appeal, because Appellants do not even assert that the Administrative Law Judge's findings are unsupported by competent, substantial evidence. If an opposing party submits superior factual evidence, and factual findings are based on that evidence, then the non-prevailing party cannot escape sanctions under section 57.105 by merely arguing on appeal that its evidence should have prevailed. Tradewinds Mfg. Co. v. Cox, 541 So. 2d 667 (Fla. 1st DCA 1989) (holding that where there is CSE to support the factfinder, it is irrelevant whether there is CSE to support a contrary

finding). While this may be sufficient to avoid the imposition of sanctions in an administrative proceeding, see Albritton v. Ferrera, 913 So. 2d 5, n.1 (Fla. 1st DCA 2005), such an assertion is not sufficient to avoid sanctions when attempting to meet the higher burden of demonstrating the right to seek judicial review under section 120.68. This is especially true where the operative facts go to whether a party has standing to appeal. If there is no standing, then sanctions are appropriate, as the prevailing party should never have been required to undergo the expense and delay inherent in the appellate process.

This is not the first occasion when Martin County Conservation Alliance and its counsel have pursued an appeal which was later dismissed due to lack of appellate standing. See O'Connell v. Dep't of Cmty. Affairs, 874 So. 2d 673 (Fla. 4th DCA 2004); Melzer v. Dep't of Cmty. Affairs, 881 So. 2d 623 (Fla. 4th DCA 2004). Appellants and their attorney would have been well advised to learn from their experience in the Fourth District before filing yet another appeal under section 120.68, where no adverse effects flowed from the Department of Community Affairs' (the Agency) final action. Certainly, these previous cases establish beyond any doubt that Appellants and their counsel knew or should have known that no material facts justified their appeal here, and they made no good faith effort to modify the relevant law by failing to even address appellate standing in their Initial Brief.

Facts and History Below

The Martin County Commission passed ordinances 777 and 781 in 2007 amending the Martin County Comprehensive Growth Management Plan (Plan). The first amendment is known as the Land Protection Incentives Amendment ("Land Protection Amendment"); the second is the Secondary Urban Services District Amendment ("Urban Services Amendment"). Both amendments were submitted to the Department of Community Affairs ("Agency"), which issued a notice of intent to find the Land Protection Amendment not in compliance with state law regarding growth management, but to find the Urban Services Amendment in compliance.

The Martin County Plan establishes a primary and a secondary urban service district to congregate public services and facilities, thereby minimizing urban sprawl. In the primary urban service district, residential density is set at two or more dwellings per acre; in the secondary service district, residential density is set at one dwelling per acre. Land not in either type of service district is primarily classified for agricultural use, with the residential density requirement of one dwelling per five to twenty acres. The Land Protection Amendment allows landowners outside of urban service districts to develop in clusters of smaller lots, if 50% of an entire tract is set aside for conservation, open space, or agricultural use.

After Appellants challenged adoption of the ordinances, the Administrative Law Judge (ALJ) found that the Land Protection Amendment "*does not allow for more development than is allowed under the Plan currently."* (Emphasis added.) This is primarily because, although the Land Protection Amendment decreased the minimum lot size from 20 acres to over 2 acres, it clustered the smaller lots rather than allowing an equal number of larger lots spread throughout the entire land tract.

The Land Protection Amendment created a new opportunity for owners of at least 500 acres of rural land to develop home sites without dividing the property into very large lots, but the Amendment required developers to set aside at least 50% of the land to be protected from further development by creating easements for agricultural, conservation, or public open space uses. These easements would be permanently held by public entities. In addition to resulting in the same density as currently allowed by the Plan, the Land Protection Amendment also leaves large tracts of land available for continued agricultural uses or for surface water management projects needed for the Everglades Restoration Project and related efforts.

With regard to the Urban Services Amendment, the ALJ found:

> It amends the text of the future land use element, the sanitary sewer services element, and the potable water services element of the Plan. As amended, the Plan would allow owners of real property within the [urban service district] to apply for connection to regional water and

> sewer service rather than be limited to using individual potable water wells and individual septic tanks, provided all costs of connection to the public services would be paid by the owner.

Appellants did not challenge below the benefits of extending water and sewer service into the secondary urban services district, nor did they dispute the ALJ's numerous factual findings that the amendments would positively affect the environment, fire safety, and drinking water quality, and that taxpayers would not be adversely affected. As noted by Martin Island Way,

> [T]here is nothing in the record . . . below, and not even any . . . evidence establishing that [Urban Services] amendment will have any effect on [Appellants] interests whatsoever, much less an 'adverse affect.' . . . [The] intervenors' two subdivisions, which were already platted and could be legally developed under the preexisting . . . land use requirements with individual potable water wells and septic tanks, are now instead going to be on regional water and waste water systems to the considerable benefit of the environment generally. . . . It is this proposition that . . . is proof positive that [Appellants] have no logical basis for pursuing an appeal as 'adversely affected' parties pursuant to section 120.68(1), Florida Statutes.

While the administrative case was pending, Martin County amended the Land Protection Amendment, and in response, the Agency found it to be in compliance; thereafter, Appellants moved to challenge both the Land Protection Amendment as well as the Urban Services Amendment that Appellants had previously challenged.

Following a four-day evidentiary hearing, the ALJ issued a Recommended Order which held that Appellants had associational standing as well as standing in

their own right as adversely affected persons under section 163.3184(1)(a), Florida Statutes. The ALJ further held that Appellants did not prove that the two Martin County 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; each was considered and rejected by the Agency in its Final Order, which adopted *in toto* the ALJ's findings of fact and conclusions of law. Appellants appealed, and as noted, this court dismissed their appeal, finding that they lacked standing, as they could not establish they were an aggrieved party. See Martin County Conservation Alliance, 35 Fla. L. Weekly at D1386.

Analysis

1. Appeal Lacks Basis in Material Fact or Application of Then-Existing Law to Material Facts

Section 57.105(1), Florida Statutes, provides that this court shall impose sanctions on the losing party and their attorney when

> . . . the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented . . .

> (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.

Appellants lacked standing to bring this appeal; thus, the appeal was completely meritless.

Appellate standing is not equivalent to administrative standing. See § 120.68(1), Fla. Stat.; Legal Envtl. Assistance Found., Inc. v. Clark, 668 So. 2d 982 (Fla. 1996). While Appellants may have had standing to file an administrative challenge to the comprehensive plan amendments, which we do not address here, Appellants failed to demonstrate on appeal that they were adversely affected by the Agency's action; thus, they do not have standing to appeal the Agency's Final Order.

It is well established that sanctions under section 57.105 are appropriate in an appellate proceeding where the appeal is without merit. Bridgestone/Firestone, Inc. v. Herron, 828 So. 2d 414, 417 (Fla. 1st DCA 2002). As we noted above, this statute does not require finding the claim or action to be frivolous, but only that the claim was unsupported by material facts or then-existing law. Yang Enterprises, Inc. v. Georgialis, 988 So. 2d 1180 (2008); Long, 14 So. 3d at 1265. Here, Appellants have failed to establish *on appeal* how their interests were adversely affected, as required under section 120.68, Florida Statutes.

Appellants repeatedly argue in their response to our order that they had legitimate interests in the Plan amendments at issue *in the administrative proceeding*. But that is not the issue here; what is at issue is whether these legitimate environmental issues were adversely affected, thus justifying an appeal under section 120.68. The heart of the matter is simple: Appellants did not and cannot claim that the amendments will increase development density or otherwise adversely affect their identified environmental interest. Here, the ALJ found that the Land Protection Amendment "does not allow for more development than is allowed under the plan currently." Significantly, the judge found this "approach, it is hoped, will make it easier and cheaper for the County and other governmental entities to acquire the large tracts of land they desire to use for . . . other conservation projects."

In response to our show cause order, Appellants argue that Audubon of Martin County will be negatively impacted by future projects authorized by the Land Protection Amendment because "as those tracts become subdivided into smaller areas and current agricultural lands are fragmented and residential housing is put into those areas, *it will fragment the habitat such that it will be less desirable to those species that require large-size tracts."* (Emphasis added.) However, the facts are just the opposite: the amendments will ensure less fragmentation by clustering smaller lots and dedicating larger land areas for preservation and

agriculture. Rather than fragmentation, the amendments ensure consolidation of development.

According to Appellants' counsel, "the challenged plan changes *could have caused environmental harm*, but were determined not to, as a result of legal interpretations that Appellants in good faith believed were flawed." (Emphasis added.) We find this statement supportive of our conclusion that this appeal was without merit, as it demonstrates precisely why Appellants' interests were *not* adversely affected below for purposes of appellate standing. 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, here, Appellants offered no evidence below that the Plan amendments would adversely affect their legally protected interests, because the evidence cannot show any density increase or other purported environmental affects. The ALJ found that no density increase would occur, and this court will not substitute its view of the facts for those of the lower court where they are supported by competent, substantial evidence. Furthermore, Appellants do not claim the ALJ's findings are not supported by competent, substantial evidence.

In defense of Appellants' actions on appeal, and in argument against the imposition of sanctions, the Agency writes that

> both Appellant associations have introduced evidence that their individual members regularly use and enjoy land which is subject to the comprehensive plan amendments at issue. . . . [and] that these members *believe* that the amendments at issue will adversely affect their use and enjoyment of the affected lands . . . establish[ing] a good faith argument . . . [for] standing.

Ironically, this assertion proves just the opposite: a party's subjective "belief" that it somehow is adversely affected is not remotely close to demonstrating material facts to support its claim. The Agency's conjoining of the words "believe" and "evidence" creates an oxymoron: there is either evidence, i.e., *facts*, to support a claim, or there is not. One cannot transform a lack of evidence into a legitimate claim or argument by "belief." It is noteworthy that the Agency, which joined in opposing Appellants' appeal on the merits, attempts to claim that the lack of standing was not subject to sanctions, yet fails to cite to the operative facts: the Agency's approved Plan amendments consolidate development and do not increase density. A purely subjective belief in the opposite conclusion cannot justify a legal action absent material facts to support that opinion.

One searches in vain throughout Appellants' lengthy response, and the Agency's reply, for those material facts which would support a meritorious argument for standing. Had the proposal allowed an increase in density based on the extension of regional sewer service, Appellants may have had at least a valid

standing argument, but that is not the case here.

The ALJ found that under the Plan amendments, development density will remain static, and by consolidation of such development, *fragmentation will be decreased and open space will be increased*. Thus, the appeal had no material facts to support an argument for standing under section 120.68. See, e.g., Tobin v. Bursch, 934 So. 2d 493 (Fla. 3d DCA 2005) (court reversed denial of fees sought under section 57.105, where facts demonstrated plaintiffs in legal malpractice suit knew that property was landlocked before purchase). As Martin Island Way and Island Way noted, Appellants did not challenge any of the additional factual findings regarding the positive impacts the amendments will produce in Martin County, including improved fire protection, increased water services with higher drinking water quality, and that the costs of water and sewer will be borne by the developers.

Appellants' interest in "access" to the affected large property holding is without merit as well. First, no witness testified that they had lawful access to use the private property for environmental or recreational purposes. Second, 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 that enhances the open spaces of that property.

2. Appeal Is Attempt To Argue Facts Not Established

Standing *to appeal* cannot be established under section 120.68, Florida Statutes, merely because the non-prevailing party below submitted evidence that could have been adopted by the factfinder, if the prevailing party's factual position is supported by competent, substantial evidence. Here, Appellants did not assert that competent, substantial evidence did not support the finding of no increase in density; thus, Appellants could not establish appellate standing on this issue, and their arguments are without merit. See, e.g., Bd. of Comm'rs of Jupiter Inlet Dist. v. Thibadeau, 956 So. 2d 529, 534 (Fla. 4th DCA 2007) (no appellate standing shown under section 120.68 because appellant could show no adverse affect on its interests based on factual findings regarding riparian line and dock's compliance with setback requirements).

Appellants assert that because the law on standing is "not the subject of clear, black-letter law," it is "essentially a case-by-case determination based on the specific facts[.]" This assertion, even if correct, is without merit in defeating a finding of sanctions where, under *these facts,* Appellants completely failed to show in the lower court that their interests were adversely affected.

Appellants' reliance on Reily Enterprises v. 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 stage of the litigation. In fact, Reily cites to our decision in Florida Chapter of the Sierra Club v. Suwannee American Cement Co., Inc., 802 So. 2d 520 (Fla. 1st DCA 2001), as a comparison to a type of case where assertions of appellate standing without adverse impacts must fail. We simply 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. Attorneys are required to conduct a proper investigation to decide whether a potential claim or argument is supported by "material facts." Here, Appellants and their counsel knew or should have known that not only did the land use amendments not increase density, but in fact they reduced fragmented development; therefore, the amendments could not adversely affect any of their legitimate environmental interests.

In addition, Appellants argue that the test for standing under section 120.68 for whether a person is "adversely affected" by the administrative ruling below 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 two statutes are similar enough to make their appeal sufficiently credible as to avoid sanctions. We reject Appellants' argument for several reasons.

First, as noted in Nassau County, standing under section 163.3215 is broadly

granted, but even under that test a party must show an adverse affect on their interests, as defined by that statute. There, for example, the county's development order dramatically increased density, unlike here, where no density increase will occur. Furthermore, we explained in detail in Nassau County how that statute provides more standing than previously existed at common law. Here, section 120.68 narrowly provides standing only to parties whose legitimate interests are adversely affected in some concrete manner.

Regarding the cases cited by Appellants that address standing to appear in administrative proceedings under section 120.68, we find those cases irrelevant to the legal question regarding the right to appeal from such a proceeding under section 120.68, as this case is controlled by the decisions cited above. For example, in Florida Chapter of the 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, the association "provided *no facts* concerning any member who is individually adversely affected by the construction of the cement plant." (Emphasis added.) Similarly, Appellants put forth no facts to show any adverse affect on their relevant interests. As noted in O'Connell, "[s]tanding on appeal requires more than standing at the administrative level." Appellants and their counsel disregarded this rule of law.

We note our holding and admonition in de Vaux v. Westwood Baptist

Church, 953 So. 2d 677 (Fla. 1st DCA 2007), that "'[w]e again remind the bar that section 57.105 expressly states courts 'shall' assess attorney's fees for bringing, or failing to timely dismiss, baseless claims or defenses.'" (quoting Smith v. Gore, 933 So. 2d 567, 568 (Fla. 1st DCA 2006)). Here, Appellants and their counsel would have been well advised to heed both the argument below regarding standing and their prior litigation history in the Fourth District.

In conclusion, 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 where Appellants failed to show material facts supported this appeal, their failure to comply with this provision of section 57.105 is further evidence of the propriety of our holding imposing sanctions under that law. When Appellants did not address standing in the Initial Brief, it is not tenable to assert that they should be held harmless under section 57.105(3). Mercury Ins. Co. of Fla. v. Coatney, 910 So. 2d 925 (Fla. 1st DCA 2005) (insufficient to argue that good faith effort was made to propose change in existing law by raising argument in Reply Brief). It was incumbent on Appellants to argue in their Initial Brief that this court should disagree with O'Connell and Melzer, and that Florida Chapter of the Sierra Club should either be receded from *en banc* or distinguished. Appellants failed to do this here.

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.

In addition, we award attorney's fees to the Intervenors pursuant to their motion filed under section 120.595(5), Florida Statutes.

HAWKES and THOMAS, JJ., CONCUR; VAN NORTWICK, J., DISSENTS WITH WRITTEN OPINION.

Van Nortwick, J., dissenting.

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, 2000). In my view, however, this case is not close to providing a basis to impose sanctions. 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 under section 57.105 or section 120.595(5). In addition, the erroneous standard applied in the sanction order, in effect, converts section 57.105 into a fee shifting statute and will create a precedent that will severely chill appellate advocacy. Accordingly, I respectfully dissent to the order imposing sanctions.

Section 57.105 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:
>
> (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 facts.

Under the current version of the statute, the standard for sanction under section 57.105 is no longer "frivolousness." The standard imposed by order, however, a "meritless" standard, is no more capable of precise definition than "frivolousness" under the prior version of the statute. See Visoly v. Security Pacific Corp., 768 So. 2d 482 (Fla. 3d DCA 2000) ("We recognize that to some extent, the definition of 'frivolous' is incapable of precise determination."). Further, 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 (Fla. 2d DCA 2005); Pappalardo v. Richfield Hospitality Serv., Inc., 790 So. 2d 1226, 1228 (Fla. 4th DCA 2001).

In seeking to define when a claim or defense is "not supported by the material facts . . . or . . . the application of the then-existing law," section 57.105, Florida courts have maintained 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 (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). There are good reasons to apply the statute with restraint. In Bridgestone/Firestone, Inc. v. Herron, 828 So. 2d 414, 417 (Fla. 1st DCA 2002), we cautioned that:

> The courts must apply § 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.

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 prospect it will 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). The standard under section 120.595(5) imposes a much greater burden than the standards under section 57.105.

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 & Probation 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 Procedures] 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 (Plan). Before the administrative law judge (ALJ), the appellants introduced 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 representation 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. The Audubon representative testified that it 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 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 (2009), 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 at 110 n.4 ("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 1977) ("Standing should not be confused with the merits of a claim."). 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 and 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 v. Prudential-Bache Sec., Inc., 613 So. 2d 108, 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).

Under the reasoning of the sanction order, because this court concluded that appellants lacked standing under section 120.68, that conclusion alone mandates sanctions under 57.105, Florida Statutes, without consideration of how close the standing issue may be in a particular case or whether any material facts or applicable law supported standing. No Florida court has adopted this interpretation of section 57.105. The standard for assessing sanctions under section 57.105 cannot be satisfied simply because an appellant errs in assessing the weight of the evidence or the effect of the law upon those facts. That is, section 57.105 cannot be read as establishing a prevailing party standard, and yet that is the effect of the

order here.

Further, the facts introduced by appellants below to support standing are materially different than the facts introduced in O'Connell v. Fla. Dep't of Cmty. Affairs, 874 So. 2d 673 (Fla. 4th DCA 2004), and Melzer v. Fla. Dep't of Cmty. Affairs, 881 So. 2d 623 (Fla. 4th DCA 2004), the two existing cases discussing the issue of appellate standing in comprehensive plan amendment challenges and relied upon by the majority. 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 fact regarding standing in the record was 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.

The sanction order asserts that "this appeal is nothing more than an attempt to retry facts determined adversely to appellants." (Order at p. 3). Certainly, simply rearguing the facts previously presented to a lower tribunal might justify sanctions on appeal. See Procacci Commercial Realty, 690 So. 2d at 609. But that is not the case here. As the briefs make clear, the essence of appellants' arguments on appeal were not a factual arguments. To the contrary, on appeal appellants contend that the comprehensive plan provisions found by the agency to adequately protect the environment and farmland were either unlawfully vague or were misinterpreted by the agency as a matter of law.

The sanction order also states that "a party's subjective 'belief' that it somehow is adversely affected is not remotely close to demonstrating material facts to its claim." This statement suggests that an easy distinction can be made between what a party "believes" the evidence shows and what in fact the evidence does show. In making this conclusion, the sanction order confuses the terminology employed in advocating a conclusion (i.e., the party "believes" that the evidence shows "x") with the conclusion itself. Every advocate who comes in good faith to this court believes in the correctness of his or her cause. Whether that belief is well-founded is our decision to make; and it is often a complex one. 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 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. The majority's conclusion that appellant's appeal was "meritless," so as to warrant sanction, fails to acknowledge the complexity of this appeal and erroneously implies that the standing question presented here was not a close call.

Finally, I am concerned that by imposing sanctions in a case such as this, we will necessarily chill an attorney's creativity in pursuing legal remedies. 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 order establishes precedent that the loss of an appeal is a sufficient basis, by itself, to award attorneys fees as a sanction; in effect rewriting section 57.105 as a fee shifting statute. Further, 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. The average citizen, small business, or nonprofit organization which in good faith seeks 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. In my view, such a chilling effect 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." Financial barriers should not stand in the way of individual 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).