IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

v.

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

Respondents.
_____/

Case No. SC11-2455
First DCA Case No. 1D09-4956

On Discretionary Review From The District Court Of Appeal,
First District of Florida

PETITIONERS' BRIEF ON THE MERITS
(Accompanied by Appendix)

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STATEMENT OF THE CASE AND FACTS

The Petitioners challenged, under Ch. 163, Part II, Fla. Stat., amendments to the Martin County Comprehensive Plan that expand development options within the County's "Agriculture" land use designation, and repeal a prohibition on extending central water and sewer service to the Secondary Urban Service District. In the administrative hearing, Petitioners argued that the amendments violated the governing law, Ch. 163, Part II, Fla. Stat. Petitioners indisputably had standing below. The Administrative Law Judge ("ALJ") entered a Recommended Order ruling that the amendments complied with the law, rejecting claims that they were vague and allowed density increases and inappropriate land uses. The Department of Community Affairs[1] ("Agency") accepted these recommendations and entered a Final Order ruling against the Petitioners on the merits. 73 So.3d at 859-861.

Petitioners' appeal to the First District Court of Appeal argued that the Agency's incorrect legal interpretations of the amendments led to erroneous findings that they would not allow adverse land use and environmental impacts. The appeal also asserted that the amendments were vague and violated the requirements for clear, predictable planning standards.[2] The Court

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[1] By subsequent action of the 2011 Legislature, Fla. SB 2156 (2011), the Agency was abolished and its responsibilities transferred to a newly-created Department of Economic Opportunity.

[2] *See* Initial Brief at 10-49.

dismissed the appeal without reaching the merits, ruling that Petitioners were not "adversely affected by final agency action." *Martin County Cons. Alliance v. Martin County, Dep't of Cmty. Affairs*, 35 *Fla*. L. Weekly D1386 (Fla. 1st DCA June 21, 2010). The Court issued an Order to Show Cause why sanctions should not be imposed under Section 57.105, Fla. Stat. All parties responded. 73 So.3d at 857. The Agency asserted that sanctions were inappropriate. Id. at 871 (Van Nortwick, Dissenting).

On December 14, 2010, the Court issued an order granting a Motion for Attorneys' Fees and Costs filed by Appellee, Island Way under Section 120.595 (5), Fla. Stat., and an Opinion, with Judge Van Nortwick dissenting, ordering payment of attorneys' fees under Section 57.105, Fla. Stat. The basis for the award was the belief that the appeal was brought notwithstanding the rulings below that the amendments did not increase development density or environmental impacts, and thus Petitioners could suffer no "adverse effect" to support appellate standing. *Martin Cnty. Cons. Alliance v. Martin Cnty., et. al*., 35 Fla. L. Weekly D1386 (Fla. 1st DCA June 21, 2010), *substituted decision*, *Martin Cnty. Cons. Alliance v. Martin Cnty.*, et. al., 73 So.3d 856 (Fla. 1st DCA Nov. 4, 2011).

The November 4, 2011 Sanction Order denied motions for rehearing and rehearing *en banc,* substituted itself for the June 1 Order, and ordered the payment of attorneys' fees. 73 So.3d at 857.

The basis for the ruling that the claim to appellate standing had no basis in material fact or law were:

(1) The findings on the merits below - that the amendments will not allow adverse impacts – precluded Petitioners from being "adversely affected" by the agency action; and

(2) Petitioners' claims that the amendments are vague, and allow density increases and inappropriate land uses were issues of fact, which had been decided below adverse to their position and were unreviewable on appeal as they were based upon competent substantial evidence. (73 So.3d at 860, 861, 863).

In a lengthy and "strong[]" dissent, Judge van Nortwick found that "this case is not close to providing a basis to impose sanctions", that this matter is "of exceptional importance", and that he was "concerned that the dismissal of this appeal for lack of standing was erroneous." 73 So.3d at 866-867, fn.1 (Van Nortwick, J. Dissenting). He wrote that the Sanction Order "fails to acknowledge the complexity of this appeal and ignores that the standing question was a close call." 73 So.3d at 871. (Van Nortwick J, dissenting). Petitioners' Motion for Rehearing En Banc was denied by an 8-6 vote, with one judge abstaining. 73 So.3d at 866, (n. 1)(Van Nortwick J, dissenting).

JURISDICTIONAL STATEMENT

The Court has accepted jurisdiction to review a decision of the District Court of Appeal that expressly and directly conflicts

with decisions of the Supreme Court and other district courts on the same point of law. Article V, Section 3(b), Fla. Const.; Rule 9.030(2)(A)(iv), Fla.R.App.P.

STANDARD OF REVIEW

An award of attorneys' fees that is based upon a question of law, as in the instant case, is reviewed *de novo*. *Freedom Commerce Centre, Venture, Inc. v. Ranson*, 823 So. 2d 817, 820 (Fla. 1st DCA 2003); *Country Place Cmty. Ass'n, Inc. v. J.P. Morgan Mortg. Acquisition Corp.*, 51 So.3d 1176, 1179 (Fla. 2nd D.C.A. 2010)(ruling that a trial court's decision regarding fees based on a determination of standing, which in turn depended on an interpretation of a contract, is reviewed de novo); *Stevens v. Zakrzewski*, 826 So.2d 520, 521 (Fla. 4th DCA 2002) (reviewing de novo an award of fees based upon an interpretation of a contract). See also *Sosa v. Safeway Premium Finance Co.*, 73 So.3d 91, 105 (Fla. 2011)(stating that the Florida Supreme Court "reviews a district court's application and conclusions of law de novo."); *D'Angelo v. Fitzmaurice,* 863 So. 2d 311, 314 (Fla. 2003)(holding that the standard of review for questions of law is *de novo*, under which no deference is given to the judgment of the lower court.) Orders of dismissal based on lack of standing are reviewed *de novo. Agee v. Brown,* 73 So.3d 882, 885 (Fla. 4th DCA 2011).[3]

3. Generally, an appellate court will review a lower court's order assessing attorney's fees for an abuse of discretion.

SUMMARY OF THE ARGUMENT

The Sanction Order is based upon erroneous legal rulings that conflict with controlling or overwhelming precedent, and is unsupported by the record.

First, the Order erroneously relied on the rulings on the merits below to find the lack of appellate standing upon which it based the award of attorneys' fees. The clear law is that outcome of a case on the merits cannot determine standing, which is a completely separate inquiry. Second, the Order characterized Petitioners' appellate claims about the ambiguity and legal effect of the comprehensive plan amendments as factual issues, but the Florida Supreme Court has ruled that interpretation of such plans is an issue of law, not fact. Third, the Order erroneously ruled that the dismissal of the appeal for lack of standing required sanctions when the Supreme Court has ruled exactly to the contrary.

Distefano Constr., Inc. v. Fidelity and Deposit Co. of Maryland, 597 So.2d 248, 250 (Fla. 1992)(upholding trial court's determination as to the number reasonable hours spent on a case). *Walker v. Cash Register Auto Insurance of Leon County, Inc.* 946 So. 2d 66, 72 (Fla. 1st DCA 2006)(deferring to a trial court's evaluation of the evidence). The rationale underlying this standard emphasizes the trial court's superior position to "see[] the parties first-hand" and assess their procedural actions. *Mercer v. Raine*, 443 So. 2d 944, 945-46 (Fla. 1983). This standard acknowledges a trial judge's unique position to assess the credibility of witnesses and determine facts. *Tramel v. Bass*, 672 So. 2d 78, 83 (Fla. 1st DCA 1996). The "abuse of discretion" standard applies a test of reasonableness. *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).Petitioners submit that the *de novo* standard applies, but that the Sanction Order should be reversed under either standard of review.

Fourth, the Sanction Order's view that there were no material facts that could possibly support the assertion of standing inexplicably ignored substantial relevant testimony presented below that went beyond a good faith effort and was adequate to support standing.

The Supreme Court should find that the Sanction Order was premised upon clearly erroneous legal rulings, ignored the record, and imposed sanctions in violation of the governing standard. The Court should also rule that the record adequately supported appellate standing under Section 120.68, Fla. Stat.

ARGUMENT

I. THE SANCTION ORDER IS BASED ON CLEARLY ERRONEOUS LEGAL CONCLUSIONS AND IS REFUTED BY THE RECORD

A. The Sanction Order Violated the Fee Shifting Standards in Sections 57.105 and 120.595(5), Fla. Stat. by Imposing Sanctions for an Appeal That Was Grounded in Law and Fact.

The Sanctions Order, over a strong dissent, and with 6 judges voting to rehear the case *en banc*, sanctioned nonprofit organizations' good faith appeal of an agency's rulings regarding the proper legal interpretation of comprehensive plan changes. It's basis – that Petitioners appealed in the face of binding factual findings that the agency action would not allow adverse impacts – was legally incorrect. The relevant findings below were legal interpretations, not factual findings. It's legal premise – that the outcome on the merits below determines the existence of appellate standing – is contrary to clear Florida law. The ruling

that the assertion of appellate standing was so groundless as to require the imposition of sanctions ignored the record, as well as Supreme Court and district court precedent in the relevant areas of law. This is not a case where a party used the courts for improper economic or personal advantage, or engaged in unethical or baseless legal behavior in disregard of procedural and substantive rules or clear case law. Petitioners, who had standing below, appealed legal rulings that they in good faith believed to violate the governing law. That the appeal was dismissed based on a debatable ruling that Petitioners' standing record did not meet the narrative standing test does not suggest, and neither does the record of this case, that the appeal was in any way the type of action that §§57.105(1) and 120.595 (5), Fla. Stat. are meant to deter.

In *Yakonis v. Dolphin Petroleum, Inc.*, 934 So. 2d 615 (Fla. 4th DCA 2006), the Fourth District explained that § 57.105:

> "*must be applied carefully to ensure that it serves the purpose for which it was intended, which was to deter frivolous pleadings*. (internal citation omitted).[4]

Sanctions are appropriate only when a claim is completely unsupported by the facts or law. *Boca Burger Inc. v. Forum*, 912 So. 2d 561, 570 (Fla. 2005). Being in derogation of Florida's common law, the §57.105(1), Fla. Stat. fee-shifting exceptions to the American Rule must be strictly construed. *Campbell v. Goldman*, 959

[3] *See also*, Mullins v. Kennelly, 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003) (noting that the central purpose of section

So.2d 223 (Fla. 2007); *Dade County v. Pena*, 664 So.2d 959 (Fla. 1995); *Finkelstein v. North Broward Hospital District*, 484 So.2d 1241 (Fla. 1986); *Sunbeam Enterprises, Inc. v. Upthegrove*, 316 So.2d 34 (Fla. 1975). In *Moakley v. Smallwood,* 826 So. 2d 221 (Fla. 2002) the Court cautioned that:

> "an appropriate balance must be struck between condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, **while ensuring that attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interests**… ." Id. at 226.(emphasis added).

In the instant case, the dissent observed 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." 73 So.3d at 868, Van Northwick, J., Dissenting.(quoting *Bridgestone/Firestone, Inc. v. Herron*, 828 So. 2d 414, 419 (Fla. 1st DCA 2002).

Section 120.595(5), Fla. Stat., the basis for the grant of the intervener's motion for fees and costs in this case, authorizes discretionary awards of attorney's fees and costs for appeals that are "frivolous, meritless, or an abuse of the appellate process…."

57.105 is, and always has been, to deter meritless filings.

§120.595(5), Fla. Stat. (2009). This requires a showing that an appeal "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" and "imposes a greater burden than the standard under section 57.105." 73 So. 3d at 867, fn. 2. Van Nortwick J Dissenting (citing *Procacci Commercial Realty, Inc. v. Dep't of Health & Rehab. Servs*., 690 So. 2d 603, 609 (Fla. 1st DCA 1997); *Treat v. State ex. rel. Mitton*, 121 Fla. 509, 510-511, 163 So. 883, 883-884 (1935); and *Consultech of Jacksonville, Inc. v. Dep't of Health*, 876 So. 2d 731, 736 (Fla. 1st DCA 2004)). Under § 120.595(5), Fla. Stat. a "frivolous appeal" is "not merely one:

> "that is likely to be unsuccessful. It is one that is so readily recognizable as devoid of merit on the face of the record that there is little, if any, prospect whatsoever that it can ever succeed. [citation omitted] It must be one so clearly untenable, or the insufficiency of which is so manifest on a bare inspection of the record and assignments of error [or briefs, in keeping with modern practice], that its character may be determined without argument or research. An appeal is not frivolous where a substantial justiciable question can be spelled out of it, or from any part of it, even though such question is unlikely to be decided other than as the lower court decided it, i.e., against appellant or plaintiff in error." *Procacci,* 690 So. 2d at 609 (Fla. 1st DCA 1997) (quoting *Treat v. State ex rel. Mitton,* 121 Fla. 509, 510-11, 163 So. 883, 883-84 (1935)).

In *de Vaux v. Westwood Baptist Church*, 953 So. 2d 677 (2007), this Court said 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." (citation omitted).

As explained in the instant case by the dissent:

> "[I]n *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. 73 So.2d at 867-868, Van Nortwick, J., Dissenting.
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> As applied to this case, the dissent wrote that:
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> "in my view, it cannot be said that the appellants' standing arguments here are 'completely untenable,' …, 'completely lacking in merit,' … 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.'" 73 So.2d at 867-868, Van Nortwick, J., Dissenting. (citations omitted).

This case bears no resemblance to the egregious situations in which courts have appropriately sanctioned a party for blatant disregard of clear substantive or procedural law. This case is instead the same as those where courts have denied attorneys' fees because losing parties had asserted "arguable" claims in good faith. See e.g. *Wendy's of N.E. Florida, Inc. v. Vandergriff*, 865 So. 2d 520, 523 (Fla. 1st DCA 2003); *Mason v. Highlands County Bd. of County Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002); *Tampa Bay I, L.L.C. v. Lorello Cypress Family Ltd.,* 821 So. 2d 434 (Fla. 2d DCA 2002); *Peyton v. Horner*, 920 So. 2d 180 (Fla. 2d DCA 2006);

McMonigle v McMonigle, 932 So. 2d 369 (Fla. 2d DCA 2006); *Shulmister v. Yaffe*, 912 So. 2d 53 (Fla. 4th DCA 2005)(reversing an attorneys fees award to prevailing party where there was at least some evidence to support the losing parties claim; *Vasquez v. Provincial South, Inc.*, 795 So.2d 216 (Fla. 4th DCA 2001)(reversing an attorneys fees award against a party who could have prevailed had the court accepted its interpretation of an ambiguous statute).

Petitioners' good faith assertion of appellate standing does not come close to offending either statute. The dissent expressed "deep concern" over the "chilling effect" on good faith efforts to seek appellate redress by parties without deep pockets, and the potential denial of the Florida Constitution's right of access to courts. 73 So.3d at 872. (Van Nortwick, J. Dissenting). The Sanction Order, the dissent wrote, "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*." 73 So.3d at 867. The dissent was "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'." 73 So. 3d at 870, Van Nortwick, J., Dissenting. (emphasis in original)[5]

The Sanction Order unduly restricts appellate review of a wide variety of agency orders. If allowed to stand, it may ensure that no citizen will ever again avail themselves of statutory remedies regarding environmental and land use matters. Any doubt as to whether to appeal an adverse agency order will preclude an appeal, for fear of having to pay attorneys fees regardless of a good faith belief of reversible error. Parties with legitimate claims, but arguable appellate standing, would likely abandon their statutory rights to administrative hearings, because the inability to appeal an agency order largely negates the right to that hearing.

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[5] At least one commentator has observed that the Sanction Order has "profound implications."Hauser, *Attorney's Fees in Florida*, Ch.9 §9.01[2][k] (2nd ed. Matthew Bender).

An abuse of discretion in the award of attorneys' fees exists where "no reasonable person would have taken the view adopted by the … court". *Canakaris v. Canakaris*, 382 So.2d 1197, 2003 (Fla. 1980). It was unreasonable for the Sanction Order to rule that (1) the interpretation of a land use plan is a factual issue, rather than a legal interpretation; (2) standing depends on the outcome on the merits below; (3) the perceived lack of standing required the imposition of sanctions; and (4) Petitioners' claim of appellate standing was factually or legally groundless. Petitioners' claim to appellate standing was well grounded in law and fact. The Sanction Order was premised on clearly erroneous legal conclusions.

B. The Sanction Order Is Based On Clearly Erroneous Legal Conclusions.

1. The Sanctions Order Improperly Relied on the Rulings on the Merits Below to Find a Lack of Appellate Standing

The Order relied on the rulings on the merits below to find the lack of standing which it viewed as requiring sanctions:

> "Important to our analysis, the ALJ held that Appellants failed to prove that the amendments do not provide meaningful and predictable standards [and] promote urban sprawl. (73 So.3d at 861)
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> ***
>
> the relevant inquiry is whether these legitimate environmental issues were adversely affected, thus justifying an appeal. The ALJ found that the Amendment does not allow for more development. Appellants cannot now claim that the amendments will increase development density or adversely affect their environmental interest. (73 So.3d at 863).
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> ***
>
> Appellants offered no evidence that the plan amendments

> will adversely affect their interests, because the evidence cannot show any density increase or other adverse affects." (73 So.3d at 863).

As the dissent noted, 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…. This … erroneously merges … standing and the merits of this case." 73 So.3d at 869, Van Nortwick, J., Dissenting. This creates a "Catch 22" whereby legal rulings on the merits below (relative to claims regarding the impacts allowed by the agency action) are assumed correct and to automatically preclude "adverse impact" appellate standing to seek review of such rulings. The paradoxical result would be that only parties who prevail on the merits below could appeal. The Order should be reversed as it conflicts with clear, un-contradicted, precedent.

In *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051 (Fla. 5th DCA 2011) the Fifth District held that standing is distinct from the merits, and reversed an agency's denial of standing that relied on an administrative law judge's ruling that no harm would result from a proposed consumptive water use permit. Id at 1054-55. In *Peace River/Manasota Reg'l Water Supply Auth., et. al. v. IMC Phosphates Co., et. al,* 18 So. 3d 1079 (Fla. 2d DCA 2009), the Second District rejected a claim that a finding in the administrative hearing below that no adverse impacts to natural resources would occur, precluded standing. Id. at 1082-

1084. “[I]nterpreting section 120.68(1) in this manner”, it wrote, “would result in a situation in which a party who unsuccessfully challenged a permit … could never appeal….” *Id*. at 1086. The “proof required is proof of the elements of standing, not proof directed to the elements of the case or to the ultimate merits of the case.” *Id.* at 1084. (emphasis added). It added:

> “[T]he fact that the [Administrative Law Judge] and [Agency] ultimately found that [Respondent’s] activities would not adversely affect the Peace River does not retroactively eliminate the [Petitioner’s] standing to prosecute the action.” 18 So. 3d at 1083.

Because standing is a “forward –looking concept” which “cannot disappear based on the ultimate outcome of the proceeding,” Plaintiffs are not, in order to have standing … required to ultimately prevail on the merits.” *Id.* at 1082.

Similarly, in *Reily Enterprises, LLC v. Fla. Dept. of Env’tl Prot.*, 990 So. 2d 1248, 1251 (Fla. 4th DCA 2008), the Fourth District held that a party challenging an environmental permit is not required to prevail on the merits in order to have standing. This “would confuse standing and the merits such that a party would always be required to prevail on the merits to have had standing.” In *Palm Beach County Envtl. Coalition v. Fla. Dep’t of Envtl. Prot*., 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009), the Court reversed a finding that a party which had lost on the merits thereby lacked standing, where it had “presented evidence - albeit evidence that was *ultimately found not sufficient to carry the day on the merits-*

that they reasonably *could be* affected by the proposed activities." (emphasis added). Prior to the Order on review, the First District had precluded the merging of standing with the outcome on the merits. *Sun States Utilities., Inc. v. Destin Water Users, Inc.,* 696 So. 2d 944, 945 n.1 (Fla. 1st DCA 1977).

The Sanction Order does exactly what these cases say is erroneous. No authority supports its preclusion of appellate standing for (and imposition of sanctions against) a party that did not prevail below on the merits of claims concerning impacts of agency actions.

2. The Sanction Order Erroneously Ruled that Petitioners Appealed in the Face of Binding Factual Findings That They Were Not Adversely Affected, But the Relevant Rulings Were Instead Legal Interpretations Appropriately Challenged on Appeal.

The Sanction Order erroneously viewed the appeal as seeking to re-try binding factual findings (that the challenged land use amendments do not increase development density or environmental impacts). This violates the Florida Supreme Court ruling that the interpretation of such plans presents legal, not factual, issues.

Initially, the Sanction Order correctly observed that:

> "Appellants asserted that the Amendment increased density, 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 asserted that the lack of meaningful standards will cause haphazard planning by negotiation and … whim of the County. 73 So.3d at 861.

The Order, however, ruled that these issues were factual, and

that the *findings of fact* below precluded "adverse impact" standing:

> "In his ***factual findings***, the ALJ found that the Amendment does not allow for more development." (73 So.3d at 860) (emphasis added).
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> ***
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> "The ALJ found ***no credible evidence*** …that the amendment will allow further extensions of water and sewer lines." (73 So.3d at 861) (emphasis added).
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> ***
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> "the relevant inquiry is whether these environmental issues were adversely affected, thus justifying an appeal. The ALJ found that the Amendment does not allow for more development. *Appellants cannot now claim that the amendments will increase development density or otherwise adversely affect their interest when they made no credible* ***factual claims*** *to the contrary."* (73 So.3d at 863) (emphasis added).
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> ***
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> "Appellants argue that the [land use amendment] will cause habitat fragmentation…. *The* ***facts****, however, are just the opposite.* The [amendment] will not increase density or cause habitat fragmentation." (73 So.3d at 863) (emphasis added).
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> ***
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> "Appellants offered no evidence below that the amendments will adversely affect their interests*,* ***because the evidence cannot show*** *any density increase or other adverse affects.* ***Most significantly, Appellants do not and cannot claim that the ALJ's factual findings are unsupported*** *by competent, substantial evidence."* (73 So.3d at 863).

These rulings violate the law established by this Court that the interpretation of land use plans - the standards they set, and what they allow, require and prohibit – are legal issues[6]. In *Rinker Materials Corp. v. North Miami*, 286 So. 2d 552, 553 (Fla.

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[6] The dissent stated that the "majority's repeated reference to [the] failure to raise a fact question on appeal suggests they misapprehend the nature of Appellants' appeal." 73 So.3d at 870.

1973), this Court held that the interpretation of land use ordinances is an issue of law to be decided by the rules of statutory construction.[7] In *Village of Key Biscayne v. Dep't of Comm. Affairs*, 696 So. 2d 495 (Fla. 3d DCA 1997), the Third District held that a comprehensive plan amendment was "*invalid on its face* because it does not comply with the mandatory [statutory] requirement that any comprehensive plan include specific standards for the density or intensity of use." *Id*. (emphasis added). The Fourth and Fifth Districts follow this rule. *Colonial Apt's v. City of Deland*, 577 So. 2d 593, 596 (Fla. 5th DCA 1991); *1000 Friends of Florida v. Palm Beach County*, 69 So. 3d. 1123, 1126. (Fla. 4th DCA 2011). The First District had also previously followed this precedent.[8] There is no contrary authority.[9]

[7.] The dissent in this case stated "'[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.') 73 So.3d at 870, Van Nortwick, J. Dissenting.

[8] *Nassau County v. Titcomb*, 41 So. 3d 270, 278 (Fla. 1st DCA 2010); *Johnson v. Gulf County*, 26 So.3d 33 (Fla. 1st DCA 2009)(reviewing trial court's interpretation of a comprehensive plan *de novo* and relying on plain language regarding wetland setback); *Dixon v. City of Jacksonville,* 774 So.2d 763 (Fla. 1st DCA 2002).

The issue in comprehensive plan policy amendment cases is whether the land uses the plan allows, requires or prohibits are consistent with the controlling statute – Ch. 163, Part II, Fla. Stat. In this case, as noted by the dissent[10], the premise of the Sanction Order – that the appeal improperly re-argued facts – completely mischaracterized the appeal. The Petitioners' appellate points were legal, not factual - claims that the challenged amendments were unlawfully vague, and that, but for the Agency's legal misinterpretations, would not have been found environmentally benign. The rulings on the merits below that the amendments did not allow land use or environmental harms were the Administrative Law Judge's *interpretations of* the language of the newly – adopted plan policies. (R. 619-621, 624-627, 630-632, 642 (Findings of Fact 27, 31, 37, 38, 40, 42, 47, 49, 50, 57, 86, and 87). The appeal argued that the disputed comprehensive plan language, which was interpreted by the ALJ and the Agency to require the protection of the environment and farmland, was either illegally vague or clearly

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[9] Comprehensive plans and amendments are legislation. *Martin County v. Yusem*, 690 So. 2d 1288, 1293 (Fla. 1997).

[10] 73 So.3d at 870. (observing that "appellants' arguments on appeal are not factual arguments. To the contrary … 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."

said something contrary to the Agency's interpretation.[11] Petitioners argued that the amendments violated Rule 9J-5.005(6), Fla. Admin. Code (2009)[12], which required comprehensive plans to "establish meaningful and predictable standards …."

This rule requires comprehensive plan language to include sufficient detail so that the results to be achieved, and the manner in which those results will be achieved, is understood.[13] As explained in *DCA v. Escambia County*, 92 ER FALR 138 *53-54 (July 22, 1992 Final Order) the Act requires specific comprehensive plan language to prevent arbitrary development decisions:

> "[P]olicies contained in comprehensive plans must be **specific enough to be measurable against a permit or proposed development Order**. To find **otherwise would render meaningless the procedure for challenging development Orders or permits as compared to the comprehensive plan**. **To permit vague, nebulous "policies" can easily lead to arbitrary decisions, which is not permitted by law**. *See Drexel v. City of Miami Beach*, 64 So.2d 317 (Fla. 1953); *City of Homestead v. Schild*, 227 So.2d 540, 542 (Fla. 3d DCA 1969). Furthermore, … **a plan's lack of specificity constitutes a material defect**. *See Department of Community Affairs v. Charlotte County*, 12 FALR 2760, 2762-66 (Admin. Comm., March 15, 1990)"(emphasis added).

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[11] Initial Brief of Appellants at pgs 14-39.

[12] Subsequent legislation (HB 7207 2011, Sections 12 and 72) repealed this rule and inserted its requirements, verbatim, into the Florida Statutes at Section 163.3177(1)(2011).

[13] *Economic Dev. Council of Broward Inc. v. DCA*, 1997 Fla. Div. Adm. Hear. LEXIS 5839 *120-122 (Oct. 8, 1997, Recommended Order).

The Court in *Dixon v. City of Jacksonville,*[14] explained that:

> [A]mbiguity in … plans would frustrate one of the cardinal purposes behind their creation: to provide '…appropriate … principles, guidelines, and standards for the orderly and balanced future … development of the area.' 163.3177(1), Fla. Stat. (1999)"

The legal issues raised in Petitioners' Initial Brief included, among others, whether the "land protection" amendment met these requirements relative to the following issues:

- Did it require a subsequent plan amendment subject to state review prior to actual development approval, or allow a locally – issued development order without the need for a state-reviewed plan amendment. (The ALJ had interpreted the language – which was silent on this issue and had been interpreted differently by the Agency's planner and the County's planner - to be "reasonably clear".) (Initial Brief at 14-17).
- Guiding county decisions about which lands could be developed and which lands had to be preserved under the amendment. (Initial Brief at 17-20, 23-28).
- Did the amendment remove the density and intensity limits for subject lands, and did it comply with the mandate in Section 163.3177(6)(a), Fla. Stat. (2009) that plans set standards regarding "population densities and building and structure

[14] 774 So.2d 763, 765 (Fla. 1st DCA 2000)(Fla. 1st DCA 2000), *rev. granted, City of Jacksonville v. Dixon*, 814 So. 2d 438 (Fla.

intensities." (The amendment explicitly required compliance with all plan policies "*[e]xcept* for the … policies … pertaining to the 20-acre lot size", which include a "restrict[ion] of "one single-family residences per gross 20-acre tract" and a prohibition on "density or intensity of greater than one single-family dwelling unit per 20 gross acre lot….") R. Pet. Ex. 1, Section 4.4.M.1.a. The amendment explicitly stated that these provisions no longer apply to development under the amendment, but the Agency ruled that they do still apply.) (Initial Brief at 20-22).

- Whether subsequent comprehensive amendments that increased density on subject lands were allowed. (The amendment prohibited "Future Land Use Map amendment[s]" that increased density, but did not include the second type of plan amendments – text amendments – in this prohibition.)(Initial Brief at 22-23).
- Whether land "protected" for "agricultural land uses" could be mined or used for other uses that displaced, as opposed to preserved, farmland. (The zoning regulations for the "Agriculture" land use category allow mining, commercial uses, daycares, airstrips, golf courses, processing plants, shooting ranges, kennels, trash processing facilities, and other uses.)(Initial Brief at 28-31).

2002), *appeal dismissed*, 831 So. 2d 161 (Fla. 2002).

Petitioners also raised the issue of whether the urban services plan amendment allows polluting “package” water plants outside of the Secondary Urban Services District. The Agency found it did not, but the text of the amendment prohibits them “*outside the Primary or Secondary Urban Services District*." R. Pet. Ex. 82 @ 13 of 26. (emphasis added).(See Initial Brief at 37-39).

Petitioners explained that the Agency’s interpretations would not be binding when these new plan policies were applied to subsequent development applications because, in such cases, the local government’s interpretation of its comprehensive plan is given no deference by courts[15] and these interpretations are binding only on the administrative agency.[16]

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[15] *Brevard County v. Snyder*, 627 So. 2d 467, 475 (Fla. 1993); *Dixon v. City of Jacksonville,* 774 So.2d 763 (Fla. 1st DCA 2002); *Pinecrest Lakes v. Shidel* 795 So. 2d 191, 198 (Fla. 4th DCA. 2001) *rev. den.*, 821 So. 2d. 300 (Fla. 2002). A local government's interpretation of its comprehensive plan in conflict with its plain language cannot stand. *Leseman Family land Partnership v. Clay County*, 2008 Fla. Div. Adm. Hear. LEXIS 425, *10 (Oct. 20, 2008, Final Order). The Sanction Order stated that “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.” 73 So.3d at 858. Yet, the case law requiring *de novo* review (without deference) of local government interpretations of their comprehensive plans at the actual “development order” stage” is clear.

[16] Initial Brief at 40-44. (citing *McDonald v. Dep’t of Banking and Finance*, 346 So.2d 569, 582 (Fla. 1st DCA 1977) and *Nordheim v. Dep’t. of Envtl. Prot.*, 719 So.2d 1212 (Fla. 3d DCA 1998).

The Court's opinion dismissing the appeal did not reach the merits of any of the issues raised by Petitioners. Instead, the Sanction Order ruled that the Agency's interpretations of the comprehensive plan policies precluded appellate "adverse impact" standing for Petitioners to seek judicial review of those interpretations. This is erroneous. Legal conclusions are subject to *de novo* review. *Southwest Fla. Water Management Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594, 597 (Fla. 1st DCA 2000) (observing that, in contrast to the "restrictive standards" placed on the review of findings of fact, "appellate courts are free to disagree with an agency on a point of law").[17]

The Sanction Order means that issues of legal interpretation, which are at the heart of land use plan cases, cannot be appealed for lack of appellate standing if the Agency's legal interpretations are that plans do not allow "adverse impacts". A law intended to manage growth throughout Florida, and for which citizen enforcement is authorized by law[18], would be rendered virtually immune from judicial review. Sanctioning parties for trying in good faith to overturn erroneous rulings precludes clearly expressed legislative intent.

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[17] As stated by the dissent, "arguing for a different interpretation of the law, such as the … appellants challenge here, is the quintessential relief sought by an appeal which raises an error of law." 73 So. 3d at 870. Van Nortwick, J. dissenting.

[18] *See* Sections 163.3184 (1)(a) and (5)(a), Fla. Stat. (2011).

The Supreme Court should rule that the issues raised on appeal were legal in nature, and that, accordingly, Petitioners did not appeal in disregard of binding factual findings.

3. The Sanction Order Erroneously Found That the Dismissal of the Appeal Required Sanctions.

The imposition of sanctions for lack of standing should be reversed based on this Court's decision in *Whitten v. Progressive Casualty Insurance Co.*, 410 So.2d 501 (Fla. 1982) that Section 57.105 Fla. Stat. does not require an award of fees simply because a party loses. *Id.* at 505-06.[19] The Fourth District, in *Read v. Taylor*, 832 So. 2d 219, 222 (Fla. 4th DCA 2002) ruled that fees may not be appropriate even where an action is dismissed. The Second District also held, in *Mason v. Highlands County Bd. of County Comm'rs*, 817 So. 2d 922, 923 (Fla. 2d DCA 2002), that "failing to state a cause of action is not, in and of itself, a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105."

A Section 57.105(1), Fla. Stat. fee award is appropriate when a case is dismissed for lack of standing when "there was no way on this record that the plaintiffs could have ever shown standing." *Tiedmeman v. City of Miami*, 529 So. 2d 1266, 1267 (Fla. 3d DCA 1988). When there is a fair debate about a plaintiff's standing,

[19] After the 1999 revisions, courts still rely on *Whitten*'s holding that § 57.105, Fla. Stat. is not a prevailing party attorney's fees provision and requires more to assess sanctions

sanctions are not appropriate when a case is dismissed for lack of standing. In *McMonigle v McMonigle*, 932 So. 2d 369 (Fla. 2d DCA 2006), the Court reversed an award of attorneys' fees under Section 57.105, observing that:

> **"Although … the lack of standing may be the basis of an award of … fees, it does not require that the fees be awarded**. Clearly, [the Appellant] did not have standing to bring the … action. *** **To award fees …, the trial court must conclude there is a total absence of a justiciable issue of either fact or law."…**Since the factual issues here were actionable, the trial court abused its discretion by finding that a total lack of justiciable issue of fact." Id. at 371 (internal citations omitted) (emphasis added).

Peyton v. Horner, 920 So. 2d 180, 183 (Fla. 2d DCA 2006) also held that dismissal for lack of standing does not require the sanction of attorney's fees, and reversed a fee award because a:

> "determination that a party's interpretation of a contract is incorrect does not mean that the other party is necessarily entitled to section 57.105 fees. *** [T]he new statute is still intended to address frivolous pleadings. Id. The [plaintiff's] position that it could enforce the restrictions … may have been incorrect…. But it was not frivolous. The issue was not so cut and dried that either the association or its attorney knew or should have known that it was not supported by the material facts necessary to establish standing." (citations in original omitted).

In the instant case, the dissent observed that:

> "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

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than lack of success in the case. *See Mason*, 817 So.2d at 923.

> definition than 'frivolousness' under the prior version of the *statute*." (Citation omitted). 73 So.3d at 867 (Van Nortwick, J. Dissenting).

The dissent noted the discrepancy between the lack of sanctions 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), and the imposition of sanctions here, where the appellate standing record was categorically superior. 73, So.2d at 870, Van Nortwick, J., Dissenting.

The Supreme Court should reverse the Sanction Order, as the underlying dismissal of the appeal for lack of standing did not automatically require sanctions and this case is just like those where sanctions were deemed an inappropriate response to unsuccessful, but well-grounded claims of standing.

4. The Sanction Order Erroneously Found that that the Assertion of Standing Was Groundless

The Order's premise that standing was "clearly not present" erroneously reflects the law of standing and the record.

i. The Sanction Order Erroneously Ruled That Petitioners Ignored the Law Requiring a Showing of Adverse Affect, When They Had Introduced Substantial Relevant Evidence

The Sanction Order's statement that Petitioners and their counsel "ignored" the rule that standing on appeal requires more than standing at the administrative level is, as noted by the

dissent[20], contradicted by the record. 73 So.3d at 865[21]. This is not a case where there was no evidence that could have possibly supported standing. Petitioners presented evidence to establish standing under the controlling law. 73 So.3d at 869 (Van Nortwick, J., dissenting). While the Court found the standing record made at the hearing below inadequate, an arguable standing record below was made, under a process whereby the Administrative Law Judge only allowed a record to be made but made no factual findings on the issue. When Petitioners brought the appeal, it was not at all clear that they lacked standing, as no relevant factual findings on the issue of "adverse affect" had yet been made.

Challenges to comprehensive plan amendments are litigated in the Division of Administrative Hearings, whose limited jurisdiction is to enter a recommendation regarding consistency with applicable standards, and does not extend to making fact findings as to whether parties meet the “adversely affected” appellate standing test. This process is explained in *Ashley v. Dep’t of Comm. Affairs, et al.,* 2006 Fla. ENV LEXIS 178, 2007 ER FALR 5 *66-67 (June 12, 2006, Recommended Order):

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20. “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 … sanctions.” 73 So.3d at 866.

21. An abuse of discretion exists when a court “clearly erred in its interpretation of the facts”. *Mercer v. Raine*, 443 So. 2d 944, 946 (Fla. 1983).

> "**Petitioners also sought findings that they are 'adversely affected,' presumably for purposes of establishing appellate standing** under Section. 120.68(1). See *Melzer v. Dept. of Community Affairs*, 881 So.2d 623 (Fla. 4th DCA 2004); *O'Connell v. Dept. of Community Affairs*, 874 So.2d 673 (Fla. 4th DCA 2004); *Fla. Chapter of the Sierra Club v. Suwannee American Cement Co., 802 So.2d 520* (Fla. 1st DCA 2001). [The opposing parties]reserve the right to oppose such findings at the appropriate time. **It is considered unnecessary and premature to determine whether any party would be entitled to judicial review of the final order entered in this case, or to make findings as to whether the parties would be 'adversely affected.' It is believed that such determinations, if they become necessary, can be made upon the evidence in the record**." (emphasis added).

In this case, Petitioners made a record for appeal as to their potential appellate standing, and the ALJ made no relevant findings of fact.[22] Petitioners introduced the testimony of multiple individual members who own, use and enjoy lands affected by the challenged amendments. While this proof was ultimately deemed inadequate, Petitioners did not ignore the law. They sought in good faith to prove standing.[23] Petitioners:

> "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,

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[22] See R. Vol. VIII @ 541.

[23] Given this posture, the caution expressed by this Court in *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 570-571 (Fla. 2005) that "because a district court of appeal is, in the vast majority of cases, the court of last resort, it should exercise great restraint in imposing appellate sanctions" is particularly relevant.

> 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." 73 So.3d at 869, Van Nortwick, J. Dissenting. (emphasis in original).

At least 3 members of MCCA and 1000 Friends own land in the Agriculture land use area. R. Vol. X (Thornton at 757; Brumfield at 772); R. VIII (Braun at 439). Members of both groups testified that they regularly use and enjoy areas within the Agriculture area for outdoor and recreational activities like bird watching, hiking, boating and kayaking.[24] Six members of MCCA testified that they regularly use and enjoy areas within the Agriculture designation for outdoor and recreational activities.[25] Five members of 1000 Friends testified that they regularly use and enjoy areas within the Agricultural area for outdoor and recreational activities.[26]

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[24] R. Vol. VIII (Braun at 435, 436); R. Vol. X (Melzer at 732, 740); R. Vol. X (Thornton at 758); R. Vol. XI (Florio at 944); R. Vol. X (Tomlinson at 767); R. Vol. X (Brumfield at 771).

[25] R. Vol. IX (Braun at 435, 436); Vol. X (Melzer at 732, 740; Thornton at 758; Tomlinson at 767; Brumfield at 771); R. Vol. XI (Florio at 944)

[26] R. Vol. X (Melzer at 732, 740; Thornton at 758; Tomlinson at 767; Brumfield at 771); R. Vol. XI (Florio at 944)

Greg Braun testified that Martin County Audubon, a member organization of MCCA, regularly uses such areas for field trips and educational excursions to watch bird species with unique habitat requirements.[27][28] He testified that these activities would be negatively impacted by development allowed by the land use amendment as a result of the fragmentation of habitat into smaller tracts, with inferior habitat value for birds. Mr. Braun explained that the construction of housing in those areas could negatively affect the ability to manage properties by fire. R. Vol. IX at 588.

Pine flatwoods in the area that depend on fire would be adversely impacted as concerns for the safety of newly constructed homes could preclude the use of fire management of these lands. He explained that the conversion of farmlands to residential use would adversely affect species important to the group's bird – watching activities and that the ambiguity of the land "set-asides" supposedly required by the land use amendment may actually provide no offsetting public benefit of bird watching. R. Vol. IX at 588-89. He explained that increases in traffic from residential development in the agricultural area would increase the risk of road kill for several bird species, especially Sandhill cranes. R. Vol. IX at 591. Mr. Braun explained that increased urbanization

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[27] Mr. Braun described the activities of Audubon of Martin County, which is a member of the Martin County Conservation Alliance. See R. Vol. IX (Braun at 433).

[28] R. Vol. IX (Braun at 435-438); Pet. Ex. 102.

outside the USD would adversely affect his organization (R. Vol. V at 594) as members on a field trip would have a diminished experience resulting from the existence of more dense housing units. R. Vol. IX at 605. Joe Florio, a member of both Petitioners testified that he engages in target practice and wildlife viewing outside the primary urban service district. R. Vol. X at 752-764. He believes these activities will be negatively impacted by the development permitted by the amendment. R. Vol. X at 764-65. MCCA and 1000 Friends member Donna Melzer testified that MCCA hosts field trips to such areas and that she personally uses such areas for hiking, boating and kayaking.[29] Maggie Hurchalla, a member of both organizations, testified to taking canoe trips on the St. Lucie River and hiking in the Atlantic Preserve Wilderness, both affected by the urban services amendment, and hiking, canoeing and other activities in the Agricultural land area. R. VI 4 at 248-251. 1000 Friends and MCCA also have a history of expending time and effort to further planning in Martin County.[30]

These are material facts.[31] The presentation of this evidence

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[29] R. Vol. X (Melzer at 732, 740; Pet. Ex. 39.

[30] R. Vol. VII (Pattison at 360, 363-365, 367-368, 379-378, 384-385, 386-387, 408); Vol. X (Brumfield at 770); Vol. X (Melzer at 726-728, 731-732, 742, 743-744); Vol. X (Florio at 763-764); Pet. Ex. 26, 29, 30, 32, 39, 40.

[31] "'Supported by the material facts' means the party possesses admissible evidence sufficient to establish the fact if accepted by

alone – this good faith effort to prove what the case law required Petitioners to prove - should preclude sanctions. In *Siegel et al v. Rowe et al*, 71 So.3d 205 (2nd DCA 2011), the Court reversed a trial court's award of attorneys fees against a non-prevailing party which had presented testimony to the contrary of that presented by the opposing, ultimately prevailing party. The non-prevailing party's claims, "were 'supported by the material facts' necessary to establish them because her testimony—if believed by the circuit court—would have been sufficient to prove the claims." (Citation omitted). "Where the losing party presents:

> "competent, substantial evidence in support of the claims … and the trial court determines the issues of fact adversely to [that] party based on conflicting evidence, [§]57.105(1) **does not authorize an award of attorney's fees** …. Thus we conclude that the circuit court abused its discretion…." 71 So.3d at 212. (emphasis added).

The Court cautioned that:

> "[a] contrary conclusion would make engaging in litigation a very risky business for both lawyers and their clients." 71 So.3d at 213.

The Sanction Order clearly erred by sanctioning Petitioners for an alleged lack of proof that they clearly presented.

ii. The Narrative Standing Requirement is Not Nearly As Clear Cut As to Render the Claim to Standing Groundless

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the finder of fact." *Albritton v. Ferrera*, 913 So.2d 5, 8 n.1 (Fla. 1st DCA 2005).

Attorneys' fees should not be awarded where the disputed law is not well established. *Global Heir and Asset Locators, Inc. v. First NLC Financial Services LLC*, 936 So.2d 1216 (Fla. 4th DCA 2006). Standing law is subjective, not clear–cut.[32] The uncertainty of the law of standing clear from the substantial number of cases where a higher tribunal reversed a ruling of a lack of standing below.[33] There is no bright line, for example, for any specific number of members who must be impacted or for the degree or extent of the necessary impact. See e.g. *Hillsborough County v. Fla. Restaurant Assoc.,* 603 So.2d 587, 589 (Fla. 2d DCA 1992)("[w]e do not find that a specific number or percentage is required in order

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[32]. As stated in *NAACP, Inc. v. Florida Board of Regents*, 822 So. 2d 1, 14, (Fla. 1st DCA)(dissenting opinion, Judge Browning), reversed, 863 So. 2d 294 (Fla. 2002), "the law of standing is often hard to define and subject to dispute." About the law of associational standing, one commentator has observed "there are more general guidelines than bright lines…." *Richard M. Ellis, Rule-Challenge Standing After NAACP, Inc. v. Florida Board of Regents*, 78 Fla. B.J. 58, 62 (Mar. 2004).

[33]. See, for example, *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051, 1052-1054 (Fla. 5th DCA 2011); *Palm Beach County Envtl. Coalition v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009); *Reily Enterprises v. DEP*, 990 So.2d 1248 (Fla. 4th DCA 2008); *Save the Homosassa River Alliance, Inc. v. Citrus County,* 2 So.3d 329, 337 (Fla. 5th DCA 1998); *Fed'n of Mobile Home Owners of Fla., Inc. v. Dep't. of Business Regulation*, 479 So. 2d 252 (Fla. 2d DCA 1985); *Peace River/Manasota Regional Water Supply Auth., et. al. v. IMC Phosphates Co., et. al*, 18 So.3d 1079 (Fla. 2d DCA 2009); *Putnam County Envtl. Council, Inc., v. Bd. County Comm'rs*, 757 So.2d 592, 594 (Fla. 5th DCA 2000); *NAACP v. Florida Board of Regents*, 863 So. 2d 294 (Fla. 2003); *Sakelson v. Dep't of Envtl. Prot.*, 790 So. 2d 1206 (Fla. 2d DCA 2001); *Fla. E. Coast Industries v. Dep't of Community Affairs*, 677 So. 2d 357 (Fla. 1st DCA 1996).

to meet the standing requirement … but only that a substantial number of the Association's members have been affected....”). Courts have found associational standing where as few as three members would be affected by the action, even though that was “only a small fraction of the owners represented by the association….” *Fed’n of Mobile Home Owners of Fla., Inc. v. Dep’t of Bus. Reg.*, 479 So.2d 252, 254-55 (Fla. 2d DCA 1985).[34]

There is a dearth of authority describing, and no bright line rule for determining, who is “adversely affected” for purposes of judicial review of a comprehensive plan case such as this one.

iii. Petitioners Met, At Least Arguably, the Test for Appeals in Land Use Cases Under Section 120.68

An association has standing to represent its members if (1) a substantial number of its members, but not necessarily a majority, are adversely affected by the agency action; (2) the subject of the action is within the association’s scope of interest and activity; and (3) the relief requested is appropriate for it to receive for

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[34] In *Fed’n of Mobile Home Owners*, appellant trade association represented tenants in mobile home parks, seeking a declaratory statement under Ch. 120 regarding a state agency’s interpretations of certain statutory terms. The questions were of general application to mobile homeowners but the petition was dismissed on the ground that the trade association failed to demonstrate that it was affected. The Court reversed, holding that **an allegation of standing by "not less than three"** mobile home parks “which **comprise only a small fraction of the owners represented by the association”** was sufficient to meet "the threshold standing requirements….” Id. at 254-55. (emphasis added).

its members. *Fla. Homebuilders, Ass'n. v. Dep't of Labor & Employment Security*, 412 So.2d 351, 353 (Fla. 1982). Here, the Administrative Law Judge found this case germane to the scope of interest and activities of MCCA and 1000 Friends, the invalidation of the plan amendments a remedy appropriate for them to receive for their members, and that both groups have a substantial number of members who are "affected persons" with standing to maintain the hearing below. R. Vol. IV 609-612, 647. The lack of appellate standing was based upon the perceived lack of adverse affect from the agency action. Yet, as shown above, the record did support standing under the case law, and, given the record in this case, the claim of appellate standing was grounded in law and fact.

The two appellate decisions applying the "adversely affected" standing requirement of Section 120.68(1) to comprehensive plan amendment cases are *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). In these cases, the Fourth District ruled that appellants in such cases must show they are adversely affected by agency action.[35] In *O'Connell*, the facts were:

[35] See, *Melzer*, 881 So. 2d at 625. (citing *LEAF v. Clark*, 668 So. 2d 982 (Fla. 1996); *Fla. Chapter of the Sierra Club v. Suwannee Am. Cement Co.*, 802 So. 2d 520 (Fla. 1st DCA 2001); *Daniels v. Fla. Parole & Probation Comm'n*, 401 So. 2d 1351 (Fla. 1st DCA 1981).

- "None of the individual Appellants have stated how the amendments will adversely affect them." 874 So. 2d at 676.
- "MCCA has also failed to assert how its members will be adversely affected by the amendments." Id.
- 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." Id.
- MCCA's interest "is only a general interest in maintaining the quality of life in Martin County…." Id. at 677.

In *Melzer*, the appellants proved only that they "are residents of Martin County." 881 So.2d. at 624. There was no record of land ownership or use and enjoyment of lands impacted by the comprehensive plan amendments in that case. The *Melzer* decision distinguished *Matter of Surface Water Management Permit No. 50-01420-S, Challancin v. Florida Land & Water Adjudicatory Commission*, 515 So. 2d 1288, 1293 (Fla. 4th DCA 1987), which held that the Audubon Society, which owned land within the water management district, had standing to appeal agency approval of a development on an island in Lake Okeechobee. The *Melzer* Court rejected a broad application of *Challancin that* would support standing for any landowner anywhere in the water management district. "Such an interpretation… is unrealistic because the:

> South Florida Water Management District encompasses all or part of sixteen counties. The only reasonable interpretation of *Challancin* is that the property was sufficiently close to Lake Okeechobee to be adversely affected if the development were allowed." 515 So. 2d at 625.

In the case *sub judice*, the Petitioners presented the testimony not presented in *Melzer* and *O'Connell*. Petitioners presented testimony by representative members of land ownership and of regular use of the specific land areas within a single County impacted by the amendments, and are not claiming standing based on land ownership or use within the County in general, and certainly not within an entire 16 county area.

Petitioners also submit that their standing was supported by *Fla. Chapter of the Sierra Club and Save our Suwannee, Inc. v. Suwannee Am. Cement Co.*, 802 So.2d 520 (Fla. First DCA 2001), which found associational standing lacking to appeal an agency action granting a permit for a cement production plant. The Court described the controlling standard:

> "In *Legal Envtl. Assistance Found. v. Clark*, 668 So. 2d 982, 987 (Fla. 1996)(LEAF), the Florida Supreme Court, citing *Daniels*, held that a public interest advocacy organization lacked standing to challenge a final order of the Public Service Commission setting conservation goals because the organization had failed to show that its interests would be 'adversely affected' by the final agency action. The Court explained that LEAF's stated interest in protecting 'its members' use and enjoyment of Florida's natural resources by seeking to avoid unneeded new power plants and obtaining lower energy costs to consumers' was not a 'basis upon which to conclude that the organizations' interests are adversely affected.' Id. The decision in LEAF is consistent with decisional law subsequent to *Sierra Club v. Morton*, 405 U.S. 727, 92 S.

> Ct. 1361, 31 L. Ed. 2d 636 (1972), where the Court rejected a claim of standing under [the U.S. Administrative Procedure Act] by an environmental organization seeking judicial review of the grant of a permit … to develop a resort in the Sequoia National Forest. There, although the Supreme Court recognized that 'an organization whose members are injured may represent those members in a proceeding for judicial review,' id. at *405 U.S. at 738*, the Court held that a general interest in environmental issues did not place the organization in Morton 'among the injured.'" 802 So. 2d at 522. (citations omitted).

The Court found that one group, Save our Suwannee, claimed standing merely on the fact that "its members are citizens of the state and that the state has granted to citizens the right to participate in administrative, licensing or other proceedings authorized by law for the protection of the environment." That was not enough. Id. at 522. The Sierra Club's standing was found lacking as it "provided no facts concerning any member who is individually adversely affected by the construction of the cement plant." Id. The Court ruled that an organization lacks appellate standing if its only interest is "a generalized interest in the environment". Id. at 522- 523. Instead, an organization must show that it will suffer an injury in fact or that the action of the agency will adversely affect its individual members. Id.

In the instant case, as noted by the dissent, as a result of the testimony of organization members as to their ownership, or use of the areas affected by the comprehensive plan amendments:

> "the allegations of injury are much more particularized…. 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." 73 So.3d at 867, fn. 1 (Van Nortwick J. Dissenting).

Moreover, *Sierra Club* involved a specific parcel of land where a cement plant was being sited, but this case involves changes to comprehensive plan policies that apply to vast areas of the County. Given the nature of these amendments, it is not possible to make a factual showing of any specific impact to any specific location. The most that anyone can show is that, because they own or regularly use areas that can now be development or receive urban infrastructure as a result of these changes, they could be impacted by the allowed development.

Neither *Melzer* nor *O'Connell* further describes what facts parties must prove to meet the §120.68(1) standard. Neither case explain any of the following issues relative to associational standing to appeal a final order in a comprehensive plan case: (1) is there a specific number of a group's members who must be individually affected?; (2) is there a specific standard for the extent of use and enjoyment of areas or natural resources to be impacted by the development authorized by a challenged action that must be shown in order to be "adversely affected"?; (3) How much more extensive must the proof relative to these issues beyond that necessary for standing in cases decided under §163.3215, Fla. Stat. to challenge development orders for inconsistency with comprehensive plans, or under the "substantial interests" test for

standing to challenge agency actions under §120.57, Fla. Stat.

iv. Petitioners' Standing Was Supported By Substantial Associational Standing Case Law

Environmental permit standing cases recognizing standing to appeal agency orders in §120.57, Fla. Stat. "substantial interest" proceedings also support Petitioners' standing.

In *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgmt.*, 54 So. 3d 1051, 1052-1054 (Fla. 5th DCA 2011), the Court reversed a denial of standing under the "substantial interests" test[36], ruling that the use of a river for ecological boat tours, recreation, boating, fishing, wildlife viewing and similar activities by an organization's members, and the organization's mission to protect the impacted area, conferred standing to challenge a permit allowing consumptive water withdrawals that could have contributed to algae blooms in the river. In *Palm Beach County Envtl. Coalition v. Fla. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009), the Court overturned a denial of standing for persons who regularly used the Loxahatchee National Wildlife Refuge – 1000 feet away from a proposed power plant, and a resident who lived 2.5 miles away, to challenge an environmental permit, holding that "it is sufficient that the petitioner demonstrate by such proof that his substantial interests "*could* reasonably be affected by . . .

[36] Which, the Court noted, required a "substantial" "injury in fact" to "protected interest" of sufficient immediacy to entitle" the petitioner to a hearing. 54 So.3d at 1054.

[the] proposed activities." 14 So.3d at 1085. (internal citations omitted) (emphasis in original). Neither *St. Johns Riverkeeper,* nor *Palm Beach County Envtl. Coalition* suggest that these types of interests – the same as those possessed by the Petitioners in this case - were inadequate to confer appellate standing to seek the reversal of the challenged agency action.[37]

In this case, the testimony of members of the Petitioner organizations of their ownership, use and enjoyment of the areas affected by the comprehensive plan amendments, and expert testimony about the potential impacts of the plan amendments on the affected lands[38], supported associational standing.

Petitioners' also cited below to land use cases under §163.3215, Fla. Stat. to describe the point of law that membership use and enjoyment of areas that could be impacted by development, and prior efforts to protect those areas, are legally relevant to

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[37.] See also *Peace River/Manasota Regional Water Supply Authority, et. al. v. IMC Phosphates Co., et. al*, 18 So.3d 1079, 1085 (Fla. 2d DCA 2009), where the Second District ruled that a water supply authority had standing to appeal an agency final order issuing phosphate mining permits located away from its wells since the permitted activities could impact its water withdrawal activities elsewhere along the river.

[38] The Sanction Order incorrectly stated that "Appellants' proposed recommended order does not assert that any specific environmental harm will result from approval of the amendments." 73 So.3d at 860. Paragraphs 46, 52, 53, 54, 55-58, 72-74, 95, 96, 98, 102, 105, 107, 111-124, 128, 130-147, 169-172, 188-190, 227-228, 231, 233-237 and 245 of that proposed recommended order included such assertions, with corresponding references to expert testimony. R. Vol. III, at 540-542, 545, 549-559, 563-564, 567, 575-576, 578.

confer associational standing.[39] While these cases were not interpreting the term "adversely affected" under §120.68(1), Fla. Stat., the statutory standing definition at issue in those cases – "aggrieved or adversely affected party" – requires an "adverse effect", akin to, the "adversely affected" standard in §120.68(1), Fla. Stat.:

> "Aggrieved or ***adversely affected*** party" means any person or local government which will **suffer an adverse effect to an interest protected or furthered by the local government comprehensive plan**, including interests related to … densities or intensities of development, … **or environmental or natural resources**. The alleged adverse interest may be shared in common with other members of the community at large, but **shall exceed in degree the general interest in community good shared by all persons**. §163.3215 (2), Fla. Stat. (emphasis added).

While this statute has been interpreted as liberalizing the common law of standing, it does require plaintiffs to show "they will suffer an ***adverse effect....***" *Save the Homosassa River Alliance, Inc. v. Citrus County*, 2 So.3d 329, 336 (Fla. 5th DCA 2008). See also *Parker v. Leon County*, 627 So. 2d 476, 479 (Fla. 1993); *Fla. Rock v. Keyser*, 709 So.2d 175, 177 (Fla. 5th DCA 1998). This is the same phrase used to govern standing under Section 120.68(1), Fla. Stat., which renders these cases persuasive, if not controlling, to support Petitioners claim to standing in this case. They demonstrate that these types of impacts are relevant to

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[39] See pages 4 through 7 of the Reply Brief.

organizational standing in cases involving planning and development, and are relevant to at least the second aspect of the applicable standing requirement. "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Agrico Chemical Co. v. Dept. of Environmental Reg.*, 406 So.2d 478, 482 (Fla. 2d DCA 1981).

An environmental organization "simply … must…have an interest that is something that more than a general interest in community well being." *Save the Homosassa River Alliance, Inc. v. Citrus County,* 2 So.3d 329, 337 (Fla. 5th DCA 1998)[40]; *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 427, 434 (Fla. 4th DCA 2007). An association has an interest greater than that shared by all people for the good of the community (is adversely affected) when its primary purpose includes protecting the area that will be affected by the agency action. *Homosassa,* 2 So.3d at 337.

The testimony of Petitioners' members clearly supported their standing interests under this precedent, even if the Court felt perhaps that the extent or impacts, or the number of members who must be shown to bear them, should be greater for appellate standing than it is under the under the "adversely affected" standard of § 163.3215, Fla. Stat.

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[40] This is consistent with the interpretation of the standing requirement of §120.68 as explained in *Sierra Club*, *supra*, at pages 38-40 of this Brief.

v. The Claim of Appellate Standing Was Not Groundless

The ALJ found that the petitioners had standing to maintain the administrative proceeding below - that they were "affected persons" under § 163.3184(1)(a), Fla. Stat. (R. Vol. IV RO FOF 7, 10; COL 97, 98). Section 120.68, in turn, provides for judicial review by any party "who is adversely affected by final agency action". While an appeal is subject to the judicial interpretations of the scope of standing under §120.68, at this point, Petitioners reasonably took stock of the following:

- They indisputably had associational standing for the administrative hearing they had just lost.
- They had responded to existing precedent on appellate standing in comprehensive plan cases, made a record to support standing under a process where the Administrative Judge made no factual findings as to whether they would have standing to appeal.
- Significant precedent supported appellate standing for associations whose members own or make recreational and other uses of lands that could be impacted by land use and development approvals.

This is not a situation where the Petitioners lacked standing pre-requisites or the legal capacity to maintain the action, or where the subject matter of this case was not germane to their purposes, or had made no credible effort to prove bona fide standing. The standing issue was at least subject to a good faith

judgment call as to whether an appellate court would deem sufficient the evidence offered to prove standing. The law is not nearly as clear cut as to have required Petitioners to know that they had no genuine claim to appellate standing and had no choice but to abandon their case. It was unreasonable, and an overly-expansion, not strict, reading of the statutory fee-shifting provisions, for the Sanction Order to rule that Petitioners should have known that their appeal surely would be dismissed for a lack of standing based on novel and clearly erroneous legal rulings.

II. THE FIRST DISTRICT'S DISMISSAL OF THE APPEAL FOR LACK OF STANDING WAS ERRONEOUS

Judge Van Nortwick, dissenting wrote, "I have become concerned that the dismissal of this appeal for lack of standing was erroneous." 73 So.3d at 866-867, fn.1 (Van Nortwick, J. Dissenting). Petitioners ask the Supreme Court to reach the standing issue due to its public importance[41]. The record and case law described above show that the underlying dismissal of the appeal was erroneous. Petitioners ask the Court to reverse the dismissal of, and reinstate, their appeal.

CONCLUSION

Petitioners ask the Supreme Court to reverse the Sanction Order's erroneous rulings that (1) standing depends on the outcome

[41] By granting jurisdiction to review these two decisions, the Court may address other issues properly raised and argued. *Boca Burger, Inc. v. Forum*, 912 So.2d 561, 563(Fla. 2005).

on the merits; (2) the interpretation of land use plans is an issue of fact; (3) a lack of standing required the imposition of sanctions; (4) Petitioners' claim of appellate standing was factually and legally groundless; and (5) appellate standing was lacking in this case. The Court should overturn the *sua sponte* order imposing attorneys' fees under § 57.105, Fla. Stat., and the order granting the Motion for Attorneys' Fees and Costs filed by Respondent/ Appellee, Island Way under § 120.595 (5), Fla. Stat., and reverse the dismissal of, and reinstate, Petitioners' appeal.

RESPECTFULLY SUBMITTED on this _4th__ day of June, 2012.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Courier New 12-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Richard Grosso
Richard Grosso, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via United States Mail to the following, on this _4th__ day of June 2012.

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