

Standing Since *Agrico* Under Chapter 120, Florida Statutes¹

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***“[T]he law of standing is often hard
to define and subject to dispute.”²***

Section 120.57, Florida Statutes, was recognized early on as the Florida APA’s “core section.”³ The formal trial-type hearing before an independent administrative law judge, framed by Sections 120.569 and 120.57, is surely the Florida APA’s centerpiece. This powerful remedy, however, is available only to those who have access to it, that is, those with “standing.”

A HYPOTHETICAL: ROMAN LEGIONS AND THE APA

In the early third century the historian Polybius describes a discipline of the Roman Republic relied upon by Roman generals for centuries:

If ever these same things happen to occur among a large group of men... the officers reject the idea of bludgeoning or slaughtering all

¹ The authors extend thanks to Administrative Law Judge Cathy Sellers whose excellent CLE materials, “Prehearing and Post-Hearing Matters,” are relied on heavily. Those materials were presented in Tallahassee at the 2009 annual “Practice Before DOAH” seminar sponsored by the Administrative Law Section. Thank you also to William E. Williams’ for his excellent materials that more broadly cover the standing provisions in Chapter 120: “Who Sits at the Round Table? Standing in Administrative Proceedings,” presented at the 2010 Patricia A. Dore Administrative Law Conference in Tallahassee. ALJ Sellers’ and Mr. Williams’ work are both available at the Administrative Law Section’s website: <http://www.fladminlaw.org/>

² *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).

³ *State ex rel. Dept. of General Services v. Willis*, 344 So.2d 580, 591 (Fla. 1st DCA 1977).

the men involved [as is the case with a small group or an individual]. Instead they find a solution for the situation which chooses by a lottery system sometimes five, sometimes eight, sometimes twenty of these men, always calculating the number in this group with reference to the whole unit of offenders so that this group forms one-tenth of all those guilty of cowardice. And these men who are chosen by lot are bludgeoned mercilessly by their unit members.

Plutarch describes how Anthony employed decimation after a defeat in Media:

Anthony was furious and employed the punishment known as 'decimation' on those who had lost their nerve. What he did was divide the whole lot of them into groups of ten, and then he killed one from each group, who was chosen by lot; the rest, on his orders were given barley rations instead of wheat.

This was decimation, a rule of the Roman legions.

Our question is: If Antony was an agency of the state of Florida, who would have standing to challenge decimation under Florida's APA?

- A soldier selected for stoning?
- A soldier in the unit from which the victim has not yet been selected?
- The soldier's union?
- The soldier's spouse?
- The soldier's children?
- What of the soldier's parents?

As we ponder these questions, remember there is ample authority that Florida's 1975 Administrative Procedure Act was intended to broaden access to agency proceedings. *E.g., Hasper v. Department of Labor and Employment Security*, 359 So. 2d 400, 402 (Fla. 1st DCA 1984): "we do believe that the legislature intended by the passage of Section 120.57(1) to create a broad avenue of redress for many persons variously situated..." *See* Reporter's Comments on

the Proposed Administrative Procedure Act for the State of Florida, March 9, 1974.⁴

Focusing on standing to invoke the formal, trial-type hearing, these Webinar materials are by necessity limited in scope. Other varied remedies in Chapter 120 each have some differences for standing to participate or access to agency proceedings. Here, the discussion of standing and access to agency proceedings is limited to:

- The language in the Administrative Procedure Act, Chapter 120, Florida Statutes relating to standing to seek a formal hearing;
- “*Agrico* standing,” that is, standing to invoke the hearing procedures described in Sections 120.569 and 120.57(1), Florida Statutes;
- Standing to challenge the validity of proposed or existing agency rules pursuant to Section 120.56, Florida Statutes;
- Associational standing in the above two contexts; and
- Standing to seek judicial review pursuant to Section 120.68, Florida Statutes.

The Holding in *Agrico*

The leading Chapter 120 standing case, *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), established a two-part test for a party to be entitled to an administrative hearing. The petitioner must demonstrate:

1. Injury in fact which is of sufficient immediacy, and
2. The substantial injury is of a type or nature which the proceeding was designed to protect.

⁴ The Reporter’s Comments are reproduced on the Florida Legislature’s Joint Administrative Procedure Committee website at <http://japc.state.fl.us/research.cfm>
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Thirty years have now passed since *Agrico* was decided, but standing issues continue to arise. It is hoped that these materials will touch upon significant developments since *Agrico* and provide some guidance to the Florida administrative practitioners.

Standing: A Threshold, “Forward-Looking Concept”

In footnote 3 of *Agrico*, the court observed: “[t]he § 120.57 hearing should have terminated when the hearing officer became aware that...[petitioners]...could put forth no evidence that they would be injured environmentally.” 406 So. 2d at 482 n 3. Standing is, therefore, a threshold issue. In the first instance, a petitioner must allege facts that, if taken as true, demonstrate standing. The Uniform Rules of Procedure require a petition to include: “an explanation of how the petitioner's substantial interests will be affected by the agency determination...” Rule 28-106.201(2)(b), Fla. Admin. Code. As exemplified by *Agrico*'s footnote 3, *supra*, petitioner has the burden of proving its standing at hearing.

Moreover, as was observed in *Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Company*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009), standing is unrelated to the elements or merits of the underlying claim. That is because standing is a forward-looking concept that does not “disappear” based on the ultimate outcome of the proceeding. *See Hamilton County v. Department of Environmental Regulation*, 587 So. 2d 178, 1383 (Fla. 1st DCA 1991).

The APA’s Standing Provisions

Section 120.569, Florida Statutes provides, in part:⁵

120.569 Decisions which affect substantial interests.—

(1) The provisions of this section apply in all proceedings in which the *substantial interests of a party* are determined by an agency...

(Emphasis added).

“Party” is defined in Section 120.52(13), Florida Statutes in part as follows:

⁵ All statute cites are to the 2010 edition of the Florida Statutes unless noted otherwise.
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(13) “Party” means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

These three categories of parties are briefly discussed:

Section 120.52(13)(a): Specifically Named Persons

The standing of “specifically named persons” in subparagraph “(a)” of Section 120.52(13) is probably the most obvious and least contested. For example, if a person applies for a permit or license, and the agency denies the application, the disappointed applicant is surely a “[s]pecifically named person...whose substantial interests are being determined in the proceeding.” Similarly, if a person receives an administrative complaint from an agency seeking monetary penalties or other sanctions, that person would have standing under Section 120.52(13)(a). In each example, there would be access—standing—to invoke the procedures in Sections 120.569 and 120.57.

Section 120.52(13)(b): Party Status by Provision of Statutes and Rules

Subparagraph (b) of Section 120.52(13) has two parts. The first part defines “party” as a person who is entitled to participate in a proceeding by constitutional right, or a provision of a statute or agency rule. Unique standing requirements are scattered among various substantive statutes administered by agencies and a discussion of each of them are beyond the scope of these materials. *See, e.g.,*

Section 408.039(5)(b), Florida Statutes (who may invoke or intervene in a hearing on a Certificate of Need decision by the Agency for Health Care Administration); Section 163.3215, Florida Statutes (who has standing to enforce local comprehensive plans through development orders) and Section 413.412(5), Florida Statutes (discussed *infra*, codifying environmental substantial interests sufficient for standing).

Standing provisions in a substantive statute administered by an agency are ordinarily controlling and preempt general standing provisions in Chapter 120, Florida Statutes, including the two-part test in *Agrico*. See, e.g., *Grand Dunes, Ltd. v. Walton County*, 714 So. 2d 473 (Fla. 1st DCA 1998)(petitioner lacks standing as not among those named in statute who can bring proceeding).

Petitioners' counsel should *always* check for and be certain of any particular standing provisions in the statute that the agency administers.

Section 120.52(13)(b) “Agrico Standing” – A “person whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.”

First, a discussion of *Agrico*'s roots is in order. *Agrico* added a requirement from federal administrative law, not found in Chapter 120, requiring an examination of the type or nature of a petitioner's interest. This development was likely influenced by dicta in *Department of Offender Rehabilitation v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978). *Jerry* involved a challenge by a state prisoner to an agency rule that required “gain time” to be reduced or forfeited by prisoner misconduct. In *Jerry*, the court discussed the development of the law of standing in a number of federal cases, including *Sierra Club v. Morton*, 92 S. Ct.1361 (1972), wherein the United States Supreme Court noted that standing to seek judicial review under the federal APA existed only to those who could show that the challenged action caused them “injury in fact” and that the alleged injury was “arguably within the zone of interest” to be protected or regulated by the statutes that the agency were claimed to have violated.

While the opinion and holding in *Jerry* neither established nor applied a requirement that a petitioners' injury be of a certain type or nature, the question was brought to the forefront in *Agrico*. In *Agrico*, the petitioners opposed an environmental permit sought by a competitor, asserting economic interests. While petitioners' interests were undoubtedly substantial, the second prong of the “*Agrico*

test,” evaluating the kind of interest asserted, was established. The result was the court’s holding that petitioners lacked standing in that they did not assert an environmental interest which was the kind of interest that Chapter 403, Florida Statutes was enacted to protect. The two-part *Agrico* test for standing has been applied ever since by the several district courts of appeal.

The issue of standing arises very often in situations where, as happened in *Agrico*, a third party seeks a hearing to contest an agency’s decision on a permit or license sought by someone else. In this context, the petitioner’s standing is assailed on grounds that the alleged interests asserted by the petitioner are remote or speculative; or that the alleged interests are outside of the “zone of interest” of the statute in question; or both. The question of standing provides an opportunity for counsel, either for the respondent license applicant, or for the agency defending a rule challenge, to “take a shot” at a quick victory on procedural grounds. In this regard, and remembering Judge Browning’s words at the beginning of these materials,⁶ the two-part *Agrico* test can present opportunities to weave creative arguments. Those arguments will, sometimes, carry the day.

A good example is the often-cited rule challenge case, *Florida Society of Ophthalmology v. Board of Optometry*, 532 So. 2d 1279, 1285-86 (Fla. 1st DCA 1988). There, the First District Court of Appeal applied the two-part *Agrico* test, explaining:

Appellants have failed to satisfy both elements of this [*Agrico*] test. While appellants may well suffer some degree of loss due to economic competition from optometrists certified to perform services that appellants alone were previously permitted to perform, we fail to see how this potential injury satisfies the "immediacy" requirement. More importantly, the allegations in the petition that these activities by certified optometrists will adversely affect the economic affairs of appellants are legally insufficient because the alleged economic injury does not fall within the zone of interest intended to be protected by the applicable statutes. *See Boca Raton Mausoleum, Inc. v. State, Department of Banking and Finance*, 511 So.2d 1060 (Fla. 1st DCA 1987). The nature of the injury to appellants' economic interests is no longer entitled to protection under chapters 458 and 459. Section 463.0055 entitles each applying optometrist to receive the requested

⁶ “[T]he law of standing is often hard to define and subject to dispute.” *See* note 2, *supra*.
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certification upon showing compliance with the statutory requirements. Since appellants have shown no zone of interest personal to them that would be invaded by the certification process, they have no standing to contest the Board's decisions on the applications generally. See *ASI Inc. v. Florida Public Service Comm'n*, 334 So.2d 594 (Fla.1976). For the reasons quoted from the appealed order, *supra*, we approve the denial of appellants' standing based on the allegations of economic injury upon the rationale in *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So.2d 478, and *Shared Services, Inc. v. State, Department of Health and Rehabilitative Services*, 426 So.2d 56.

Specific to environmental cases arising under Chapter 120, an *Agrico*-like standard has been codified in Chapter 403, Florida Statutes, with qualifications that appear to broaden the kinds of interests considered “substantial.” Section 403.412(5), Florida Statutes, provides, in part:

A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources protected by this chapter.

See St. Johns Riverkeeper, Inc. v. St. John's River Water Management District, ___ So. 3d ___ (Fla. 5th DCA 2011)(Case Nos. 5D09-1644 and 5D09-1646)(Holding that petitioner environmental organization established its standing, citing Section 403.412(5), Florida Statutes).

Examples of Cases Applying the *Agrico* Test

The following are some examples of case law where the *Agrico* test was applied in the context of a third party challenge to agency action on a license or permit. These are examples only; this is *not an exhaustive list*:

Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Company, 18 So. 3d 1079 (Fla. 2d DCA 2009)(in proceedings on various permits to operate a new phosphate mine, water authority that supplies potable water to a four-county region asserted interests that Chapter 373, Florida Statutes, dealing with the protection and conservation of water resources, was designed to protect.)

City of Sunrise v. South Florida Water Management District, 615 So. 2d 746 (Fla. 4th DCA 1993)(City lacked standing because city's allegations of duplication of services and increased rates for water to its customers were as a result of issuance of consumptive use permit were not protected by Chapter 373, Florida Statutes.)

Friends of the Everglades, Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 595 So. 2d 186 (Fla. 1st DCA 1992))(Environmental organization had standing to challenge Trustees' decision to use certain lands designated as a botanical site as a juvenile detention facility as its injury was of the type that the Conservation and Recreation Lands Statute (CARL), Section 253.023, Florida Statutes, was designed to protect.)

Gregory v. Indian River County, 610 So 2d 547 (Fla. 1st DCA 1992)(In proceedings on environmental permit sought by the county, landowner's asserted interest, albeit economic, in determining how much of his property should be considered wetlands was sufficient to confer standing. "We reject any interpretation of *Agrico* which would preclude a landowner from participating in proceedings involving the use of his own property." *Id.* at 554.)

International Jai-alai Players Association v. Florida Pari-Mutuel Commission, 561 So. 2d 1224 (Fla. 3d DCA 1990)(Allegations that changes in the Jai-Alai playing dates will aid fronton owners in their labor dispute with the players' association are remote and speculative; and Sections 551.031 and 550.0841 were not designed to protect the jobs or economic interests of jai-alai players.)

Shared Services, Inc. v. Department of Health and Rehabilitative Services, 426 So. 2d 56, 58-59) (Fla. 1st DCA 1983)("Shared

Services' particular interest [in application for a competing ambulance service] has not been shown to be other than an economic one. The construction placed upon Rule 10D-66.41(d) by HRS excluding consideration of competitive economic injury to providers is a reasonable one, since there is no statutory language to the contrary. Absent clear authority for the insertion of competitive economic consideration into the licensing and certification procedures involved here, the final order determining Shared Services is not entitled to a Section 120.57 hearing regarding Shands' licensure and certification is AFFIRMED.”)

Section 120.52(13)(c): Persons “allowed by the agency to intervene or participate in the proceeding as a party”

Although the definition of a “party” includes persons “allowed by the agency to...participate as a party,” stipulations that a person “has standing” require careful consideration. In *Grand Dunes, Ltd. v. Walton County*, 714 So. 2d 473 (Fla. 1st DCA 1998), the court found that the petitioner lacked standing, contrary to a stipulation by the parties. The court equated the petitioner’s lack of standing to lack of jurisdiction over the subject matter, which cannot be overcome by stipulation or failure to object. *Id.* at 475.

Stipulations are of course encouraged, and petitioner’s counsel should welcome a stipulation that the client has standing. But note well: a stipulation addressing a petitioner’s standing should contain *specific facts* that enable the Administrative Law Judge to make findings of fact that establish standing. A bare stipulation that recites “petitioner has standing to bring this proceeding” is insufficient. *See Grand Dunes, Ltd., supra.*

Standing to Challenge an Agency Rule

Everything that has been said before should apply equally to standing in rule challenge cases. The operative words that describe who may seek an administrative determination are nearly the same. Section 120.56 says that persons who are “substantially affected” by a proposed rule, an existing rule, or an agency statement challenged as an unpromulgated rule,⁷ may seek an administrative determination of the rule’s validity. The “substantially affected” standing test

⁷ §120.54(1)(a)
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requires a party to show “injury in fact” and that the injury falls within the “zone of interest of the proceeding.”

The cases seem to interpret the “substantially affected” standard to provide a somewhat broader "zone of interest" for rule challenges. *See, Board of Optometry v. Florida Society of Ophthalmology*, 538 So. 2d 878 (Fla. 1st DCA 1988); *see also, Florida Society of Ophthalmology v. Board of Optometry*, 532 So. 2d 1279, 1288 (“[t]here can be, as this case illustrates, a difference between the concept of "substantially affected" under section 120.56(1) and "substantial interests" under section 120.57(1)).

If the rule directly regulates a party’s behavior or limits its rights, odds are good it will cause injury in fact to the party. *Reiff v. Northeast Florida State Hospital*, 710 So. 2d 1030 (Fla. 1st DCA 1998); *Coalition of Mental Health Professions*, 546 So. 2d 27 (Fla. 1st DCA 1989); *Professional Firefighters v. Department of Health and Rehab. Svcs.*, 396 So. 2d 1194 (Fla. 1st DCA 1981).

If a rule has the effect of directly regulating a person’s profession, chances are the person is substantially affected for purposes of rule challenge standing. *Ward v. Board of Trustees*, 651 So. 2d 1236 (Fla. 4th DCA 1995).

Standing for Associations

The standing of associations has come to question most often in rule challenges. Two Florida Supreme Court cases govern standing for associations. They are: *NAACP, Inc. v. Florida Board of Regents*, 863 So. 2d 294 (Fla. 2003) and *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So. 2d 351 (Fla. 1982).

The general rules and considerations that can be gleaned from *NAACP* and *Florida Home Builders* are:

1. The Legislature created rule challenges to expand public participation in the administrative process and courts “should” interpret standing to further this goal;
2. The financial barriers to an individual challenger and the financial facilitation of challenges by groups merit some consideration;
3. A substantial number, but not necessarily a majority, of a group’s members must be “substantially affected” by a challenged rule;

4. The subject of the challenged rule must be within the association's general scope of interest and activity;
5. The relief requested must be of the type appropriate for an association to receive on its members' behalf;
6. Standing for associations is not limited to professional or trade associations. Environmental and other citizen groups can have standing; and
7. Proof of immediate and actual harm is not required to establish a "substantial affect."

NAACP and *Florida Home Builders* express a broad view of standing. However, counsel should not ignore the narrower views expressed by the majority in *NAACP, Inc. v Florida Board of Regents*, 822 So. 2d 1 (Fla. 1st DCA 2002), even though the Florida Supreme Court reversed. At the very least, the First District's majority opinion identifies issues to address by pleading and by proof.

Similarly, the opinion and reasoning in *International Jai-Alai Players Ass'n v. Florida Pari-Mutuel Com.*, 561 So. 2d 1224 (Fla. 3d DCA 1990) merit study. In that case, the court determined that the players did not have standing to challenge the fronton owners' application to change opening and closing playing dates, operation dates and makeup performance dates. The opinion at 1225 summarizes a narrow view of standing for associations and rule challengers in three paragraphs.

Florida Home Builders Association v. Department of Labor & Employment Security, 412 So.2d 351 (Fla. 1982), relied on by the Association, merely allows the Association to assert whatever standing its members may have in this case, and does not, as urged, alter or supersede *Agrico*.

First, the Association has not alleged below that its members will suffer an injury in fact of sufficient immediacy to entitle it to a hearing under Section 120.57, Florida Statutes (1987). *Agrico*. The central injury asserted by the Association -- namely, that the sought-after changes in the jai-alai playing dates will aid the fronton owners in their labor dispute with the Association and thus will either break or

prolong the ongoing strike of the Association to the economic detriment of its members—is far too remote and speculative in nature to qualify under the first prong of the *Agrico* standing test; moreover, the remaining allegations of injury are equally remote, speculative, or irrelevant. *Village Park Mobile Home Ass'n v. State, Dept. of Business Regulation*, 506 So.2d 426 (Fla. 1st DCA), *rev. denied*, 513 So.2d 1063 (Fla. 1987); *Florida Soc'y of Ophthalmology v. State, Bd. of Optometry*, 532 So.2d 1279 (Fla. 1st DCA 1988), *rev. denied*, 542 So.2d 1333 (Fla. 1989).

Second, the Association has not alleged below that the injury which it asserts its members will suffer is the type of injury which the subject proceeding before the Commission was designed to protect, so as to entitle it to a hearing under Section 120.57, Florida Statutes (1987). *Agrico*. On the contrary, the proceedings under Sections 551.031, 550.0841, Florida Statutes (1987), were not designed to protect the jobs or economic interests of jai-alai players; consequently, there can be no standing under the second prong of the *Agrico* standing test. *Agrico; Florida Soc'y of Ophthalmology; Shared Servs., Inc. v. State, Dept. of Health & Rehabilitative Servs.*, 426 So.2d 56 (Fla. 1st DCA 1983).

Standing to Seek Judicial Review

The requirements for standing to seek judicial review of agency action are stated in Section 120.68(1), Florida Statutes: “A party who is adversely affected by final agency action is entitled to judicial review.”

Florida appellate courts have made it clear that standing for judicial review of agency action is *not* as broad as the requirements for access to administrative proceedings. The distinction is explained in *Daniels v. Florida Parole and Probation Commission*, 401 So. 2d 1351, 1354 (Fla. 1st DCA 1981):⁸

The fact that a person may have the requisite standing to appear as a party before an agency at a *de novo* proceeding does not mean that the party automatically has standing to appeal. The APA’s definition of a

⁸ *Aff'd sub. nom., Roberson v. Florida Parole and Probation Commission*, 444 So. 2d 917 (Fla. 1983), *abrogated on other grounds, Griffith v. Florida Parole and Probation Commission*, 485 So. 2d 818 (Fla. 1986).

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party recognizes the need for a much broader zone of party representation at the administrative level than at the appellate level. For example, in rulemaking, a large number of persons may be invited or permitted by the agency to participate as parties in the proceeding, so as to provide information to the agency concerning a broad spectrum of policy considerations affecting proposed rules. See *Balino v. Dept. of Health and Rehab., etc.*, 362 So. 2d 21 (Fla. 1st DCA 1978). Yet, a person who participates in such a proceeding by a statute, rule, or by an agency's permission, may not necessarily possess any interests which are adversely, or even substantially, affected by the proposed action.

Eight Things (or more) To Remember

1. Judge Browning's dissent in *NAACP, Inc. v. Florida Board of Regents*, 822 So. 2d 1, 14, (Fla. 1st DCA 2002), *reversed*, 863 So. 2d 294 (Fla. 2002), was right: "While I disagree with the majority, I realize the law of standing is often hard to define and subject to dispute."
2. Standing allegations are not *pro forma*. Research the facts and the law when drafting or evaluating a petition.
3. *Assume nothing*. *Never* take standing for granted. Alleging standing is not enough. Your allegations in the petition on standing should be drafted with an expectation that *you must prove every fact alleged*.
4. Proof is everything. By stipulation or evidence, prove or challenge *the specific factual details of standing*, such as the mission of an organization, organization by-laws, composition of membership, nature of the petitioner's business operations, and likely effect of the agency action or rule.
5. Proof of the "zone of interest" is just as important as proof of the substantial affect or injury in fact.
6. A rule challenge brought by an association should include an individual petitioner whenever possible and the petition should

separately describe why that individual has standing in his or her own right.

7. *The importance of the record.* In every case, a party loses. That party might be your client. Therefore: be sure the facts in the record are sufficient to demonstrate that (1) your client had standing in the first instance to bring the proceedings, and also (2) your client is “adversely affected” by the agency’s unfavorable Final Order.

8. So far, standing is unaffected by the ultimate resolution of the challenge on the merits. *NAACP, Inc. v. Florida Board of Regents*, 863 So. 2d 294, 300 (Fla. 2003); *Palm Beach County Env’tl Coalition v. Department of Env’tl Prot.*, 14 So. 3d 1076 (Fla. 4th DCA 2009); *Peace River/Manasota Reg’l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079 (Fla. 2d DCA 2009).⁹

AND WHAT OF THE LEGIONNAIRES’ QUESTIONS?

- Is the likelihood of injury sufficiently immediate?
- Can any legionnaire satisfy the zone of interest test?
- Will a substantial number of them be affected for purposes of association standing?
- What relief is appropriate?

⁹ **A case to watch** on the relationship between the resolution of merits and the petitioner’s standing (among other issues): Motion for Rehearing pending in *Martin County Conservation Alliance v. Martin County*, 1st DCA Case No. 1D09-4956. Following dismissal of the Alliance’s appeal, a divided panel assessed attorney’s fees and costs against the appellant, and counsel, pursuant to Section 57.105, Florida Statutes, for invoking judicial review without standing to do so. The majority opinion appears to merge issues on the merits of the case with petitioners’ standing. See *Reily Enterprises v. Department of Environmental Protection*, 990 So.2d 1248, 251 (Fla. 4th DCA 2008); *Hamilton County v. Department of Environmental Regulation*, 587 So. 2d 178, 1383 (Fla. 1st DCA 1991).