Administrative Law Section Newsletter

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The New Energy Bill and Legislative Rule Ratification:

A Quick Overview of the Roles of the Florida Public Service Commission, the Department of Environmental Protection, and the Florida Energy and Climate Commission in Implementing House Bill 7135

by Michael Cooke, Cindy Miller, and Erik Sayler[1]

The new energy legislation, House Bill 7135 (Chapter Law 2008-227), establishes a three-pronged attack on greenhouse gas emissions and global climate change. The Florida Public Service Commission ("FPSC"), the Department of Environmental Protection ("DEP") and the Florida Energy and Climate Commission ("FECC") are given distinct roles in implementing this major legislation. The FPSC will develop new renewable portfolio standard rules. The DEP will oversee cap and trade rules and the FECC will take the lead on a host of other areas. The new law took effect July 1, 2008, and the agencies and offices charged with implementing it are already quickly moving forward to turn the words on the page into action. On June 25, 2008, Governor Charlie Crist, in his keynote address at the 2008 Serve to Preserve Florida Summit on Global Climate Change, called the legislation the "most comprehensive energy and economic development policy in the

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From the Chair

by Elizabeth McArthur

There are times when extraordinary experiences provide vivid perspective, shaking loose the ordinary routines of one's life so that, for at least a moment, patterns emerge and weave together in a mosaic, the proverbial big picture: Life's Lessons.

No, your Chair has not gone off the deep end and is not about to launch into a diatribe about religion or politics. But I am going to share some perspectives gained from my recent life-changing experience. In late October, I joined the other women lawyers in my firm, along with our office manager, a paralegal assistant, and a lawyer who used to be with my firm, for the 2008 Atlanta Susan G. Komen Breast Cancer 3-Day event. After six months of training and raising donations for research, your Chair walked 60 miles in three days! Day One, in particular, tested mettle: it rained all day, sometimes hard and horizontally, and was bone-chilling cold and windy. I decided it was part of the psycho-

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CHAIR'S MESSAGE
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logical plan, and a good one at that: If you could somehow push yourself and your poor pickled feet to make it through that day, the rest would be a breeze by comparison.

Interesting, but what, you might ask, does this have to do with administrative law -- don't you see the banner at the top of the page? At first, during and even after the event, I was convinced that what I had experienced was completely new and different, totally beyond the realm of anything I had seen, felt, or experienced before. (Yet I was very determined to write about it, somehow, somewhere). The more I thought about it, the more the patterns revealed themselves: Life's Lessons. These were not new experiences, new revelations, new lessons learned. Instead, they were new applications of the same core principles that anchor everyday life, ones I strive for every day in my administrative practice. (There!)

Lesson I: Preparation is the key; we can only learn the hard way that it is sometimes vastly underrated.

First, there must be the long-term, advance preparation: study/research/train. Pace yourself. Have a plan for how you will be ready, whether it is for an undertaking like my walking adventure, or an upcoming administrative hearing, or the next legislative session, or your Board's next meeting.

Just as I would not consider attempting something like the Susan Komen 3-Day without training, I would not want to venture into a totally new substantive area of administrative practice without taking advantage of any training tools to learn about the area. That is why I signed up for the APD training seminar that was held at the FSU College of Law on November 14, which was the subject of a recent listserv email notice sent to section members. I urge all of you to join me in volunteering to take on some of the vast numbers of administrative cases in which needy persons need the help of administrative lawyers in assessing and resolving their claims for services and/or funding for services provided through APD to persons with developmental disabilities.

Another dimension to Lesson I is short-term, event preparation: learn what you can about the environment you will be in, and then bring the right equipment. For strolling 20 miles in cold, wet, windy weather, the lecture offered by my Boy Scout-esque husband served me well: head, hands, and feet. Well, head and hands, anyway. Feet were another story, since I did not want to invest in pricey waterproof over-athletic-shoe covers, and I refused to go the route of many walkers of wrapping plastic bags – as in cut-up Target or Walmart bags – around their shoes. I found good warm, wicking socks did the trick, plus walking fast enough to squish the water out of my shoes. But head and hands, those were critical – and as a result of planning, I was one of the reasonably comfortable walkers throughout that bitter day. I did, however, overstuff my pockets with too many things that I could not easily get to in the rain, and in hindsight, I would have simplified and brought less.

I do the same thing for administrative hearings, or Board meetings, or oral arguments in appellate courts – learn what I can about the environment I can expect for the big event, and plan accordingly. It is also important to think through what you really need to have with you and then organize what you bring, so that when you need to present an exhibit or offer a case, it will be right at your fingertips and not buried in a mass of too much stuff.

Lesson II: We all need the support of those around us, be they volunteers, co-workers, friends, family, or adversaries. Oh, those amazing volunteers – decked out in costumes you could only imagine, they got us through the 3-Day walk: stopping traffic to help us cross the street, sometimes with a timely rock 'n roll song blasting out of a boom box and a little dance-encouragement; manning the pit-stops and pushing drinks and snacks on us; running medical tents that thankfully I did not get to experience; and keeping us going with cheers alongside our route, outstretched tissue boxes, band-aids, lip balm, sweets, stickers, and great signs (e.g., Blisters are temporary; a cure is forever; Go Walkers!).

What this lesson is about is that each of us controls the main events – the walk, the hearing, the presentation, the argument – but we need to develop support on the periphery, to help us through our main events. While the support that we can tap into may not be as obvious as the well-developed machine that is the Susan Komen 3-Day, if you think about it, it will become apparent. For example, I think of how I got involved in the administrative law section, around 13 years ago: I was recruited by an administrative law judge who had scared me to death in one of my first administrative hearings (and who shall remain nameless, Judge Rigot!) to join a committee to work on the first draft of the Uniform Rules of Procedure, successors to the old Model Rules of Procedure. That experience opened my eyes to the wonderful support system of the administrative law section and its leadership: there was a great cross-section of private sector and public sector attorneys volunteering their time to share their very different perspectives on administrative procedure issues and work together on a product that would blend the diverse input. That same support benefit is something I have enjoyed as an executive council member for more than ten years, and it is the same support that each of you can tap into by becoming active in the section and helping us with our many projects.

Another good example of the support network for administrative law practitioners is the Pat Dore Administrative Law Conference. The 2008 Conference in early October was a great success, with more than 200 registrants who attended and learned from the informative presentations. Scott Boyd, Executive Director of the Joint Administrative Procedures Committee, did a great job as master of ceremonies, introducing the fine program and speakers that he lined up with the help of Seann Frazier. The broad array of topics and expert presenters ensured that there was

plenty for everyone's interests. Once again, the Conference proved to be a wonderful opportunity, worthy of its namesake, to share information and learn with our colleagues.

Lesson III: Do for others, and do unto others, as you would have them do unto you. Life is incredibly short; trying not to get too sappy here, all I can say is that I will be inspired for my remaining days by the survivor stories and the tributes to those who did not survive; by the outpouring of not just rain, but also of caring for others, helping those who needed a hand (or a glove) – the other-directedness of it all. Giving to others – such as by volunteering our administrative law skills to those in need – will enrich us. And as we plod through the daily routine of our busy practices, remember to show consideration for others and reach out a helping hand, even to your adversaries. You will find that what goes around comes around, so practicing professionalism and engaging in random acts of kindness will serve you well.

Lesson IV: Go for a walk if you are able – you'll feel better! And keep in mind and heart those who are not able. That is all.

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Appellate Case Notes

by Mary F. Smallwood

Adjudicatory Proceedings

Comprehensive Medical Access, Inc. v. Office of Insurance Regulation, 983 So. 2d 45 (Fla. 1st DCA 2008) (Opinion filed May 5, 2008)

Comprehensive Medical Access, Inc. ("CMA") filed an application for approval of its health flex plan. The Office of Insurance Regulation ("OIR") proposed to deny the application on the grounds that the management of the company was untrustworthy in violation of section 624.404(3), Florida Statutes. OIR reached that conclusion based on the fact that a civil complaint had been filed against CMA's sole owner, Dr. Michel, by the federal government for fraud in relation to the practice of medicine. CMA requested a formal hearing on the denial.

At the hearing, OIR introduced into evidence the complaint in the civil action. However, it did not introduce any other evidence related to the trustworthiness of CMA or its directors or management. CMA presented evidence to support its position that it met the criteria for licensure as a health flex plan but did not present any evidence related to the issue of trustworthiness. The administrative law judge ("ALJ") issued a recommended order finding that the existence of the civil complaint was sufficient to raise an issue as to Dr. Michel's fitness to operate CMA. While the ALJ concluded that CMA had presented competent substantial evidence demonstrating that it was capable of administering a health flex care plan, she recommended denial of the application on the ground that CMA had failed to overcome OIR's concerns regarding trustworthiness. OIR adopted the recommended order in full.

On appeal, the court reversed and remanded with directions to OIR to approve the application. The court held that the complaint, alone, was not competent substantial evidence to justify denial of the license. The complaint simply contained allegations regarding potential fraudulent activity by Dr. Michel but no evidence proving such behavior was introduced. Thus, while the complaint may have provided a basis for raising OIR's suspicions, it was not sufficient to justify permit denial.

Hollis v. Department of Business and Professional Regulation, 982 So. 2d 1237 (Fla. 5th DCA 2008) (Opinion filed May 30, 2008)

The Department of Business and Professional Regulation filed an administrative complaint against Hollis, a licensed real estate appraiser. The complaint put Hollis on notice that if he did not file an election of rights form or other responsive pleading within 21 days the Department would request an informal hearing before the Real Estate Appraisal Board. Hollis responded that he would like to respond to the charges as he "dispute[d] the allegations of fact" but that he needed additional time to prepare that response. The Department granted him additional time and Hollis filed a more detailed response 6 days after that extended deadline. After the parties had engaged in extended discovery, the Department requested that an informal hearing be set over Hollis' objections. The Board held an informal hearing and issued an order placing Hollis on probation for one year and imposing a fine. On appeal, Hollis contended that he should have been granted a formal hearing.

The court reversed and remanded. It held that Hollis' initial response put the Department on notice that he wanted a formal hearing. The court rejected the Department's argument that Hollis waived his right to a formal proceeding by filing his second more detailed response untimely.

Seminole Electric Cooperative, Inc. v. Department of Environmental Protection, 985 So. 2d 615 (Fla. 5th DCA 2008) (Opinion filed June 13, 2008)

Seminole Electric Cooperative filed an application for certification of a new coal powered power plant in Putnam County, Florida, adjacent to two existing coal units. Initially, the Sierra Club objected to the application; however, its issues were resolved and a settlement reached. In accordance with the Power Plant Siting Act ("PPSA"), the parties filed a joint stipulation providing that all parties agreed that Seminole had provided reasonable assurances that the permitting criteria had been met and stating that there were no disputed issues of fact or law. As allowed by the PPSA, the parties requested that the administrative law judge cancel the scheduled certification hearing and remand the matter to the Secretary of the Department of Environmental Protection for entry of a final order.

Upon remand, however, the Secretary issued an order remanding the case to the Division of Administrative Hearings, on the grounds that the

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stipulation did not contain sufficient findings of fact to allow him to make the determinations required by the PPSA. The Division declined to accept the remand, and the Department issued a final order denying certification of the plant.

On appeal, the court remanded to the Department with instructions to issue a final order granting the certification. The court found that the Department was bound by its execution of the stipulation as there was no indication of fraud, misrepresentation or mistake. The court found that the stipulation contained all facts necessary to support issuance of the certification.

Rodriguez v. Department of Business and Professional Regulation, 985 So. 2d 697 (Fla. 4th DCA 2008) (Opinion filed July 2, 2008)

Rodriguez entered into a contract with a building contractor to construct a home. The contract provided that Rodriguez would pay a $24,750 draw at the time plans for the home were prepared. The payment was made but the contractor went out of business and no construction occurred. Rodriguez sought to recover the $24,750 from the Florida Homeowners' Construction Recovery fund. The attorney for the Construction Industry Licensing Board ("Board") recommended that Rodriguez receive the full amount. The Board sent notice to Rodriguez that it would meet on a certain date, but the notice did not include a proposed resolution and did not indicate that any testimony would be taken. At the meeting, which Rodriguez did not attend, the Board voted to deny any recovery to Rodriguez, concluding that the plans were worth $24,750. It entered a final order citing section 120.57(2), Florida Statutes.

The court reversed. It held that the Board had failed to follow the procedures of section 120.57(2) in that it had not given Rodriguez notice of its intended action, it did not provide Rodriguez with an opportunity to present evidence, and it based its decision on disputed issues of fact. The court found that there was no evidence presented that justified the Board's finding that the plans had a value of $24,750, or that they had even been prepared by the contractor or received by Rodriguez.

National States Insurance Company, Inc. v. Office of Insurance Regulation, 988 So. 2d 107 (Fla. 1st DCA 2008) (Opinion filed July 21, 2008)

The Office of Insurance Regulation ("OIR") entered an order requiring National States Insurance Company to cease selling long term care insurance in Florida on the ground that National had not submitted its annual rate certification. National submitted its annual rate filing and filed a petition challenging the order requiring it to cease selling the policies. OIR then returned the rate filing on the grounds that it was incomplete and dismissed the petition with leave to amend. National filed an amended petition challenging both the order and the action returning the filing, arguing that OIR should have allowed National to submit additional information supporting its rate filing. OIR dismissed the amended petition with prejudice.

On appeal, the court reversed. It held that OIR had correctly dismissed both the initial and amended petitions as neither alleged disputed issues of fact sufficient to put OIR on notice of the disputed issues. However, the court held that OIR was obligated to allow National another chance to amend its petition as it was not clear from the face of the petition that it would be unable to cure that defect.

Collier County Board of County Commissioners v. Fish and Wildlife Conservation Commission, 33 Fla. L. Weekly 2181 (Fla. 2d DCA 2008) (Opinion filed September 12, 2008)

The City of Naples adopted an ordinance imposing slow speed zones in portions of Naples Bay. It subsequently sought a permit from the Fish and Wildlife Conservation Commission ("FWCC") for a waterway marker permit. FWCC proposed to issue the permit, and it was challenged by several individuals, including the Marine Industries and Collier County. The FWCC rule provided that FWCC would find an ordinance was adopted for a valid safety purpose if it meets certain specific criteria, including, but not limited to, addressing vessel traffic congestion, hazardous water levels or other navigational hazards. The petitions were referred to the Division of Administrative Hearings. The administrative law judge entered a recommended order concluding that the permit should not be issued as the criteria had not been met.

The Executive Director of FWCC, acting under a delegation from the Commission, then entered a final order issuing the permit. It adopted the judge's findings of fact, but rejected a number of conclusions of law. In particular, it held that FWCC was only required to make a determination that the placement of the marker would not be a navigational hazard. It held that the requirements of the rule were satisfied so long as the application identified the particular provision of the rule upon which it relied. FWCC determined that it had no authority to question the validity of the applicant's statements in that respect.

On appeal, the court reversed. The court held that FWCC's interpretation of its own rule was not more reasonable than that of the administrative law judge. It agreed with the judge that the plain meaning of the rule required FWCC to make a determination that one or more of the criteria of the rule had been met before issuing a permit for a waterway marker. The court further held that the delegation of authority to the Executive Director to issue final orders was invalid. The court noted that the statute provides that the Commission is the agency head. The Executive Director has certain administrative functions but cannot be delegated the authority to make decisions for the Commission.

Licensing

Heshmati v. Department of Health, 983 So. 2d 632 (Fla. 5th DCA 2008) (Opinion filed May 9, 2008)

Heshmati, a physician, appealed the decision of the Board of Medicine suspending his license for one year. His license had been temporarily suspended in August 2005. An administrative hearing before the Division of Administrative Hearings did not occur until 11 months later.

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On appeal, Heshmati argued that the administrative law judge should have dismissed the proceeding because of the length of time between the temporary suspension and the hearing.

The court affirmed. It found that the delay did not impair the fairness of the proceedings. The court noted that section 120.60(6), Florida Statutes, requires that suspension or revocation proceedings be instituted promptly when an emergency suspension order has been issued. In this case, the Department argued that there had been settlement negotiations between the time of the emergency suspension and the ultimate hearing; and the court found support in the record for that contention. In addition, the court noted that Heshmati was credited with the 11 months of temporary suspension against the final penalty of one year suspension. Accordingly, the court found that Heshmati had not been prejudiced.

The court also rejected Heshmati's argument that the administrative law judge and the Board were required to consider all mitigating and aggravating factors in determining the appropriate penalty, noting that the penalty was within the range of permissible penalties in the applicable rule.

N.W. v. Department of Children and Families, 981 So. 2d 599 (Fla. 3d DCA 2008) (Opinion filed May 14, 2008)

The Department of Children and Families denied N.W.'s request for a license to operate a foster home. The notice of intent to deny indicated that N.W. had physically abused her adopted daughter and that her parental rights had been terminated. The administrative law judge entered a recommended order recommending that the license be issued. However, the Department rejected that recommendation and one of the findings of fact. Specifically, the Department's final order stated that it was rejecting the finding of the administrative law judge that "the 'only evidence' the Department adduced to support the denial of the petitioner's license was the testimony of [a] licensing specialist...." The amended finding then pointed to the issues raised in the notice of intent to deny.

On appeal, the court reversed. It noted that the Department's final order misquoted the administrative law judge's finding of fact. Further, the court held that the administrative law judge had considered the abuse allegations and made specific findings of fact in that regard in a separate paragraph. The recommended order found that the alleged incident of abuse had not endangered the child, that N.W. had voluntarily given up her parental rights to the maternal grandmother, and that she still had an ongoing relationship with the child. The appellate court concluded that the Department had erred by rejecting a finding of fact for which there was competent substantial evidence and had reweighed the evidence introduced at the hearing.

Beckett v. Department of Financial Services, 982 So. 2d 94 (Fla. 1st DCA 2008) (Opinion filed May 12, 2008)

The Department of Financial Services filed an administrative complaint against Beckett, alleging that she had sold ancillary (optional) insurance to three customers without their informed consent, seeking suspension or revocation of her license. At the administrative hearing, the three customers and Beckett all testified. In addition, the specific insurance forms were submitted into evidence. The customers testified that they had approached Beckett and requested the minimum required automobile coverage required under Florida law. They further testified that the process was rushed and that they signed as directed by Beckett without reading the forms. Beckett testified that she generally includes optional coverage in the documents she presents to customers, that most customers do not understand the forms, that she willingly answers questions and does not discourage the customers from reading the documents.

The administrative law judge found that Beckett intentionally provided the customers with more coverage than they requested, leaving them to distinguish what coverage was optional. Based on Beckett's conduct with the customers, the judge found that Beckett had charged an applicant for ancillary coverage "without the informed consent of the applicant," a practice known as sliding, in violation of section 626.954(1)(z), Florida Statutes. Under that statutory provision, sliding is an unfair or deceptive act. However, the administrative law judge found that the Department had failed to prove by clear and convincing evidence that Beckett had demonstrated a lack of fitness or trustworthiness to engage in the business of insurance. He recommended a 60-day suspension of Beckett's license.

The Department adopted the administrative law judge's finding that Beckett had engaged in sliding but rejected the finding that the Department had failed to prove a violation of section 626.611 (which governs mandatory revocation or suspension), relating to Beckett's lack of fitness or trustworthiness. In rejecting the latter finding, the Department held that the administrative law judge had failed to follow the essential requirements of law by not following the precedent of *Thomas v. Department of Insurance and Treasurer*, 559 So. 2d 419 (Fla. 2d DCA 1990).

The court reversed in part and remanded. The court held that the Department improperly substituted its judgment for that of the administrative law judge by rejecting the finding of fact regarding fitness and trustworthiness. It concluded that the Department had misunderstood the provisions of section 120.57(1)(l), Florida Statutes, in holding that the judge had failed to comply with the essential requirements of law. The court held that the Department was incorrect in concluding that engaging in sliding was per se a violation of section 626.611(7). It also rejected the Department's holding that *Thomas* required suspension of the license. The court noted that violations of section 626.611 require mandatory suspension or revocation of a license while section 626.954(1)(z) does not. Therefore, it concluded that suspension of a license for sliding was discretionary with the Department, not required. The court also held that

Thomas could be distinguished from this case, in part, because the forms involved in the *Thomas* case appeared to be much more confusing than those in Beckett's situation. The case was remanded to the Department for reconsideration of the appropriate penalty.

B.J. v. Department of Children and Families, 983 So. 2d 11 (Fla. 1st DCA 2008) (Opinion filed June 5, 2008)

The Department filed a motion for rehearing in this case after the court had reversed its final order (*See B.J. v. Department of Children and Families*, 33 Fla. L. Weekly 900 (Fla. 1st DCA 2008)). In the prior case, the Department had rejected findings of fact in the recommended order that B.J. had rehabilitated himself and was entitled to an exemption from disqualification from employment in childcare. In its motion, the Department argued that the court's decision was in conflict with *Heburn v. Department of Children & Families*, 772 So. 2d 561 (Fla. 1st DCA 2000), in which the court had upheld the Department's rejection of the administrative law judge's conclusion that Heburn had demonstrated rehabilitation and should be granted a license. The court case rejected the motion for rehearing holding that *Heburn* was distinguishable. In particular, the court noted that the case below had involved the Department's rejection of a finding of fact in the recommended order, unlike *Heburn*.

Garcia v. Department of Business and Professional Regulation, 988 So. 2d 1199 (Fla. 3d DCA 2008) (Opinion filed August 13, 2008)

The Department of Business and Professional Regulation filed two separate administrative complaints against Garcia, a licensed real estate agent, one in October 2004, and the second in November 2005. Garcia timely requested an administrative hearing on the first complaint. In January 2006, her counsel contacted counsel for the Department and requested additional time to respond to the second complaint. At that time, the Department counsel suggested a settlement stipulation to resolve the matter. Apparently nothing further happened until January 2007, when the Department's counsel filed a motion for an informal hearing in the second matter. In February, the Department submitted a proposed settlement agreement to Garcia and held an informal hearing in the second matter. Neither Garcia nor her counsel attended the hearing before the Florida Real Estate Commission ("FREC"). After the informal hearing, FREC adopted the findings of fact and conclusions of law in the complaint and determined that Garcia's license should be revoked.

On appeal, Garcia argued that the doctrine of equitable tolling should be applied to allow her to challenge the second complaint. The court agreed and reversed the final order of revocation. The court held that by transmitting the settlement agreement to Garcia's counsel a year after the initial discussion of settlement and two weeks after noticing the informal hearing, the Department misled or lulled Garcia's counsel into inaction. The court noted, however, that the record was not clear as whether the offer of a settlement applied to both of the cases.

Cisneros v. School Board of Miami-Dade County, 990 So. 2d 1179 (Fla. 3d DCA 2008) (Opinion filed September 17, 2008)

Cisneros appealed the order of the Miami-Dade School Board terminating his employment as a teacher for the school system on the ground that he was convicted of a crime involving moral turpitude. The matter was submitted to the administrative law judge on facts contained in a joint stipulation of the parties, and the sole issue for the judge was related to pleading nolo contendere to a charge of vehicular homicide. The judge also considered the arrest warrant that indicated Cisneros had been driving in the Florida Keys at a high rate of speed. He lost control of the vehicle and one of the passengers, a seven year old child, was ejected from the vehicle and died. The judge entered an order holding that vehicular homicide was a crime of moral turpitude.

On appeal, the court reversed and mandated that Cisneros' license be reinstated. The court noted the definition of moral turpitude for an

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employed teacher required an act of "baseness, vileness or depravity." R. 6B-4.009(6), Fla. Admin. Code. It concluded that vehicular homicide did not rise to that level. It further noted that the rule cited by the stipulation, which defined moral turpitude to include vehicular homicide, applied to applicants for a teaching position, not presently employed teachers.

Rulemaking
Agency for Health Care Administration v. Custom Mobility, Inc., 33 Fla. L. Weekly 2113 (Fla. 1st DCA 2008) (Opinion filed September 4, 2008)

The Agency for Health Care Administration ("AHCA") notified Custom Mobility, Inc. that AHCA's audit had indicated Medicaid overpayments of $245,318. In making that determination, AHCA had done a statistical analysis of a certain number of claims using the statistical sampling methodology of cluster sampling. Under that methodology, the auditor draws a random sample of Medicaid recipients for a particular Medicaid provider. Claims paid for each recipient in the random group are then evaluated to determine the exact amount of overpayment. The statistical formula is used to extend the overpayment found in the sample to the entire population.

AHCA had used the statistical formula for about 20 years. In recent years it was used in about 10 percent of the audits performed. AHCA stipulated that it had not adopted the formula as a rule pursuant to the Administrative Procedure Act. Custom Mobility challenged the formula as an unadopted rule. After a formal hearing, the administrative law judge issued a final order holding that the cluster sampling formula was a rule and ordering AHCA to stop relying on it.

The court reversed and remanded. It held that the methodology was not an agency statement of general applicability as it was not used consistently by the agency in conducting audits. In this case, the auditor had the discretion to either use or not use the methodology. For the same reason, the court held that the methodology did not require compliance or establish mandatory requirements.

Timeliness
School Board of Osceola County v. Universal Education Services, Inc., 990 So. 2d 1210 (Fla. 5th DCA 2008) (Opinion filed September 19, 2008)

The Osceola County School Board appealed an order of the Board of Education reversing the School Board's denial of a charter school application for Universal. The court reversed. It held that Universal had failed to file a timely appeal of the School Board's decision since it was filed more than the 30 days allowed by statute after the decision.

Attorney Client Privilege
Valliere v. Florida Elections Commission, 989 So. 2d 1242 (Fla. 4th DCA 2008) (Opinion filed September 10, 2008)

The Vallieres appealed the ruling of an administrative law judge that their communications with two lawyers were not protected by the attorney-client privilege. The judge held an evidentiary hearing and found that the Vallieres had consulted with the attorneys primarily about political issues. The communications for which protection was sought were conducted at a social event and most of the discussion revolved around political issues.

On appeal, the court affirmed. It noted that a determination of the existence of a privilege is a factual one. While it depends on the potential client's intention to seek legal advice from an attorney, the belief must be a reasonable one. In this case, the court held that the judge had not departed from the essential requirements of law although there was disputed evidence regarding the Vallieres' intent.

Immediate Final Orders
Allstate Floridian Insurance Company v. Office of Insurance Regulation, 981 So. 2d 617 (Fla. 1st DCA 2008) (Opinion filed May 14, 2008)

Allstate filed motions for rehearing, rehearing en banc and certification in the case after the First District Court of Appeal issued an opinion upholding the Office of Insurance Regulation's ("OIR") issuance of an immediate final order ("IFO") suspending Allstate's certificates of authority to conduct new business in Florida. The court denied the motion in its entirety, withdrew its initial opinion and filed a substituted opinion upholding OIR's authority to issue the IFO.

The substituted opinion was essentially the same as the original opinion with certain clarifications. In particular, the court noted that Allstate's willful refusal to comply with the statutory disclosure requirements made it very difficult for OIR to be as specific as the court might usually require for an IFO. Accordingly, the court applied a more relaxed standard in its review of this case.

Disqualification of Hearing Officer
Jones v. Florida Keys Community College, 984 So. 2d 556 (Fla. 3d DCA 2008) (Opinion filed May 14, 2008)

Jones filed a writ of prohibition seeking disqualification of a hearing officer appointed by the Community College to hear his petition challenging his dismissal as an employee. He alleged that the hearing officer appointed by the college was a member of the Board of Trustees for the college and had voted for termination of his employment. The college argued that it had the discretion to appoint a hearing officer to hear the case.

On appeal, the court granted the petition. It held that the college's right to appoint a hearing officer did not immunize that person from a disqualification challenge. It further noted that the test for disqualification is whether the petitioner had a reasonable fear that he would not get a fair and impartial hearing. In this case, the hearing officer's participation in the initial decision to terminate Jones' employment would lead a reasonable person to fear potential impartiality. The court strongly recommended that the college request appointment of an administrative law judge from the Division of Administrative Hearings.

Declaratory Statements
Costa Del Sol Association, Inc. v.

Department of Business and Professional Regulation, 987 So. 2d 734 (Fla. 3d DCA 2008) (Opinion filed July 2, 2008)

The Division of Florida Land Sales, Condominiums and Mobile Homes issued a declaratory statement concluding that items such as Jacuzzis, trellises and screen enclosures were condominium property and must be insured by the condominium association despite the fact that the items were purchased and installed by individual condominium owners and could only be used by those owners.

The court overturned the order. It held there was no legal basis for such a conclusion, that it was unfair to the members of the association who must pay insurance for items they could not use, and that the statement was inconsistent with prior rulings of the agency itself.

Government in the Sunshine

Dascott v. Palm Beach County, 988 So. 2d 47 (Fla. 4th DCA 2008) (Opinion filed July 9, 2008)

Dascott, in a previous case, had prevailed on appeal in getting an action of the County's pre-termination hearing panel and the grievance committee rejected in her wrongful termination case as the panels failed to meet in the Sunshine. On remand, she sought to obtain back pay arguing that that remedy was available under Chapter 286, Florida Statutes. The court held that the Government in the Sunshine Act neither expressly nor implicitly provides for monetary damages. Instead, relief is limited to those remedies specifically provided for in the Act, including vacation of the action taken out of the Sunshine and attorney's fees.

Statutory Construction

Creative Choice XXV, Ltd. v. Florida Housing Finance Corporation, 991 So. 2d 899 (Fla. 1st DCA 2008) (Opinion filed July 17, 2008)

Creative Choice sought Community Workforce Housing Innovation Pilot Program ("CWHIPP") funding for a project it constructed in Brevard County. At the time the application was submitted, the project had already been constructed but had not received final certificates of occupancy. The Florida Housing Finance Corporation ("FHFC") refused to consider the project for funding, concluding as a matter of law that the statute only provided funding for not yet constructed projects. FHFC entered a final order to that effect after an informal hearing.

On appeal, the court reversed. While noting that an agency's interpretation of a statute it has power to implement should be given great weight, the court concluded that there was no basis for limiting funding to new construction. In reaching that conclusion, the court looked at a number of provisions of the statute. In particular, it noted that the section of the statute that provided for funding used the term "construction," not "new construction." Another provision, however, did provide priority to new construction. The court remanded to FHFC with directions to at least consider Creative Choice for funding but noted that funds might not be available for various reasons.

Disqualification of Agency Head

Verizon Business Network Services, Inc. v. Department of Corrections, 988 So. 2d 1148 (Fla. 1st DCA 2008) (Opinion filed August 4, 2008)

Verizon Business Network Services challenged a final order of the Department of Corrections awarding a public contract to a competitor, Securus Technologies. On appeal, Verizon argued that the Secretary of the agency had a conflict of interest and should not have entered the final order.

When the Department posted a Notice of Intent to Award a contract to Securus to provide inmate telephone services, Verizon and another bidder, Global-TelLink Corporation ("GTL") filed formal protest petitions. All of the allegations in the petitions related to actions taken either directly or indirectly by the Department Secretary. During the course of discovery, GTL sought to depose the Secretary. The Department refused to produce him, in part, because it would be in conflict with his role in entering a final order. On a motion to compel, the administrative law judge required that the Secretary appear for the deposition. The Department conceded in the hearing on the motion to compel that it was possible for it to appoint another individual to take action on the recommended order. The Secretary's deposition testimony was entered into evidence at the final hearing and the administrative law judge relied on that testimony in support of certain findings of fact. The recommended order recommended dismissal of the petitions. Exceptions were filed. In entering the final order, the Secretary relied on his own testimony to justify rejecting certain of the exceptions.

On appeal, the court reversed and remanded to the Department with directions to appoint an independent person to review the matter and enter the final order. The court noted that the issue of the fairness of the proceeding was not raised below; however, it held that the right of a litigant to appear before an impartial tribunal is so fundamental that it may be challenged for the first time on appeal. Relying on *Ridgewood Properties, Inc. v. Department of Community Affairs*, 562 So. 2d 322 (Fla. 1990), the court held that when the facts indicate that an agency head is predisposed toward a certain outcome, he or she must defer to an impartial decision-maker in entering the final order. Noting that the Secretary in this case made the initial decision to award the contract, testified at the final hearing and relied upon his own testimony in reaching a decision in the final order, the court concluded that he was not impartial.

Non-Final Orders

CNL Resort Hotel, L.P. v. City of Doral, 991 So. 2d 417 (Fla. 3d DCA 2008) (Opinion filed September 24, 2008)

CNL Resort Hotel appealed an interlocutory order of the administrative law judge dismissing portions of its petition for hearing challenging provisions of the City of Doral's comprehensive plan. Count I of the petition alleged that the plan abrogated CNL's private property rights while benefitting other surrounding property owners. Count III of the petition alleged that the plan was internally inconsistent because it purported to protect private property rights and prevent urban sprawl but failed to actually do so. The administrative law judge dismissed Count I and the portion of Count III that related to pri-

continued...

CASE NOTES
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vate property rights on the grounds that they presented a constitutional takings claim that could not be heard by the judge.

On appeal, the court held that the interlocutory order was reviewable because CNL would have been irreversibly harmed if the court did not consider the merits of the claim. The court noted that CNL asserted that during the pending proceedings the surrounding property owners would be able to receive permits using limited roadway capacity, ultimately precluding CNL from future development. Further, the court reversed on the merits, agreeing with CNL and the Department of Community Affairs that private property rights were relevant in evaluating a comprehensive plan.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is a Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* Mary.Smallwood@Ruden.com.

Administrative Law Section Executive Council

June 20, 2008 – Boca Raton Resort & Club

I. **CALL TO ORDER - Andy Bertron, Chair**

Members Present: Andy Bertron, Elizabeth McArthur, Paul Amundsen, Allen Grossman, Daniel Nordby, Li Nelson, T. Kent Wetherell, II, Linda Rigot, Michael Cooke, Donna Blanton, Bill Williams, Cathy Sellers, F. Scott Boyd, Seann Frazier, Clark Jennings, Bruce Lamb, Larry Sellers

Others in Attendance: John Newton, Julie Waldman, Sheila Meehan, Robin Rosenberg, Jackie Werndli

II. PRELIMINARY MATTERS

A. Consideration of Minutes

1. February 21, 2008

Elizabeth McArthur noted that Cathy Sellers would be serving for the first time as CLE Committee Liaison. She suggested that reference in the minutes that Cathy would "continue to" serve in that role be omitted. The change was moved and adopted.

2. February 22, 2008 (LPR Retreat)

A change was made in order to correctly report that the division "opposes" rather than proposes legislation that would restrict funding in a matter. The change was moved and adopted.

3. March 12, 2008 (Conference Call)

Moved and approved

B. Treasurer's Report - Cathy M. Sellers

1. 6/10/08 Detail Statement of Operations

Cathy Sellers provided the Treasurer's Report.

The Section is experiencing lower revenue in the current fiscal year. However, budgeted expenses are also lower, so the Section still expects net income for the fiscal year.

Revenues were lower in part due to a higher level of sharing revenues with The Florida Bar and in part due to slow sales of past CLEs and lower interest on the Section's Fund Balance.

Budgeted expenses that were below expectation included the amounts allocated to the Law School Liaison program, and web site expenditures. Though some costs have increased, such as newsletter and graphics costs charged by The Florida Bar, total expenses remain well below budget.

Clark Jennings posed a question regarding graphics services and commented that expenses were being well-managed.

C. Chair's Report - J. Andrew Bertron, Jr.

1. ABA Section on Administrative Law and Regulatory Practice.

a. State Administrative Law Committee Update and Survey

Andy completed the survey as requested by the ABA Committee.

2. Lawyer Advertising Rules

Jennifer Corbely, Chair of the Florida Bar's Board Review Committee on Professional Ethics, wrote the Administrative Law Section in order to seek member opinion on changes to lawyer advertising rules that would exempt lawyer-to-lawyer communications and communications with past clients from lawyer advertising rules. The Administrative Law Section does not intend to respond.

Larry Sellers reported that the request stemmed from questions concerning lawyer-to-lawyer advertising and communications with existing and former clients. The Bar largely views such advertising as exempt from general advertising rules. The Bar re-considered the position in order to determine whether such communications should be regulated.

3. Assistance to Persons with Disabilities

John Newton, General Counsel of APD, joined the meeting. Sheila Meehan from Florida Legal Services was present and available to address the same subject. Robin Rosenberg with Florida's Children First also joined the meeting in person.

III. COMMITTEE/LIAISON REPORTS

A. Continuing Legal Education - F. Scott Boyd

1. Pat Dore Conference - Seann M. Frazier

The Pat Dore Conference is scheduled for October 2 and 3 at the University Center Club in Tallahassee. Seann Frazier reviewed the scheduled speakers and their topics.

Andy Bertron discussed the proposed $50 discount for governmental lawyers. Jackie Werndli agreed to check with The Florida Bar in order to determine whether the Administrative Law Section would have to pay that difference, covering the $50 cost. Seann Frazier noted that the expense could be as much as $5,000.

Kent Wetherell questioned whether we will still have a difference in price for members vs. nonmembers. Typically, the Section has charged members $25 less than nonmembers for the seminar. Jackie Werndli indicated that the CLE designation of Pat Dore conference meant that the $25 difference could not be automatically allocated to new membership dues.

The Executive Council previously decided that no reception will be conducted unless a sponsor is located. Allen Grossman may solicit a sponsor.

B. Publications - Elizabeth W. McArthur

1. Newsletter - Donna E. Blanton

a. Agency Snapshots - Amy W. Schrader

Donna Blanton earlier reported that a new Newsletter is forthcoming. The deadline for articles on the next Newsletter is at the end of July.

Elizabeth McArthur reported on her efforts to reinvigorate the Public Utilities Law Committee's use of Newsletter space.

Editing responsibility for the Section Newsletter will be transitioned to new leadership. Amy Schrader will serve as co-editor, and may serve as the lone editor in the following year.

2. *TFB Journal* - Deborah K. Kearney

Debby Kearney was not present. Elizabeth McArthur reported that Debby has agreed to continue her service to coordinate Bar Journal articles.

Elizabeth noted that many of the Pat Dore conference subjects would serve as a good subjects for Newsletter or Bar Journal articles.

C. Legislative - Wellington H. Meffert/Linda M. Rigot/William E. Williams

Linda Rigot provided a legislative update. The 2008 APA bill passed. Two provisions are new from last year's bill.

First, the law specifically authorizes agencies to comply with the requirement to index orders by allowing the use of DOAH's website for that purpose. Second, uniform rules will now provide that when a disputed fact arises in an informal hearing, the case shall be terminated and a formal hearing conducted.

Linda also provided a report on other legislation that affects administrative remedies. Bills included proposals to exempt ALJ phone records from public records requirements. A separate bill made section 120.57(4) summary hearing procedures applicable to chapter 378 and for phosphate mining cases, but the ALJ would only issue a recommended order in those cases.

Another bill would require expedited hearings for insurance rate filing cases. Finally, a House bill intended to offer small business relief requires review of agency rulemaking if a proposed rule has an effect on small business.

D. Public Utilities Law - Michael G. Cooke

Michael reported that the committee is planning an agency profile for a Section Newsletter.

Michael also expects to solicit an article addressing a major piece of energy legislation passed this year.

The Public Utilities Law Committee is also planning another CLE this year in January 2009. Michael reported that he would work with incoming CLE Chair, Bruce Lamb, on the seminar.

E. Membership - T. Kent Wetherell, II

Judge Wetherell reported that membership has 1273 members, up from 1112 in Sept. 2006. He noted that the Pat Dore Conference has been one of the more successful recruiting measures. Dave Watkins will be incoming membership committee chair.

F. Webpage - Daniel E. Nordby

Exploring improvements. Many of the past Newsletters are scanned in pdf format and are being made available on the Section website. Dan solicited help in converting past meeting minutes into Word documents so that could be made searchable.

The web site budget has been $3000 for several years. Last year the Section spent only $250. Dan proposed using an outside vendor to do maintenance. Elizabeth agreed that the expense would be a good investment to improve the web site.

Jackie noted that site re-design could be accomplished for as little as $3000, but that spending $10000 - $15000 is not unreasonable.

Allen asked if we have an opportunity to offer advertising on the web site. Jackie reported that advertising was permitted, but it may be necessary to comply with the Bar's advertising section.

G. Uniform Rules of Procedure - Linda M. Rigot

Judge Rigot reported that the Uniform Rules have been adopted. Thus, there is no longer a need to keep this item on the Section's agenda for future meetings.

H. Board of Governors Liaison - Lawrence E. Sellers, Jr.

1. Meeting Summary - May 30, 2008

Larry Sellers provided a summary of the last meeting of the Board of Governors.

The Board decided that there

continued...

MINUTES - JUNE 20, 2008
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would be no increase in dues for the coming year.

The Board addressed planned budget cuts for the court system. The courts and the Bar have responded by seeking additional sources of funding, perhaps by increasing some Art. V fees.

The Board discussed an ethics opinion concerning the outsourcing of paralegal work offshore. A committee suggested additional language that would require notifying opposing counsel if work were to be sent offshore.

The Board approved openings on judicial nominating committees. Candidates were recommended by the Bar to the Governor. Clark Jennings was recently appointed to a JNC.

Last meeting, Government Law Section and Subcommittee on attorney client privilege Task Force recommendations were addressed. Administrative Law Section comments were critical of the proposal and were well-received by the Task Force and other committees of the Bar.

The subcommittee made a much more limited proposal. That limited recommendation was approved by the Task Force. The modified proposal will be published and further comment invited in the near future, perhaps in early Fall. Then it will travel to Board of Governors before final approval.

Elizabeth noted that we may gather for another conference call to discuss the revised proposal.

I. Law School Liaison - Bruce D. Lamb

Bruce reported that he has had a hard time getting participation. He is trying to get introductions to professors

J. CLE Committee Liaison - M. Catherine Lannon

No report.

K. Council of Sections - - Allen R. Grossman/Clark R. Jennings

Clark provided a report. The Section agreed to pay for Seann Frazier and Elizabeth McArthur to attend a Section Leadership Conference. Others were invited to attend a Section Leadership Conference.

L. Section/Division Liaison

1. Environmental and Land Use Law Section - Cathy M. Sellers

The ELULS is preparing for a retreat to Costa Rica.

The Environmental Section Newsletter is moving out of print and will only be published on the Section's web site, both to reduce expenses and to serve the environment.

Law School Liaison committee is very active and has established a network with a professor at each law school. The committee has three fellowships and helped coordinate agency clerkships.

CLEs - ELULS has started webinars at lunch. They are packaged as a group of four webinars for $130, and about 20 people participate per call.

Andy Bertron discussed again the proposition that the Administrative Law Section move to a paperless Newsletter.

2. Health Law - Allen R. Grossman

No report.

3. YLD Liaison - Rhonda Chung-DeCambre Stroman

No report.

M. DOAH Update - Lisa S. Nelson/ Linda M. Rigot/T. Kent Wetherell, II

Judge Don Davis retired. Judge Kent Wetherell moved to the Northern District. Judge Bram Canter moved from the Middle District to the Environmental Division.

IV. OLD BUSINESS

A. Proposed Revisions to Appellate Rules

Judge Rigot asked Kent to review the proposed revisions. Kent was the primary drafter.

1. Proposed amendment to 9.190(b) and (c): Revisions to clarify procedure for seeking judicial review of immediate final orders and emergency orders suspending, restricting or limiting a license. The revisions also address what the record should contain.

2. 9.190(e)(2)(A) and (3): Revisions regarding stays to clarify that considerations include likelihood of success on the merits, likelihood of irreparable harm and likelihood of substantial harm to non-parties.

3. Proposed amendments to uniform citations for Florida administrative agencies. Kent offered some suggestions for changes to the FSU

LRS

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Style Manual, which is a default citation source when the rules do not address how citation should occur.

The Committee made these recommendations, but further comment was invited.

Andy asked about Jim Konish of FALR. Kent indicated that FALR would still be referenced in the FSU Style Manual, but that the majority of agency cases are not reported in FALR, so it should not be the primary citation. The DOAH web site is the leading source, with agency sites also serving an important role. Additionally, if the new APA law takes effect, DOAH's web site will gain further importance if it serves as the final order repository for most agencies.

Andy Bertron asked for discussion of the proposals. Allen Grossman moved to transmit these rules to the appropriate sub-committee of the Appellate Rules Committee and to forward them to the FSU Style Manual. Duly seconded, the motion passed unanimously.

V. NEW BUSINESS

A. Section Officer/Executive Council Election

1. Nominating Committee Recommendations

Slate recommendations include Seann Frazier as Chair-elect, Cathy Sellers, Secretary, and Allen Grossman, Treasurer.

All expiring members recommended for renewal.

Paul Amundsen was recommended for the vacant spot created by Allen Grossman's move to Treasurer.

Elizabeth moved the slate, duly seconded. Motion carried unanimously.

B. 2008-10 Biennium Legislative Positions

1. Rollover of Section Positions 6 & 7

Elizabeth moved to roll-over positions 6 and 7. Allen seconded. Motion carried.

C. Live Webcast of CLE Programs

Terry Hill (Program Division Director of the Florida Bar) provided a letter outlining the ability to offer live webcast of seminars. Terry has worked to get electronic simulcast of live presentations, including the live web cam. It's been used by other sections, and allowed for attendance by persons at their offices. Jackie reported that implementation was slightly complicated but very successful.

D. APD Pro Bono/Training Project

John Newton, along with Julie Waldman (DCF Attorney in Gainesville) discussed the APD Pro Bono Project. Julie is already beginning to prepare training materials for volunteer lawyers.

Andy Bertron summarized activities on this subject to date.

APD is seeking help. It looks like APD cases will stay at DOAH. APD says the creation of a pro bono referral network would be useful. Many recipients are unrepresented or are represented by only family members at DOAH. So, the thought is to provide legal training to legal aid attorneys regarding DOAH procedures.

Sheila Meehan summarized the need for attorney assistance. People need good representation to keep these recipients with their families and within the community rather than in institutional care. Changes in levels of APD service are coming. Two levels are being re-assigned to four levels. APD expects challenges to those assignments. The recipients will require representation. Legal Aid programs are committed, but there will be needs around the state.

John Newton reported that the APD provides some direct care, but also provides indirect services including training and transportation provided through a waiver program from the federal government. APD contracts with third party service providers, but the client makes selection of service providers. APD serves 30,000 individuals with another 30,000 on a waiting list. The only additions are persons placed "in crisis" to fill openings created through attrition.

The beneficiaries are usually represented by benefits coordinators. APD is doing rulemaking and could use help. The qualified representative exception within the Uniform Rules is being used now, but APD may propose further exceptions. Next week, Judge Hunter is conducting a final hearing challenging validity of the four tier level of service rule. If the rule is valid, the agency will assign clients to tiers. Many challenges may be expected. Many will find themselves in a tier with less benefits or a cap that is less than the costs of their current benefits.

Donna Blanton asked for an article for the Newsletter on this need and the Section's efforts to provide assistance.

Andy suggested two articles. One article would address needs (perhaps by John Newton). The second would be prepared by a member of the Administrative Law Section on its efforts to assist. (perhaps by Andy Bertron.)

Allen Grossman suggested a complementary agency snapshot on APD.

The Section formed a committee to discuss how the Administrative Law Section and its members can help.

VI. INFORMATIONAL

A. Executive Council List

B. 2008-09 Committee List

C. Section Leadership Conference - July 11, 2008

VII. FINAL REMARKS & PRESENTATION OF AWARDS - Outgoing Chair

Andy Bertron distributed presents for Council members. He selected baseball caps to promote the section, which were to be worn throughout the remainder of Bar Conference in Boca Raton. The front of the caps read: "ALS," back " Chapter 120 Rocks!"

VIII. PROGRAM OUTLINE & CLOSING COMMENTS - Incoming Chair

Elizabeth McArthur said she is excited about upcoming events and the Volunteer Program. Elizabeth awarded Andy a gift in honor of his service as Outgoing Chair.

IX. TIME AND PLACE OF NEXT MEETING

Fall 2008 - Tallahassee

X. ADJOURNMENT

Andy moved to adjourn, Elizabeth seconded. Motion carried.

Agency Snapshot

Florida Housing Finance Corporation

Agency Head:
Stephen P. Auger, Executive Director
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
850-488-4197

Type of agency:
Florida Housing is "an entrepreneurial public corporation organized to provide and promote the public welfare by administering the governmental function of financing or refinancing housing and related facilities in Florida," created in 1998 by section 420.504, Florida Statutes. Florida Housing is not a state agency, but is functionally related to and administratively housed within the Department of Community Affairs. Florida Housing does not build or manage properties. Rather, it provides low-cost financing through loans, bond issues, and federal tax credits, which makes it possible for private sector developers and lenders to provide affordable rental and ownership housing to Floridians. Florida Housing staff members are employees of the corporation, rather than the state.

General Counsel:
Wellington Meffert
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
850-488-4197

Educational Background of General Counsel:
B.S. English Education, Florida State University, 1967
Graduate Study – Florida State University School of Theatre, 1969-70
Building Contractor 1975-1985 (Very educational)
J.D. (Honors) Florida State University College of Law, 1988

Agency Clerk's name, telephone, physical location for filing, hours of operation:
Sherry M. Green
Corporation Clerk
850-488-4197
850-414-6548 (Fax)
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
8:30 am – 5:00 pm Monday- Friday

Number of lawyers on staff: Four (including General Counsel).

Kinds of cases handled by the Agency; percentage that involves use of the APA:
All types of cases, including commercial lending issues, including foreclosures, and some transactional matters. About 80% of work in the Office of General Counsel involves the APA.

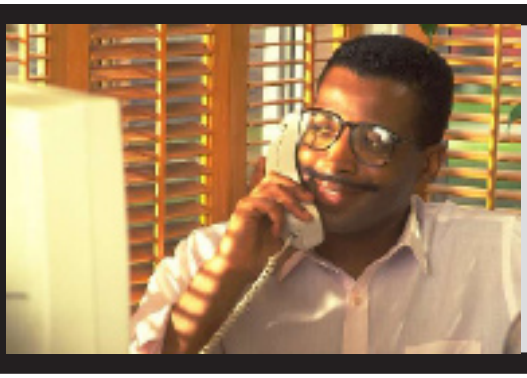
How does Chapter 120 affect the mission of the Agency?
Florida Housing is expressly subject to the APA, per section 420.504(2), Florida Statutes. Chapter 120 does not particularly affect Florida Housing's mission; it provides a framework for the agency's business. However, the strictures of rulemaking under Chapter 120 do in some ways limit Florida Housing's flexibility and ability to react quickly to changing market conditions.

How does the rulemaking process affect the Agency?
As noted above, the limitations and timeframes of rulemaking do not lend themselves well to the need for flexibility in a financial institution.

What, if any, changes to the APA are desirable from the agency's perspective?
A major and ongoing concern is the ability of a single person to freeze the movement of hundreds of millions of dollars in financing through a rule challenge to the annual funding cycle for multifamily projects.

What changes to the Uniform Rules, if any, are desirable?
None suggested.

Tips for practice before the agency:
As most of Florida Housing's APA litigation involves very strict and specific application of its statutes and rules in the context of competitive funding cycles, it is especially important for practitioners to be familiar with the nuances of those rules.



Ethics Questions?

Call The Florida Bar's ETHICS HOTLINE: 1/800/235-8619

Section Budget/Financial Operations

	2007-2008 Budget	2007-2008 Actual	2008-2009 Budget
REVENUE			
Dues	27,500	28,258	29,190
Affiliate Dues	50	100	100
Dues Retained by Bar	(19,290)	(20,622)	(20,555)
Administrative Fee Adjustment	0	0	0
Online CLE	700	0	0
CLE Courses	5,000	8,047	9,000
Section Differential	0	2,576	1,875
Section Service Programs	5,000	2,550	5,000
Investment Allocation	12,106	5,326	13,379
Miscellaneous	150	0	150
TOTAL REVENUE	**31,216**	**26,235**	**38,139**
EXPENSE			
Credit Card Fees	0	33	0
Staff Travel	1,306	1,467	1,341
Postage	208	62	175
Printing	2,808	82	120
Officer Expense	500	0	500
Newsletter	3,000	3,811	5,400
Membership	500	0	500
Supplies	50	0	50
Photocopying	156	64	150
Officer Travel	2,500	1,336	2,500
Meeting Travel	3,000	1,050	3,000
CLE Speaker Expense	100	0	100
Committees	500	0	500
Council Meetings	600	530	600
Bar Annual Meeting	1,950	1,999	2,400
Section Service Programs	5,000	222	5,000
Retreat	4,500	2,500	4,500
Public Utilities	500	0	500
Awards	600	523	600
Writing Contest/Law School Liaison	4,900	0	4,900
Website	3,000	235	3,000
Legislative Consultant	5,000	0	5,000
Council of Sections	300	300	300
Misc.	500	333	500
Operating Reserve	4,338	0	4,422
TFB Support Services	1,902	2,763	2,586
TOTAL EXPENSE	**47,718**	**17,310**	**48,644**
BEGINNING FUND BALANCE	**172,945**	**199,292**	**191,134**
PLUS REVENUE	**31,216**	**26,235**	**38,139**
LESS EXPENSE	**(47,718)**	**(17,310)**	**(48,644)**
ENDING FUND BALANCE	**156,443**	**208,217**	**180,629**

SECTION REIMBURSEMENT POLICIES:

General: All travel and office expense payments are in accordance with Standing Board Policy 5.61.

Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5)(a)-(i) or 5.61(e)(6) which is available from Bar headquarters upon request.

NEW ENERGY BILL
from page 1

history of our state."[2] It will reduce harmful greenhouse gas emissions, support renewable resources, protect natural resources, and stimulate the economy.

One interesting legal twist in the bill is that both the FPSC rulemaking on a renewable portfolio standard and the DEP rulemaking on a cap-and-trade regulatory program to reduce greenhouse gas emissions are subject to legislative ratification. Those rules must be presented to the Legislature and ratified before becoming effective.

This article primarily concerns the FPSC's role in establishing the renewable standard and legislative ratification. A host of other provisions in this 237-page bill affecting utilities and ratepayers within the FPSC's jurisdiction are not addressed in this article. These include increased energy conservation measures by the utilities, expanded cost recovery for environmental expenditures, and net metering.

I. The FPSC's Role

Changes Affecting the Florida Energy Efficiency and Conservation Act ("FEECA")

Because of changes to FEECA[3] in developing energy efficiency and conservation goals for utilities it regulates, the FPSC must evaluate: (1) the full technical potential of all available demand-side and supply-side conservation and efficiency measures, including demand-side renewable energy systems;[4] (2) the need for incentives to promote both customer-owned and utility-owned energy efficiency and demand-side renewable energy systems; and (3) the costs imposed by state and federal regulations on the emission of greenhouse gases. The bill uses a "carrot and stick" approach to reach those goals by allowing the FPSC to authorize financial rewards for utilities exceeding their goals and to impose penalties for those that do not.

Renewable Portfolio Standard

One of the significant legislative policy mandates of the new legislation directs the FPSC to adopt rules for a renewable portfolio standard ("RPS") that will require each provider[5] to supply renewable energy to its customers directly, by procuring the renewable energy itself, or through use of renewable energy credits. RPS is the minimum percentage of total annual retail electricity sales by a provider to consumers in Florida that shall be supplied by renewable energy produced in Florida. The FPSC must consult with the DEP and the FECC in developing the RPS rule. The rule shall not be implemented until ratified by the Legislature. The FPSC must present a draft rule for legislative consideration and ratification by February 1, 2009.

The concept of "legislative ratification" has previously appeared in Florida law a few times; however, it is not widely used. It has been used in situations where the Legislature wants to review or approve agency action before it takes effect. In discussing House Bill 7135 during the 2008 legislative session, Florida legislators stated they were adding legislative ratification to ensure that the consumer would not be harmed by excessively high rates resulting from the adoption of an RPS rule. In September 2008, the Florida Senate Committee on Communications and Public Utilities issued an interim project report regarding appropriate legal options for the legislative ratification of the proposed rules.[6] The Senate's Interim Report, entitled "Legislative Process for Rule Ratification of Renewable Portfolio Standard and Cap-and-Trade Regulatory Reform," is discussed later in this article.[7]

As stated above, the new law allows utilities to meet the RPS through renewable energy credits. It defines a "renewable energy credit" ("REC") in section 366.92(1)(d), Florida Statutes, as being ". . . a product that represents the unbundled, separable, renewable attribute of renewable energy produced in Florida and is equivalent to 1 megawatt-hour[8] of electricity generated by a source of renewable energy located in Florida." To date, there is not a market for selling or trading RECs in Florida and the FPSC is exploring ways to help facilitate the development of one for Florida-produced RECs.

In developing the RPS rule, the FPSC must evaluate both the current and forecasted levelized cost in cents per kilowatt hour through 2020, and the current and forecasted installed capacity in kilowatts for each renewable energy generation method through 2020. The FPSC is moving quickly to implement these new provisions in Docket No. 080503-EI, *In Re Establishment of rule on renewable portfolio standard.* The FPSC staff has already circulated a draft RPS rule proposal ("a straw man") and has held four workshops. In the October 14, 2008 agenda, the Commission asked for additional information and a workshop was scheduled for December 3, 2008. After that, the FPSC will submit its draft RPS rule to the Legislature for ratification.

Section 366.92(3)(b), Florida Statutes, sets forth eight criteria for the RPS rule, some of which are not mandatory:

1) Must include methods of managing the cost of compliance with the RPS, whether through direct supply or procurement of renewable power or through the purchase of RECs;

2) Must provide for appropriate compliance measures and the conditions under which noncompliance shall be excused due to a determination by the FPSC that the supply of renewable energy or RECs was not adequate to satisfy the demand for such energy or that the cost of securing renewable energy or RECs was cost prohibitive;

3) May provide added weight to energy provided by wind and solar photovoltaic over other forms of renewable energy, whether directly supplied or procured or indirectly obtained through the purchase of RECs;

4) Must determine an appropriate period of time for which RECs may be used for purposes of compliance with the RPS;

5) Must provide for monitoring of compliance with and enforcement of the requirements of this section;

6) Must ensure that energy cred-

ited toward compliance is not credited toward any other purpose;

7) Must include procedures to track and account for RECs, including ownership of RECs that are derived from a customer-owned renewable energy facility as a result of any action by a customer of an electric power supplier that is independent of a program sponsored by the electric power supplier;

8) Must provide for the conditions and options for the repeal or alteration of the rule in the event that new provisions of federal law supplant or conflict with the rule.

Beginning on April 1 of the year following final ratification of the FPSC RPS rule by the Legislature, each provider must submit a report to the FPSC describing the steps that have been taken in the previous year and the steps that will be taken in the future to add renewable energy to the provider's energy supply portfolio. The report must state whether the provider was in compliance with the RPS rule during the previous year and how it will comply in the upcoming year.

In addition, the bill required each municipal electric utility and rural electric cooperative to develop standards for the promotion, encouragement, and expansion of the use of renewable energy resources, as well as energy conservation and efficiency measures. By April 1, 2009, and annually thereafter, they must submit a report to the FPSC that identifies such standards.

II. The FECC's Role

In 2006, CS/CS/CS/SB 888 created the Florida Energy Commission and administratively housed it in the Office of Legislative Services.[9] In 2008, House Bill 7135 created the Florida Energy and Climate Commission within the Executive Office of the Governor.[10] That bill transferred all of the duties, unexpended appropriations, property, and personnel of the Florida Energy Commission from Office of Legislative Services to the FECC,[11] and transferred all of the powers, duties, personnel, and property of the state energy program from DEP to the FECC.[12]

Organization

Seven of the nine Commissioners, including the Chair, are appointed by the Governor. The remaining two Commissioners are appointed by the Commissioner of Agriculture and Consumer Affairs and the Chief Financial Officer. The Commissioners are nominated by the FPSC Nominating Council, which is the same entity that nominates Public Service Commissioners. In addition, the Chair may designate *ex officio*, nonvoting members to provide information and advice to the FECC from the following agencies: the FPSC; DEP; Office of the Public Counsel; Department of Agriculture and Consumer Services; Department of Financial Services; Department of Community Affairs; Department of Transportation; and the Board of Governors of the State University System.

Duties

The FECC administers the Renewable Energy and Energy Efficient Technologies Grants Program, the Florida Green Government Grants Act, petroleum planning, and emergency contingency petroleum planning. It will also represent Florida in the Southern States Energy Compact, complete the annual assessment of the efficacy of Florida's Energy and Climate Change Action Plan, and provide specific recommendations to the Governor and Legislature each year to improve results. The FECC will administer the Florida Energy and Climate Protection Act. It will advocate for energy and climate change issues and provide educational outreach and technical assistance in cooperation with the state's academic institutions. It shall be a party in the proceedings to adopt goals and submit comments to the FPSC, pursuant to section 366.82, Florida Statutes. Numerous additional duties are also set forth in the statute, and the FECC is required to adopt rules before exercising its powers and performing its duties.

Generally, the FECC has a mission of combating climate change, ensuring energy security and promoting economic development in the green technology fields in Florida. Provisions in the bill emphasize the Legislature's intent to encourage collegial working relationships among the FPSC, the DEP, and the FECC on the cap and trade and RPS issues. The FECC has a Policy Group and a Program Group to implement these new statutory provisions as well as carry out additional duties, such as staffing the energy functions of the Emergency Operation Center and distributing grant monies in several areas.

III. The DEP's Role[13]

Under the "Florida Climate Protection Act,"[14] the DEP is authorized to adopt rules for a cap-and-trade regulatory program to reduce greenhouse gas emissions from major emitters. When developing the rules, the DEP must consult with the FECC and the FPSC, and may consult with the Governor's Action Team for Energy and Climate Change. The DEP may not adopt rules until after January 1, 2010, and the rules will not become effective until ratified by the Legislature. Requirements for the rules, set forth in the bill, are briefly described below.

"Cap-and-trade" or "emissions trading" is defined as an administrative approach used to control pollution by providing a limit on total allowable emissions, providing for allowances to emit pollutants, and providing for the transfer of the allowances among pollutant sources as a means of compliance with emission limits.

The cap-and-trade rules must include, but are not limited to, the following: a statewide limit or cap on the amount of greenhouse gases emitted by major emitters; methods, requirements, and conditions for allocating the cap among major emitters; methods, requirements, and conditions for emissions allowances and the process for issuing emissions allowances; the relationship between allowances and the specific amounts of greenhouse gas emissions they represent; the length of allowance periods and the time over which entities must account for emissions and surrender allowances equal to emissions; the timeline of allowances from the initiation of the program through 2050; a process for the trade of allowances between major emitters, including a registry, tracking, or accounting system for such trades; and cost contain-

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ment mechanisms to reduce price and cost risks associated with the electric generation market in this state.

After DEP submits its proposed cap-and-trade rules to the FECC for review, the FECC will submit a comprehensive report to the Governor, Senate President, House Speaker, and DEP. The bill lists 17 matters that the FECC report must address.

IV. Legislative Ratification of the Rules

As previously noted, legislative ratification places an interesting legal "twist" on the RPS and cap-and-trade rules. Administrative law practitioners may find this of particular interest in that it could be used in the future in other areas. The Senate's Interim Report on Rule Ratification, mentioned earlier, described the provisions in the new law directing the FPSC and DEP to adopt rules and submit these rules to the Legislature for ratification. Neither the FPSC's RPS rule nor the DEP's cap-and-trade rule may become effective until ratified by the Legislature. The Report noted that the term "ratification" is not defined in the Florida Statutes and explored the appropriate legal options for ratification after the rules have been adopted by the respective agencies.

The Report discussed three instances where the Legislature has used "ratification" to review or approve agency rules[15] and described how the ratification process was implemented in each instance. In all three instances, the Legislature required submission of the proposed agency rule for review and ratification prior to the rule becoming effective. In the first two instances, the Legislature also required submission of subsequent rule amendments for additional review and ratification. The first instance may be described as passive subsequent ratification, the second instance as preemptive ratification, and the third instance as hybrid ratification.

The first instance of ratification involved section 373.036, Florida Statutes, where the Legislature required DEP to adopt the Florida Water Plan and submit it for review and ratification. In ratifying the Florida Water Plan, the Legislature required subsequent rule amendments to be submitted to the President of the Senate and the Speaker of the House of Representatives within seven days after publication in the Florida Administrative Weekly, and specified that the amended rule would not become effective until after the next regular legislative session. The implication was that, if no opponent to the proposed amendment obtained passage of a bill during that legislative session specifically blocking the proposal, then the amendment to the rule would become effective. Hence, this approach can be described as passive subsequent ratification.

The second instance of ratification involved sections 373.421 and 373.4211, Florida Statutes, where the Legislature required the Environmental Regulation Commission to approve a unified statewide methodology for wetlands delineation and submit it for review and ratification. In ratifying the wetlands delineation rule, the Legislature effectively codified the rule into statute by requiring any subsequent proposed amendments to the rule to be submitted in bill form to the President of the Senate and the Speaker of the House of Representatives for consideration and referral to the appropriate committees.[16] Under this instance of ratification, unless a bill with the amended rule was subsequently enacted by the Legislature, the existing rule would remain unchanged. Hence, this approach can be described as preemptive ratification, as subsequent rule amendment requires legislative enactment.

The third instance of ratification was somewhat different from the first two. In section 163.3177(9), Florida Statutes, the Legislature required the Department of Community Affairs to adopt rules related to comprehensive plans and submit the rules for review before the 1986 legislative session. The Legislature explicitly reserved the right to reject, modify, or take no action relative to the agency's rules. In addition, it required the agency to conform the rule to any changes it made, and if no changes were made, the rules would become effective. In section 163.3177(10), the Legislature reviewed the rules submitted pursuant to subsection (9), required some provisions in the rules to be amended to conform to specified legislative intent by October 1, 1986, and allowed the remaining rules to become effective. In addition, the Legislature declared that changes made to the rules prior to October 1, 1986, would not be subject to rule challenges or draw-out proceedings for a specified period of time, that subsequent amendments to the rules would be subject to the full Chapter 120 process, and that subsequent amendments need not be submitted to the Legislature for review. Hence, this approach can be described as hybrid ratification.

Regardless of how ratification is carried out by the Legislature, ratification allows the Legislature to review the agency's rule for compliance with its legislative policy prerogatives before the rule becomes effective. Because the statutory provisions in House Bill 7135 requiring legislative ratification of the RPS and cap-in-trade rules[17] did not specify which type of ratification applies, the Senate's Report listed several options, quoted below, which the Legislature may consider:

> • Incorporate the rules into statute. By incorporating rules into statutes, the rules become law and require subsequent Legislative changes.
>
> • Direct the agency to modify the rules as directed in statute and direct the provisions to be treated as rules in the future.
>
> • Set a time certain for the rules to remain unchanged.
>
> • Continue legislative oversight by requiring ratification of any changes to the rules . . . .
>
> • Repeal ratification requirements and set forth guidelines to adopt rules under Chapter 120.
>
> • Do nothing.[18]

The Senate's Report also states that the legislative review process will differ depending upon whether

the agency-proposed rule is partially developed and has only been through a portion of the rulemaking process, or whether the agency-proposed rule has been through the entire agency rulemaking process and has been filed for adoption. The Report clarifies that, once the legislative review is complete, one of the options identified above may be used.

Because legislative ratification is quite an involved process, requiring rulemaking by the agencies and subsequent review and ratification by the Legislature, it will be interesting to see how often it is used in the future to retain legislative oversight over specific agency rulemaking. In this working example, it remains to be seen which instance of legislative ratification will be applied to the rules submitted by FPSC and DEP for review and ratification.

V. Conclusion

The new energy bill confronts head-on some major environmental issues facing the State of Florida. The structure of the bill encourages a strong collegial working relationship among the agencies and offices tasked with implementing these bold new initiatives. It is not clear how the legislative ratification will unfold, and which option the Legislature will select for the new RPS and cap-and-trade rules. Meanwhile, the Commission has held workshops and public meetings concerning the RPS draft rule. The Commission will submit a draft rule to the Legislature by the February 1, 2009 deadline for review and possible ratification.

Endnotes:

[1]The authors would like to note that the interpretation of House Bill 7135 and the views expressed in this article are not necessarily the views of the Florida Public Service Commission or of the agencies mentioned herein.

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[2]The full text of Governor Crist's Keynote Address is available at *http://www.myfloridaclimate.com/env/home/summit newsroom/2008 serve to preserve florida summit on global climate change opening keynote address by governor charlie crist.*

[3]*See* § 366.82, Fla. Stat. (2008).

[4]"Demand side renewable energy" is a system located on a customer's premises generating thermal or electric energy using Florida's renewable energy resources and primarily intended to offset all or part of the customer's requirements provided it does not exceed 2 MWs.

[5]"Provider," pursuant to section 366.92(2)(b), Florida Statutes, means an investor-owned utility as defined by section 366.8255(1)(a). "Provider" does not include municipal-owned utilities or rural cooperatives.

[6]In October 2008, the Senate Communications and Public Utilities Committee also issued: "Review of Factors to be Considered in Making Further Changes to Energy Policy." That report describes the new law and warns of a "significant risk of unintended consequences" if express consideration is not given to all factors underlying both current policy and proposed policy changes. The report lists numerous questions for analysis in new policies on renewable energy, conservation and efficiency, and cap-and-trade.

[7]The Senate's Report is available at: *http://www.flsenate.gov/data/Publications/2009/Senate/reports/interim_reports/pdf/2009-108cu.pdf*

[8]One megawatt hour = 1000 kilowatt hours. An average home in Florida consumes approximately 1200 kilowatt hours of electricity monthly.

[9]*See* s. 8, ch. 2006-230, Laws of Florida (creating the Florida Energy Commission).

[10]*See* s. 46, ch. 2008-227, Laws of Florida (creating the FECC in § 377.6015, Fla. Stat.).

[11]*See* s. 45, ch. 2008-227, Laws of Florida.

[12]*See* s. 48, ch. 2008-227, Laws of Florida.

[13]In addition to the roles for DEP in the new law, the Secretary of DEP has chaired the Governor's Action Team on Energy and Climate Change. In July 2007, the Governor issued Executive Order 07-128 establishing the Action Team and tasked it with creating a comprehensive Florida Energy and Climate Change Action Plan for greenhouse gas reductions. On November 1, 2007, the Action Team issued the Phase 1 Report that recommended a range of policies. In October, 2008, the Phase 2 and Final Report was issued. There were 28 appointed members of the Team and 120 technical experts participating in the six separate Technical Working Groups.

[14]House Bill 7135 created section 403.44, Florida Statutes, the Florida Climate Protection Act.

[15]The Report noted that section 380.05, Florida Statutes, also required the Administration Commission, consisting of the Governor and the Cabinet, to submit rules designating areas of critical state concern to the Legislature for review.

[16]In instances where the Legislature preempted the agency's ability to subsequently amend a rule by requiring passage of an act approving the amended rule, the courts have held that the ratified rule has the effect of statute and any challenges to the rule must be taken to circuit court. *See Occidental Chemical Agricultural Prods., Inc. v. Dep't of Environ. Reg.*, 501 So. 2d 674, 678 (Fla. 1st DCA 1987) (citing *Key Haven Assoc. Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982)). The courts have not addressed whether preemptive ratification is constitutional.

[17]*See* § 366.92(3), Fla.Stat.(the RPS rule) and § 403.44(5), Fla. Stat. (the cap-and-trade rule).

[18]Under normal rulemaking, once an agency adopts a rule, the rule is submitted to the Secretary of State. However, with legislative ratification added to the equation, if the Legislature fails to ratify the rule (i.e., does nothing), then what happens to the rule? Will the rule submitted to the Secretary of State become effective, remain in procedural purgatory, or lapse, requiring another round of rulemaking? Pursuant to the affirmative language in sections 366.92(3) and 403.44(5), requiring the ratification of these rules, if the Legislature does nothing, then the rules submitted to the Legislature for ratification by FPSC and DEP will not become effective.

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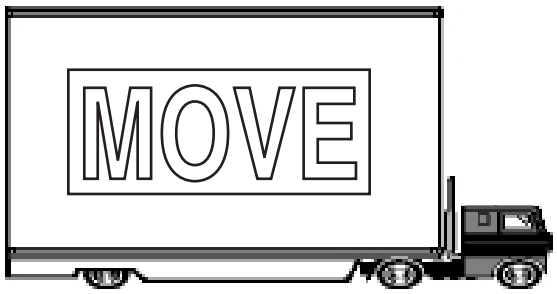
Editors' Note: Florida Supreme Court Eliminates Automatic Stay for Public Bodies and Officers in Administrative Actions under Chapter 120, Florida Statutes

On November 13, 2008, the Florida Supreme Court adopted amendments to the Florida Rules of Appellate Procedure, including an amendment to Rule 9.310(b)(2), eliminating the automatic stay previously granted when a public body or officer filed a notice of appeal in an administrative action. Under the amended rule, final orders issued pursuant to Chapter 120, Florida Statutes, by administrative law judges with the Division of Administrative Hearings will take immediate effect absent the issuance of a discretionary stay. The rule amendments are set to go into effect on January 1, 2009: however, at press time, there was a motion for clarification or rehearing on the Court's revisions to Rule 9.310(b)(2) pending. The text of the Florida Supreme Court's decision can be accessed on its website: *http://www.floridasupremecourt.org/decisions/2008/sc08-147.pdf.* We hope to bring you additional information regarding this rule amendment in the March 2009 issue of the Newsletter.



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