



# Administrative Law Section Newsletter

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• Elizabeth W. McArthur, Editor •

December 2000

## From the Chair

by Mary F. Smallwood

On September 29, 2000, the Executive Council of the Section conducted a long-range planning meeting to discuss a number of topics. A high priority for the Section with another legislative session just around the corner was a review of the Section's legislative positions. The Section has traditionally been active in providing the Legislature and legislative staff with assistance and information on proposed legislation that affects the administrative process.

As many of you may know, no Section of the Florida Bar may lobby the Legislature without formally adopting legislative positions that must be reviewed and approved by the Board of Governors. The Administrative Law Section presently has three legislative positions that have been ap-

proved by The Florida Bar. They are as follows:

Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, which undermines the rulemaking requirements of the Administrative Procedure Act by allowing "guidelines," "determinations," or other statements of agency policy without formal rulemaking.

Opposes amendment to Chapter 120, Florida Statutes, to deny points of entry to request administrative proceedings where rights of substantially affected persons are involved.

Opposes exemptions or exceptions to the Administrative Procedure Act, but otherwise supports a re-

quirement that any exemption or exception be included within Chapter 120, Florida Statutes, itself.

The Florida Bar recently reappraised these three positions. However, because it has been several years since they were initially drafted and approved, the Executive Council saw a need to review the existing positions and consider whether additional positions might be necessary. The philosophy of the Executive Council in drafting legislative positions has always been to address broad conceptual issues so as to retain maximum flexibility in appearing before the Legislature. Obviously, it isn't possible to predict what legislative proposals might come before the Legislature in any particular session or how those proposals may be modified as the session progresses.

In the past, the legislative positions have generally been adopted by a vote of the Executive Council and forwarded to the Board of Governors with little, if any, input from other members of the Section. However,

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## Chapter 2000-141, Florida Laws: *Administrative Procedural Aspects of the New Building Code Law*

by Suzanne H. Schmith

### **Background**

The 1998 Legislature passed HB 4181, directing the creation of a single, statewide building code, thereby heralding a significant policy departure from the current system in which local governments adopt, amend, interpret and enforce a variety of minimum building codes. The

1998 law directs the state, through the Florida Building Commission created therein, to develop a single statewide building code **to be adopted by state rule**. Never before has the state's building code been subject to the Administrative Procedure Act<sup>1</sup> and all that it involves. The implications are broad and perhaps not fully

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FROM THE CHAIR

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the Executive Council has decided to seek broader input from Section members in considering modification of the existing positions. We fully recognize that the membership of the Section is quite varied, including government attorneys, private sector practitioners representing clients before the agencies, and public interest lawyers. It is not always easy to establish positions that are acceptable to each and every member of the Section because of those different interests. While we can't guarantee that the final positions will be satisfactory to each of you, we will try to give every one of you the opportunity to give us your thoughts before the Executive Council votes on the matter.

Accordingly, notice will be sent to each member of the Section with the proposed revisions to the legislative positions. We will then call a general meeting of the entire Section at which any interested member may appear and address specific concerns with the proposed positions.

At its long-range planning retreat, the Executive Council voted to propose the following amendments to the Section's legislative positions. Amendments to the existing positions are presented in the legislative format with strike-through and underlining to indicate changes.

Opposes any amendment to Chapter 120, Florida Statutes, or other

legislation, which undermines the rulemaking requirements of the Administrative Procedure Act by allowing "guidelines," "determinations," or other statements of agency policy without formal rulemaking.

The amendment to the position on rulemaking was not intended to constitute a substantive change in policy. Instead, it simply eliminates unnecessary language while retaining the original intent.

Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, to deny, limit, or restrict points of entry to request administrative proceedings where rights of substantially affected persons are involved.

The intent of this amendment is to expand the concept in the existing position of protecting the rights of substantially affected persons to obtain an administrative hearing. In addition, we propose to add language making it clear that the position extends to attempts to limit public access through adoption or amendment of statutes other than in Chapter 120, Florida Statutes.

*Opposes exemptions or exceptions to the Administrative Procedure Act, but otherwise supports a requirement that any exemption or exception be included within Chapter 120, Florida Statutes, itself.*

Again, the proposed modification was

simply intended to eliminate unnecessary language in the existing position.

In addition to the proposed modifications to existing positions, the Executive Council voted to propose two new legislative positions. First, in light of the focus in recent years on alternative dispute resolution and its use in the administrative process, the Council voted to propose a position on mediation as follows:

Supports voluntary use of mediation to resolve matters in administrative proceedings and supports confidentiality of discussions in mediation; but, opposes mandatory mediation and opposes imposition of penalties associated with mediation.

In considering this issue, the Executive Council wanted to express its belief that voluntary mediation can be a valuable tool in resolving disputes in the administrative forum. Obviously, under the Public Records Act, there are documents that cannot be confidential in the context of mediation or any other proceedings; however, to the extent possible, maintaining the confidentiality of the proceedings would foster voluntary mediation. The Executive Council also believes that any attempt to force parties into mediation is ultimately nonproductive. Likewise, penalizing parties who wish to engage in mediation if it is not successful in resolving the dispute would likely discourage the use of mediation.

Finally, the Executive Council felt that it would be useful to adopt a position that encourages uniformity of procedures in all types of administrative proceedings. Clearly, the adoption of provisions establishing the Uniform Rules of Procedure was a giant step in that direction. Accordingly, the Executive Council proposes adoption of the following position:

Supports uniformity of procedures in administrative proceedings and supports modification of such procedures only through amendment of the Uniform Rules of Procedure.

A notice will be mailed to all of you as soon as we have set a date for the general meeting of the Section. I invite everyone with an interest in the Section's legislative positions to participate actively.



This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

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understood by all the affected parties: the code is subject to all state rulemaking requirements, including review by the Joint Administrative Procedures Committee (JAPC), and subject to challenge as a proposed rule, interpretation through declaratory statements and amendment through the chapter 120 process.

In order to garner support to pass the 1998 law, the Legislature had to strike a balance between the need for uniformity of building regulation and the desire for flexibility at the local level. The result is a hybrid state/local regulation which poses unique issues for implementation through the Administrative Procedure Act. Since its inception in September 1998, the Florida Building Commission has worked diligently to develop the statewide code according to legislative mandates. The process exposed the need for further legislative clarification of the application of the Administrative Procedure Act to development and implementation of the Florida Building Code. These issues were addressed during the 2000 legislative session through HB 219, which is now codified as chapter 2000-141, Laws of Florida. This two-part article explores the issues addressed by the Legislature according to administrative law topic areas. Part I, appearing in this issue, discusses the complex rulemaking aspects of chapter 2000-141. Part II will appear in a future issue and explore other administrative procedural aspects including substantial interest proceedings, variances and waivers, declaratory statements and licensing.

### ***Rulemaking Aspects*** **To be or not to be, a rule?**

One of the first hurdles to overcome in implementing the 1998 law was whether the Legislature intended for the Florida Building Code to be adopted as a state agency rule, pursuant to section 120.54, Florida Statutes, or to be a state law which could only be amended in the future by the Legislature itself. By directing the commission to adopt the code by rule,<sup>2</sup> the Legislature's intent seemed clear enough. However, the

law also directs the commission to submit the code to the Legislature prior to the 2000 Regular Session for "review and approval or rejection"<sup>3</sup> and repeals the existing state minimum building codes and local amendments thereto contingent upon approval of the Florida Building Code by the Legislature.<sup>4</sup> If the Legislature enacted a law "approving" the Florida Building Code, would that set the code in law as of the date of approval? Could it be amended without future legislative action? What effect would legislative "approval" have on the code as a proposed rule? Would the commission be authorized to go forward with a notice of change in response to public comment, as authorized in section 120.54(3), Florida Statutes, if the Legislature "approved" the code in its proposed form?

After much discussion with legislative staff, the House and Senate bills' sponsors and affected interests, the commission staff recommended that the law be clarified to direct the commission to adopt the code by rule, and that any reference to "approval" by the Legislature be stricken in order to overcome any arguments that such action would take the code outside the realm of the Administrative Procedure Act. Sections 107 and 108 of chapter 2000-141, Laws of Florida, amend the 1998 law by striking all references to legislative approval or rejection of the code, while retaining the authority of the Legislature to review the code during the 2000 Regular Session.<sup>5</sup> This action eliminated any conflict with other sections of the 1998 law which direct the commission to utilize chapter 120 procedures for adoption, amendment and interpretation of the new Florida Building Code.

### **Rulemaking Authority and Effective Date**

There is no one particular section of the enabling legislation that establishes an effective date for the Florida Building Code. Rather, the original effective date of January 1, 2001 is inferred because the 1998 law replaces adoption of the existing statewide minimum codes with authority to adopt the Florida Building Code effective January 1, 2001.<sup>6</sup> Several sections of the law also make conforming changes to chapter 553,

Florida Statutes, such as changing the title to "Florida Building Code,"<sup>7</sup> effective on the same date. Therefore, when interested parties successfully lobbied to delay the effective date of the code to July 1, 2001, the 2000 Legislature was faced with a complicated task. In order to change the effective date from January 1 to July 1, 2001, the Legislature had to republish every section of the 1998 law with the former effective date and amend the catch phrase of each affected section. This is the main reason that chapter 2000-141, Laws of Florida, is so lengthy (126 pages)!

A related issue arose concerning the commission's rulemaking authority for the Florida Building Code. When the commission submitted the code to JAPC for review as a proposed rule in February 2000, there was some concern that, since the commission did not technically have the authority to adopt the code until January 1, 2001, the rule would be held up for another year. Fortunately, JAPC did not exalt form over substance, and raised no such issue. In an abundance of caution, however, the Legislature clarified that it did not intend for the commission to wait until January 1, 2001 (or July 1, 2001, at this point) to begin adoption of the code. Chapter 2000-141, Laws of Florida, contains a "notwithstanding clause" which changes the effective date of rulemaking authority granted therein to "upon becoming a law," rather than the effective date of any particular section of the law.<sup>8</sup>

### **Transfer of Rulemaking Authority**

One of the unique features of the Florida Building Code is that it will contain construction standards formerly within the purview of various state agency construction regulations. Section 553.73(2), Florida Statutes (1999), provides, in part,

The Florida Building Code shall contain provisions or requirements for public and private buildings, structures, and facilities relative to structural, mechanical, electrical, plumbing, energy, and gas systems, existing buildings, *historical buildings, manufactured buildings, elevators, coastal construction, lodging facilities, food sales and food service facilities, health care facilities, pub-*

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*lic or private educational facilities, swimming pools, and correctional facilities and enforcement of and compliance with such requirements.*<sup>9</sup>

The structures and facilities in italics are currently governed by some existing state agency regulation which is adopted pursuant to that agency's specific rulemaking authority. While the 1998 Legislature directed the commission to include these types of regulation within the Florida Building Code to be adopted by rule, it did not eliminate or alter the existing rulemaking authority of any of the state agencies currently authorized to adopt those regulations. Therefore, during the development of the code, the commission was limited to reprinting state agency regulations governing construction of the above-referenced types of facilities within a section of the code titled "Special Occupancies." The commission needed legislative amendments to eliminate duplicative rulemaking authority over these construction regulations. Again, when submitting the code as a proposed rule to JAPC in February, 2000, there was some doubt as to the commission's authority to include the "Special Occupancy" provisions within the proposed rule.

The 2000 Legislature took the necessary next step in order to implement the inclusion of state agency construction regulations within the Florida Building Code by transferring rulemaking authority for those regulations to the Florida Building Commission, effective July 1, 2001. At least 27 separate sections of chapter 2000-141 are dedicated to transferring rulemaking authority for specific construction regulations to the Florida Building Commission from a variety of state agencies, including the Departments of Environmental Protection,<sup>10</sup> Education,<sup>11</sup> Management Services,<sup>12</sup> Health,<sup>13</sup> Business and Professional Regulation – Division of Hotels and Restaurants,<sup>14</sup> Community Affairs,<sup>15</sup> and the Agency for Health Care Administration.<sup>16</sup> These agencies will have to repeal their existing construction regulations by July 1, 2001.

Separating agencies' construction regulations from their licensing requirements proved difficult in some cases. Therefore, the law also contains several provisions granting an agency authority to enforce provisions of the commission's rules within the code during licensing and relicensing inspections.<sup>17</sup> In order to ensure continued input from agency experts, each agency is charged with the duty to provide technical assistance to the commission in updating its former construction regulations within the Florida Building Code.

**Incorporating Code-like Statutes**

Another rulemaking feature of this year's building code law involved amendment of statutes containing technical code requirement to provide for adoption of those requirements by rule, instead. Three factors led to the commission's recommendation that technical code-like requirements be placed in the building code rather than the Florida Statutes. First, this move is consistent with the 1998 enabling legislation which delegated the selection, development and adoption of the state building code to the Florida Building Commission.<sup>18</sup> That law expressed the intent that the code "contain or incorporate by reference all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair and demolition of public and private buildings, structures, facilities and enforcement of such laws and rules."<sup>19</sup> That law replaced the existing statutory scheme, in which the Legislature created the state minimum building codes and directed local jurisdictions to adopt one of them,<sup>20</sup> with a scheme in which the code is adopted by rule of the commission and is automatically effective in every local jurisdiction upon the rule's effective date.<sup>21</sup> Second, the commission, throughout its proceedings, maintained that the code ought to be comprehensive in order to eliminate existing confusion caused by location of applicable codes in a variety of documents. The commission recommended that all substantive construction regulations within the statutes be placed in the Florida Building Code. The third and final impetus for eliminating these statutory provisions was the Legislature's own di-

rection through JAPC, to implement section 120.536, Florida Statutes, for agencies to review their rules and eliminate all rules which exceed legislative authority, or are unnecessary or duplicative of statutory directives.<sup>22</sup> Since all state agencies have had to review their rules and repeal provisions which are merely duplicative of statutory directives, the commission recommended that certain sections be deleted from statute and that the commission be granted statutory authority to adopt them by rule within the building code instead.

In order to implement these recommendations, the law contains sections striking existing technical requirements for construction, replacing them with direction to the commission to adopt such requirements within the code, and providing standards to guide the commission's rulemaking. Some of the affected technical areas include a required ratio of public restroom facilities for men and women,<sup>23</sup> minimum requirements for plan review documents,<sup>24</sup> a disclosure statement for asbestos removal permits<sup>25</sup> and standards for permitting non-conforming residential buildings or structures moved into or within a county or municipality.<sup>26</sup> Further, the law repeals a section authorizing local governments to adopt construction regulations for floating residential structures,<sup>27</sup> as such regulations are within the rulemaking authority granted to the commission for developing the code.

**Conclusion**

Chapter 2000-141, Laws of Florida, reconciles the 1998 legislation, establishing the Florida Building Commission and directing it to develop a single statewide building code, with the rulemaking requirements of the Administrative Procedure Act. The law clarifies that the code is to be adopted as a rule, establishes the commission's authority to adopt that rule prior to its effective date, extends the effective date of that rule, transfers rulemaking authority to the commission from other state agencies to eliminate duplicative rulemaking, and grants the commission additional authority to adopt, within the code, technical construction requirements previously set forth in the statutes themselves. Implementing the 1998 legislation has presented, and will continue to present, the com-

mission with a challenge as it adjusts to using the Administrative Procedure Act to develop building codes which have heretofore been within the realm of local government ordinance. Part II will explore how the 2000 Legislature addressed administrative topics other than rulemaking.

**Endnotes:**

- <sup>1</sup> Ch. 120, Fla. Stat. (1999)
- <sup>2</sup> Section 553.73, Florida Statutes, states, "The commission shall adopt, by rule pursuant to ss. 120.536(1) and 120.54, the Florida Building Code which shall contain or incorporate by reference all laws and rules which pertain to and govern the design, construction, erection, alteration, modification, repair, and demolition of public and private buildings, structures, and facilities and enforcement of such laws and rules, except as otherwise provided in this section." §553.73(1)(a) Fla. Stat. (1999).
- <sup>3</sup> Ch. 98-287, § 62, 1998 Laws of Fla. at 2513, 2565.
- <sup>4</sup> *Id.*, §§ 62 & 68, 1998 Laws of Fla. at 2565-66.
- <sup>5</sup> Ch. 2000-141, §§ 107-08, 2000 Laws of Fla. at 412, 525.
- <sup>6</sup> Ch. 98-287, § 40, 1998 Laws of Fla. at 2513, 2531.
- <sup>7</sup> *Id.*, § 36, 1998 Laws of Fla. at 2529.
- <sup>8</sup> "Notwithstanding the effective date of any

- section of this act or chapter 98-287, Laws of Florida, any authority to adopt rules provided by this act or chapter 98-287, Laws of Florida, shall take effect upon this act becoming a law." Ch. 2000-141, § 133, 2000 Laws of Fla. at 412, 536.
- <sup>9</sup> § 553.73(2) (1999) Fla. Stat. (emphasis added).
- <sup>10</sup> Ch. 2000-141, §§ 5-8, 2000 Laws of Fla. at 420-24.
- <sup>11</sup> *Id.*, § 11, 2000 Laws of Fla. at 425.
- <sup>12</sup> *Id.*, §§ 14-15, 2000 Laws of Fla. at 433-34.
- <sup>13</sup> *Id.*, §§ 17, 20, 49-50, 2000 Laws of Fla. at 438-39, 457-58.
- <sup>14</sup> *Id.*, §§ 24-25, 27, 47-48, 2000 Laws of Fla. at 440-42, 443, 456-57.
- <sup>15</sup> *Id.*, §§ 56, 58, 62, 2000 Laws of Fla. at 460, 462, 465.
- <sup>16</sup> *Id.*, §§ 18-19, 21-23, 28-30, 2000 Laws of Fla. at 438-40, 443-45.
- <sup>17</sup> *Id.*, §§ 19-20, 23-24, 44-47, 49, 60, 2000 Laws of Fla. at 438-39, 440-42, 455-56, 457, 464.
- <sup>18</sup> Ch. 98-287, § 40, 1998 Laws of Fla. at 2513, 2531.
- <sup>19</sup> *Id.* (emphasis added).
- <sup>20</sup> § 553.73(2) Fla. Stat. (1999).
- <sup>21</sup> Ch. 98-287, § 40, 1998 Laws of Fla. at 2513, 2531.
- <sup>22</sup> § 120.536 Fla. Stat. (1999).
- <sup>23</sup> Ch. 2000-141, § 52, 2000 Laws of Fla. at 412, 459.
- <sup>24</sup> *Id.*, § 84, 2000 Laws of Fla. at 502.
- <sup>25</sup> *Id.*, § 36, 2000 Laws of Fla. at 449.
- <sup>26</sup> *Id.*, § 82, 2000 Laws of Fla. at 496.
- <sup>27</sup> *Id.*, § 134, 2000 Laws of Fla. at 536.

**Suzanne H. Schmith** is Assistant General Counsel for the Department of Community Affairs and has served as staff attorney for the Florida Building Commission since August, 1998. Ms. Schmith advises the commission regarding compliance with the state Sunshine and Open Government Laws, the Administrative Procedures Act, the Florida Americans with Disabilities Act, and the 1998 enabling legislation creating the commission and authorizing the development of a statewide building code. She also drafts legislation recommended by the commission and represents the commission in the legislative process. Prior to the formation of the Florida Building Commission, Ms. Schmith served as legislative analyst for the Florida Senate Committee on Community Affairs (1995-1998) and growth management attorney for the Department of Community Affairs (1994-1995). Ms. Schmith received her B.A. from Birmingham-Southern College in 1988 and her J.D., with honors, and Masters of Science in Urban and Regional Planning from Florida State University in 1994.



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# APPELLATE CASE NOTES

by Mary F. Smallwood

## Rulemaking

*Southwest Florida Water Management District v. Charlotte County*, 25 Fla. L. Weekly 2113 (Fla. 2d DCA 2000)

This appeal involved challenges filed by numerous parties to existing rules, proposed rules, and agency statements of the Southwest Florida Water Management District (District). All of the challenges involved the issuance of water use permits (WUPs) in the Southern Water Use Caution Area. A consolidated hearing was held on the various challenges in 1995; however, the final order was not issued by the administrative law judge until 1997. The final order upheld certain rules and statements and invalidated others. The District appealed the invalidation and appellees cross-appealed.

Because the case was heard prior to the 1996 amendments to the Administrative Procedure Act, but the final order was issued after that time, the court had to determine whether the shift in the burden of proof in rule challenge cases applied. Under the pre-1996 provisions, the burden was on the challenger to establish the invalidity of a rule or proposed rule. The amendments require the challenger to state its objections with particularity; the burden then shifts to the agency to establish that the rule is not an invalid delegation of legislative authority. The court held that the

amendment to the Act applied in this case since it was a procedural, as opposed to substantive, requirement. However, the court concluded that the agency met the more stringent requirement.

Ultimately, the District was successful in defending all of its rules on appeal. The court affirmed the final order to the extent that it held that challenged rules were not an invalid exercise and reversed the administrative law judge to the extent the order found the rules invalid. The bases for the challenges were varied but included allegations that the rules were vague; vested unbridled discretion in the District; and enlarged, modified, or contravened the law implemented. The challenges were rejected by the court on all grounds.

The case should be read carefully with respect to the specific issues raised and resolved. It is not feasible to address the court's reasoning in detail with respect to each rule or proposed rule in this forum. However, in general there are several premises worth discussing here. First, the court carried out a careful analysis of each of the terms challenged by the petitioners as vague and found that the rules meet the Chapter 120 requirements on several grounds. The court looked to common usage and dictionary meanings of terms in several situations to flesh out the intent of the rules. For example, the

use of the phrase "economically, environmentally, and technically feasible" was found to be acceptable when each of the component words was given its common and ordinary meaning. Similarly, the use of words such as "significant" or "unacceptable" was upheld on the grounds that application of these standards required a site-specific, scientific evaluation using professional judgment.

Ultimately, the decision was a major victory for the District, by recognizing that agencies must exercise a certain amount of discretion and professional judgment in writing and applying regulatory criteria, particularly when dealing with complex scientific issues.

## Government in the Sunshine

*Frankenmuth Mutual Insurance Co. v. Magaha*, 25 Fla. L. Weekly 697 (Fla. 2000)

The Florida Supreme Court ruled on two issues certified by the United States Court of Appeals for the Eleventh Circuit in a matter arising from a lease agreement between Escambia County and Unisys Leasing Corporation. The controversy arose when the county comptroller entered into a long-term lease with Unisys for certain computer equipment. The lease was never formally approved by the County Commission. However, the Commission did review and approve the comptroller's budget, which included lease fees, on an annual basis. In addition, when the county began looking at implementing its own computer system, it became aware that the comptroller's office had equipment in place. At that time, the Commission voted to incorporate the existing equipment into its technology plan.

When the comptroller resigned and his office was subsumed into the County Clerk of Court's office, the lease came under scrutiny. The Commission informed the lessor (Frankenmuth) that it considered the lease void since it had not received prior

## Moving? Need to update your address?

The Florida Bar's website ([www.FLABAR.org](http://www.FLABAR.org)) now offers members the ability to update their address by using a form that goes directly to Membership Records. This process is not yet interactive (the information is not updated automatically) at this time, but addresses are processed timely. The address form can be found on the website through "Find a Lawyer" and then "Attorney Search." It can also be found under "Member Services."

formal approval from the Commission. The County refused to make annual lease payments. Frankenmuth brought suit in federal court, and the District Court held that the Commission's actions constituted implicit approval even though no formal action had been taken in advance of execution of the lease.

This decision was appealed to the Eleventh Circuit which certified two questions to the Florida Supreme Court. The first question was whether a formal resolution of the County Commission was required for approval of the lease or whether informal approval was sufficient. The Court of Appeals further questioned what "standard guides the consideration of whether a County Commission has 'approved' a contract or agreement."

The Supreme Court concluded that a county commission can "approve" a contract without adoption of a formal resolution. In effect, the County Commission ratified the lease by acting to approve the comptroller's budget and incorporating the equipment into its technology plan. One of the criteria identified by the Court that must be satisfied for the approval to be valid is that the actions constituting "approval" must be taken in accordance with the requirements of the Government in the Sunshine Act.

If an "approval" by a board of county commissioners of a lease or lease purchase agreement . . . must be made in accordance with the Sunshine Law, it necessarily follows that any ratification of such an agreement must also be made in compliance with the Sunshine Law.

## Licensing

*Worster v. Department of Health*, 25 Fla. L. Weekly 1931 (Fla. 1st DCA 2000)

The courts have regularly recognized that agencies may not prosecute a license holder for alleged violations that have not been included in the administrative complaint. Requiring the complaint to identify such alleged violations affords the licensee due process of law. However, the *Worster* court recognized an exception to this rule where the licensee fails to raise an objection to the lack of notice.

Worster, a dentist, was disciplined,

*inter alia*, for violating the applicable standard of care by applying poorly fitting crowns. On appeal, he argued that this issue had not been raised in the administrative complaint. The court agreed with that assertion but held that Worster's failure to raise the issue in exceptions to the recommended order precluded him from making the argument on appeal.

## Appeals

*Lee County v. South Florida Water Management District*, 25 Fla. L. Weekly 1972 (Fla. 2d DCA 2000)

Lee County filed an appeal pursuant to Section 120.68, Florida Statutes, challenging a resolution of the Water Management District finding that an emergency existed requiring the immediate release of water from Lake Okeechobee into the Caloosahatchee River. The District Court directed that the parties file jurisdictional briefs on the issue of whether the Court had the authority to hear an appeal of the agency's decision under Section 120.68, Florida Statutes. The District argued that no appeal of the decision was allowed as the adoption of the resolution was an executive or quasi-executive act. The court agreed, holding that the only decision that could be appealed under Section 120.68 was the decision to hold an emergency hearing.

On that issue, Lee County argued that there was no emergency requiring immediate release of the water and, alternatively, that any emergency was caused by the District's own mismanagement in the past. The court rejected both of those arguments, declining to substitute its

judgment of whether an emergency existed for that of the District.

## Adjudicatory Proceedings

*City of Winter Park v. Metropolitan Planning Organization for the Orlando Urban Area*, 25 Fla. L. Weekly 1897 (Fla. 1st DCA 2000)

The cities of Maitland and Winter Park appealed an order of the administrative law judge dismissing their petitions for hearing on the grounds that they had not been allowed to amend the petitions to cure any defects and that the order of dismissal did not state grounds for the decision. The court reversed and remanded the case.

The court agreed with appellants that the administrative law judge erred in entering an order of dismissal that simply stated that the motion to dismiss was "well taken." The court noted that the motion to dismiss contained numerous grounds for the request. Since the order did not identify specific grounds for dismissal, the petitioners had no way of knowing which allegations were defective. Moreover, under Section 120.569(2)(c), Florida Statutes, petitioners must be allowed at least one opportunity to cure any defect in the initial petition.

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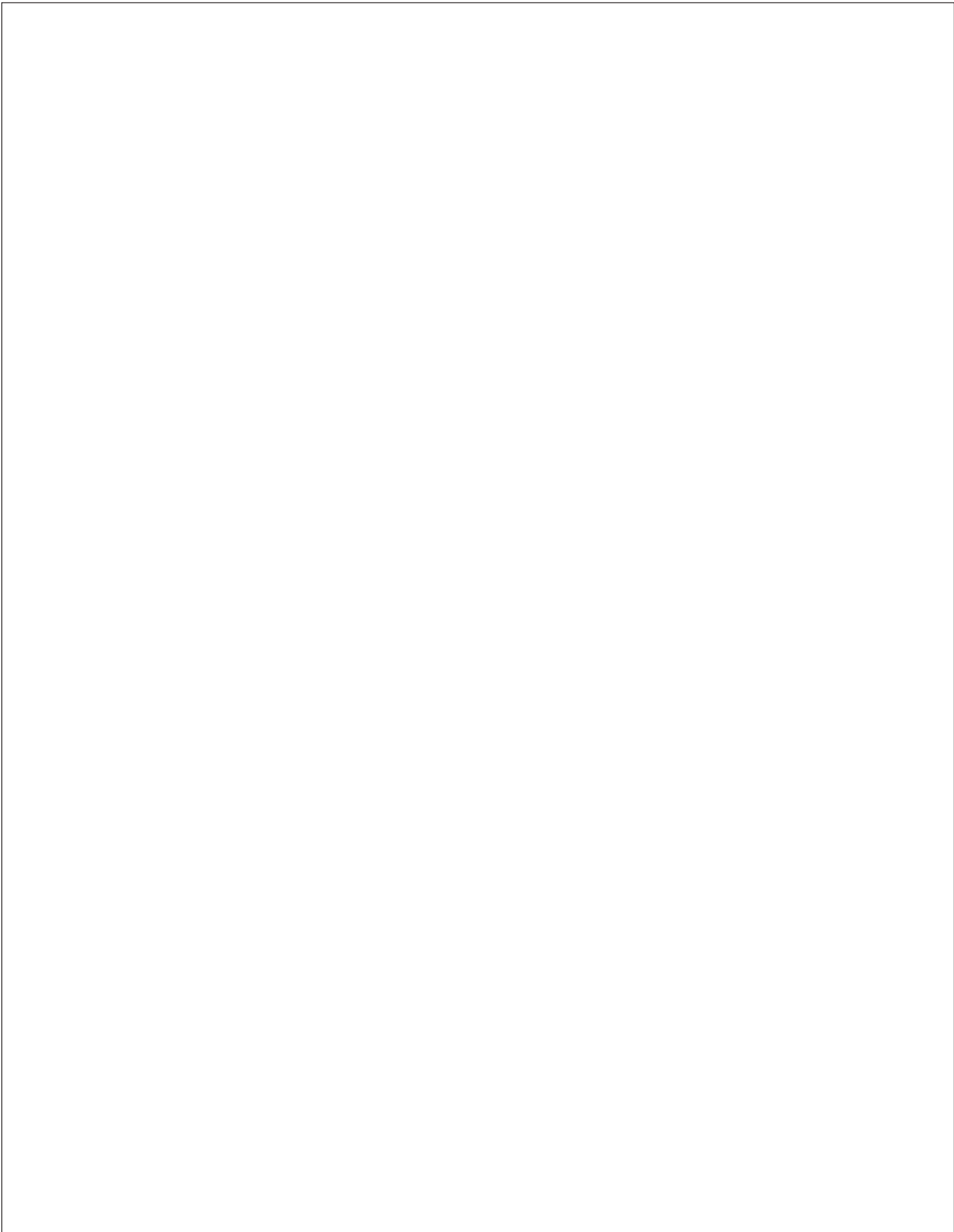
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I understand that all privileges accorded to members of the section are accorded affiliates, except that affiliates may not advertise their status in any way, nor vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

Note: Membership dues are \$25.00 (Law Students - \$20.00). Membership in the section will expire June 30. The Florida Bar dues structure does not provide for prorated dues. Your application, resume and check should be mailed to Jackie Werndli, Section Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.



## **Administrative Law Essay Competition**

**DON'T WRITE OFF** the Pat Dore Administrative Law Essay Competition. Packets of information have been provided to all of the Florida law schools, inviting their students to submit articles on the subject of Florida administrative law. We are hoping to have a good sampling of articles for this first competition. To assure that we do, you can be of enormous help.

Many of you stay in contact with your law school and many of you have developed a relationship with law professors who teach administrative law courses. Please mention to them that you would appreciate anything they could do to enhance interest in the writing competition. Perhaps you could pass on issues of merit that would prompt a student to write or encourage professors to suggest interesting issues to their students to encourage participation. The prizes are substantial: \$1400 for first place and \$500 and \$300 for second place and honorable mention, respectively.

In this era of the push for professionalism, law schools are looking for ways to better interact with the practicing legal community. Here is one way for you to introduce administrative law professors to our Section's programs.

***Share your newsletter and this application with a  
non-attorney colleague.***

Affiliate membership in the Administrative Law Section is open to members of administrative boards, agency staff, law students, legal assistants, members of the legislature and legislative staff, and other administrative personnel. This membership will help keep you up to date in administrative law and processes.

To be considered for affiliate membership, please complete the application below, enclose a resume of your professional experience and your check for \$20 or \$25 made payable to The Florida Bar.

**THE FLORIDA BAR  
APPLICATION FOR AFFILIATE MEMBERSHIP  
ADMINISTRATIVE LAW SECTION**

NAME: \_\_\_\_\_

FIRM NAME: \_\_\_\_\_

OFFICE ADDRESS: \_\_\_\_\_

CITY/STATE: \_\_\_\_\_ ZIP CODE: \_\_\_\_\_

OFFICE PHONE: (\_\_\_\_) \_\_\_\_\_

PROFESSIONAL SPECIALTY(IES): \_\_\_\_\_

WHAT AGENCIES DO YOU PRIMARILY WORK WITH? \_\_\_\_\_

WHAT LEGAL AREAS ARE YOU MOST INTERESTED IN? \_\_\_\_\_

FROM THE STANDPOINT OF YOUR PROFESSION, WHAT ISSUES INVOLVED IN ADMINISTRATIVE LAW AND PROCEDURE AND STATE AGENCY PRACTICE ARE MOST IMPORTANT? \_\_\_\_\_

I understand that all privileges accorded to members of the section are accorded affiliates, except that affiliates may not advertise their status in any way, nor vote, or hold office in the Section or participate in the selection of Executive Council members or officers.

SIGNATURE: \_\_\_\_\_ DATE: \_\_\_\_\_

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## Administrative Law Section Members: We Want To Hear From You!!

What can your section do for you that it is not now doing?  
How can we improve? What would you like to see in your newsletter that you do not see now?

**This is YOUR section — we need YOUR input.**

Listed below is the information you need to contact your section officers or your newsletter editor.  
Please let us hear from you!

Ms. M. Catherine Lannon, Chair  
Attorney General's Ofc.  
400 S. Monroe St.  
Tallahassee, Florida 32399-6526  
(850) 414-3752  
Cathy\_lannon@oag.state.fl.us

Ms. Mary F. Smallwood, Secretary  
215 S. Monroe St. Ste. 815  
Tallahassee, Florida 32301-1858  
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mfs@ruden.com

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Katz Kutter Haigler Et Al  
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emcarthur@katzlaw.com

Mr. Dan R. Stengle, Chair-elect  
The Capitol / Governors Ofc.  
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Tallahassee, Florida 32301-2034  
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Stengld@eog.state.fl.us

Mr. William David Watkins, Treas-  
urer  
Watkins Tomasello & Caleen  
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Tallahassee, Florida 32317-5828  
(850) 671-2644  
dwatkins@wtc.pa.com

### ADMINISTRATIVE LAW SECTION MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Administrative Law. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of \$20 and this completed application card to ADMINISTRATIVE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

NAME \_\_\_\_\_ ATTORNEY NO. \_\_\_\_\_

OFFICE ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_ STATE \_\_\_\_\_ ZIP \_\_\_\_\_

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.