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.
First DCA Case No. 1D09-4956

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

PETITIONERS' BRIEF ON JURISDICTION
(Accompanied by Appendix)

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INTRODUCTION

Martin County Conservation Alliance ("Alliance") and 1000 Friends of Florida ("1000 Friends") seek review of the First District's November 4, 2011 Opinion ("Decision"), holding that the Appellants and their counsel offended Sections 57.105(1), and 120.595(5), Fla. Stat., by bringing an appeal for which the Court found standing to be clearly lacking, and ordering payment of attorney fees. The Decision, to which Judge Van Nortwick strongly objected, directly and expressly conflicts with other Florida appellate decisions**.**

STATEMENT OF THE CASE AND FACTS

The Alliance and 1000 Friends challenged, under Ch. 163, Part II, Fla. Stat., amendments to the Martin County Comprehensive Plan that expand development options in the County's Agricultural area and repeal a prohibition on extending central water and sewer service to the Secondary Urban Service District. The administrative law judge's recommended order ultimately rejected Petitioners' arguments that the amendments were vague, allowed density increases and inappropriate land uses, and were otherwise inconsistent with the law. The Agency Final Order found the amendments "in compliance" with the law. Decision at 7-11. Petitioners appealed to the First District Court of Appeal, which dismissed the appeal without reaching the merits, ruling that Appellants had failed to prove they are "adversely affected by final

agency action." § 120.68(1), Fla. Stat. *Id.* at 2. The Court also issued a *sua sponte* Order to Show Cause why sanctions should not be levied under § 57.105, Fla. Stat., and responses were filed. Decision at 2. On December 14, 2010, the Court issued an order granting a Motion for Attorneys' Fees and Costs which had been filed by Appellee, Island Way under § 120.595 (5), Fla. Stat., and an Opinion, with Judge Van Nortwick dissenting, ordering payment of attorneys' fees under § 57.105, Fla. Stat. for the filing of an appeal for which the Court found standing did not exist.

The November 4, 2011 Decision denied Appellants motions for rehearing and rehearing *en banc*, and ordered Appellants and their counsel to pay Appellees' attorneys' fees. It ruled that the claim to appellate standing "lacked a basis in material facts or then-existing law" because:

(1) The findings on the merits below - that the comprehensive plan amendments will not allow the alleged impacts – conclusively meant that Appellants were not adversely affected by the Agency action. (Decision at 2, 3, 10 - 12, 15 – 17); and

(2) Appellants' claims that the amendments are vague, and allow density increases and inappropriate land uses were issues of fact, and because the *factual* issues had been decided below adverse to Appellants' position, such issues were unreviewable on appeal as they were based upon competent substantial evidence. (Decision at 10-13, 15-17).

The Agency whose final order was appealed asserted that Appellants should not be sanctioned. (Van Nortwick, Dissenting, Decision at 34-35). The dissent "strongly" disagreed with the Decision, finding "this case is not close to providing a basis to impose sanctions" and that the Decision is "of exceptional importance" *Id.* at 23 (Van Nortwick, J. Dissenting). Judge Van Nortwick wrote, "I have become concerned that the dismissal of this appeal for lack of standing was erroneous." *Id.* (Van Nortwick, J. Dissenting) (fn.1). The Dissent also stated that the Decision "fails to acknowledge the complexity of this appeal and ignores that the standing question ... was a close call." Decision at 34-35 (Van Nortwick J, dissenting).[1] Appellants' Motion for Rehearing En Banc was denied by an 8-6 vote, with one judge abstaining. Decision at 23 (fn 1) (Van Nortwick J, dissenting).

JURISDICTIONAL STATEMENT

The Court has discretionary jurisdiction to review a decision of the District Court of Appeal that expressly and directly conflicts with a decision of the Supreme Court or another District Court(s) on the same point of law. Article V, § 3(b), Fla. Const.; Rule 9.030(2)(A)(iv), Fla.R.App.P.

[1] The dissent identified the conflicts expressed in the Decision. Decision at 26 (sanctions as a matter of course), 29-31 (merits determine standing) and 33 (land use plan interpretations as facts). (Van Nortwick, J. Dissenting).

SUMMARY OF ARGUMENT

The Court should review the Decision to reconcile the express and direct conflict with decisions of the Second, Fourth and Fifth Districts, that the outcome of a case on the merits does not determine standing, with decisions of the Supreme Court and the Third, Fourth, and Fifth Districts, that interpretations of local land use ordinances are issues of law, and with decisions of the Second District and the Supreme Court that the dismissal of an action does not require sanctions.

ARGUMENT

I. THE DECISION CONFLICTS WITH DECISIONS OF OTHER DISTRICTS THAT STANDING DOES NOT DEPEND ON SUCCESS ON THE MERITS.

The Decision relied exclusively on the rulings below on the merits to determine that Appellants lacked appellate standing:

> 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 .... (Decision at 11)
>
> ***
>
> 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 .... (*Id*. at 15).
>
> ***
>
> 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. (*Id*. at 16-17).

The Decision creates a "Catch 22" whereby rulings on the merits below that adverse impacts will not occur, automatically precludes "adverse impact" appellate standing. This conflicts with the rulings of other districts. 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 a denial of standing that was based upon an administrative law judge's finding that no harm would result from a 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 a final order...." *Id*. at 1086.

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 to have standing, as 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, based on their loss on the merits, petitioners lacked standing, because "[p] etitioners… 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).

The Decision conflicts with these decisions, as it obviates appellate standing of any party that does not initially prevail on the merits of their claims concerning impacts of challenged actions, and sanctions attempts to seek judicial review of those rulings.

II. THE DECISION CONFLICTS WITH DECISIONS OF THE SUPREME COURT AND THE THIRD, FOURTH, AND FIFTH DISTRICTS THAT THE INTERPRETATION OF LAND USE PLANS IS AN ISSUE OF LAW.

Initially, the Decision accurately listed the issues raised on appeal:

> "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 by the whim of the ... County ...." (Decision at 9).

The Decision, however, ruled that these issues were factual, and that the *findings of fact* below precluded "adverse impact" appellate standing:

> "In his ***factual findings***, the ALJ found that the ... Amendment does not allow for more development ...." (*Id*. at 10) (emphasis added).
>
> ***
>
> "The ALJ found ***no credible evidence*** ...that the amendment will allow further extensions of water and sewer lines ...." (*Id.* at 10-11) (emphasis added).

***

> "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."* (*Id*. at 15) (emphasis added).

***

> "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...." (*Id*. at 15-16) (emphasis added).

***

> "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*** *...."* (*Id*. at 16-17).

These rulings expressly and directly conflict with decisions of the Supreme Court and other district courts that the interpretation of land use plans - the standards they set, and what such plans allow, require and prohibit – are legal issues. In *Rinker Materials Corp. v. North Miami*, 286 So. 2d 552, 553 (Fla. 1973), the Florida Supreme Court held that the interpretation of land use ordinances is an issue of law to be decided by the rules of statutory construction. 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 "proposed [comprehensive plan] amendment ... is "*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 Fifth District also holds that interpretation of comprehensive plans is a legal issue. *Colonial Apt's v. City of Deland*, 577 So. 2d 593, 596 (Fla. 5th DCA 1991). The law is the same in the Fourth District. *1000 Friends of Florida, Inc. v. Palm Beach County*, 69 So. 3d. 1123, 1126. (Fla. 4th DCA 2011).

The issue in comprehensive plan text amendment cases is whether the land uses the plan allows, requires or prohibits on its face are consistent with the statute. The Decision rules that issues of legal interpretation, which are at the heart of these cases, could never be appealed by non-prevailing parties for lack of appellate "adverse impact" standing if the Agency's legal interpretations were that the wording of such plans allows no adverse impacts. Accordingly, a law intended to manage growth throughout Florida, and for which citizen enforcement is authorized by law[2], would be rendered virtually unenforceable in appellate court. If adverse agency legal interpretations regarding allowed impacts of land use plans preclude appellate standing, they will be virtually immune from judicial review. The paradoxical result would be that the only party who could bring an appeal is one that prevailed on the merits and therefore does not need to do so.

III. THE DECISION CONFLICTS WITH DECISIONS OF THE SECOND DISTRICT AND THE SUPREME COURT THAT FAILURE ON THE MERITS DOES NOT REQUIRE SANCTIONS.

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

The Decision essentially holds that sanctions are required simply due to the lack of appellate standing, finding, based on the rulings described above, that Appellants "failed to factually establish how an adverse ruling harmed their interests...., [and] pursued appellate review without any foundation in law or fact. (Decision at pgs. 3-4). It ruled that, because Appellants "advanced an argument unsupported by material facts or law necessary to establish standing to appeal, sanctions must be issued." *Id*. at 18.

The automatic imposition of sanctions for lack of standing conflicts with the Second District's decision 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." *Mason* cited to the Supreme Court's ruling in *Whitten v. Progressive Casualty Insurance Co.*, 410 So. 2d 501 (Fla. 1982) that § 57.105 Fla. Stat. does not require an award of fees simply because a party loses on the merits. 410 So. 2d at 505-06.[3] In *Peyton v. Horner*, 920 So. 2d 180, 183 (Fla. 2d DCA 2006), the Court held that dismissal for lack of standing does not automatically require the sanction of attorney's fees.

[3] After the 1999 revisions, courts have relied upon *Whitten* for the holding that § 57.105, Fla. Stat. is not a prevailing party attorney's fees provision, and requires more to assess sanctions than lack of success in the case. *See Mason*, 817 So. 2d at 923.

CONCLUSION

The Decision, over a strong dissent, and with 6 judges voting to rehear the case *en banc*, sanctioned non – profit organizations for appealing an agency's rulings on the proper legal interpretation of comprehensive plan changes. The Decision is of exceptional importance, as it unduly limits the ability to seek appellate redress of a wide variety of administrative agency and other. The purpose of deterring baseless litigation must be carefully counter- balanced against protecting all citizens' rights of access to the courts.[4] The Decision may ensure that no citizen will ever again initiate legal remedies that the Legislature has established regarding environmental and land use matters. Such cases often present close issues, as the nuances between the majority and dissenting decisions in this case demonstrate. Few, if any, parties with legitimate claims would dare embark on such an action if the result of not prevailing on the merits is a punitive assessment of attorney's fees. Petitioners urge the Court to accept jurisdiction to reconcile the identified conflicts.

RESPECTFULLY SUBMITTED on this ___ day of December 2011.

_____
Richard Grosso, Esq.

[4] *See Read v. Taylor*, 832 So. 2d 219, 222 (Fla. 4th DCA 2002). Here, the Dissent expressed "deep concern" over the Decision's "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. Decision at 37 -38. (Van Nortwick, J. Dissenting).

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 ___ day of December 2011.

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CERTIFICATE OF COMPLIANCE

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

_____
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