ADMINISTRATIVE LAW SECTION NEWSLETTER

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Chairman's Message

We are very happy to provide this Administrative Law Section Newsletter to you after an almost two-year absence. It is my pledge that every effort will be made to make this a continuing publication bringing you information and ideas on Section business and administrative law developments. Let this publication be a challenge to all of us to write letters, articles or notes for inclusion.

It is my hope that we will realize a continuation of the efforts and activities of the Section developed over the past several years. The major goals of our Section this year, in addition to continued publishing of this Newsletter, is to host the Fourth Annual Florida Administrative Conference in Tallahassee in February 1986. Under the planning of Conference Committee Chairman Robert P. Smith, Jr., the conference once again will bring together representatives from the judiciary, legislature, state government agencies, local government, school boards, the private bar, the public, the news media and private industry to share ideas, thoughts and views regarding agency decision making and policy making. This conference is patterned after the United States Administrative Conference and serves as a shining example of what can be done to promote the knowledge and understanding of administrative law and practice. The Administrative Conference will continue to provide a forum for developing ideas for the improvement of Florida administrative decision making processes.

Other goals include a study as to the feasibility of drafting for consideration an administrative evidence code, a feasibility study on certification in administrative practice, the possible drafting of a model APA ordinance for local government and inquiry as to the APA's involvement with the issue of growth management.

Section representatives continue to actively work with The Florida Bar Long Range Planning Committee in developing a framework in which sections will work closer with the Board of Governors in planning, coordinating and executing bar activities. Bar President Pat Emmanuel has been most helpful in working with our Section and has invited your chairman to appear before the Board of Governors.

I have asked committee chairs to meet and prepare written reports of the committee meetings so that this information may be made available to you through the Newsletter.

If you have a particular committee preference, I ask that you let me know personally. I look forward to keeping you informed of our Section activities and invite you to contact me with any thoughts you may have regarding our section.

George L. Waas

INSIDE:

Impact of 1984 Legislation on DOAH Proceedings

The 1984 legislation having the most immediate impact of DOAH proceedings was the provision of House Bill 1225, Chapter 84-173, concerning enforcement of discovery orders.

Prior to the amendment, under the holding of *Great American Banks, Inc. v. DOAH*, 412 So.2d 373 (Fla. 1st DCA 1981), hearing officers did not have authority to impose sanctions to enforce discovery orders or subpoenas or compel discovery.

The 1984 Amendment to Section 120.58(1)(b) permits hearing officers to impose sanctions, except contempt to effect discovery by any means available to the courts and in the manner provided in the Rules of Civil Procedure.

This amendment was needed because some litigants prior to 1984 would refuse to comply with discovery to delay the pre-hearing process when delay was in their interests.

Although not a factor in a great number of cases, the amendment has eliminated this tactic, and discovery is now proceeding in a more orderly fashion.

Similarly, the amendment to Section 120.68(1) broadening and clarifying direct appeals of discovery orders to the District Courts of Appeal has not resulted in a great increase in such appeals but has provided for less disruptive pre-hearing procedure when such appeals are taken.

The Future

The impact of 1985 legislation is anticipated to hit DOAH primarily in two areas: bid-dispute resolution and growth management.

House Bill 1392, Chapter 85-180, provides that bid dispute hearing requests will be expeditiously referred to a hearing officer who shall conduct the hearing within 15 days.

In the growth management area, DOAH will be more involved than ever before because of the provisions requiring Department of Community review of Local Plans and permitting activity.

Chapter 85-55 requires local growth management plans to be consistent with the state plan. With liberal standing requirements, many hearing requests are anticipated from local interests on DCA's tentative determinations that local plans do or do not comply with the state plan.

Development Orders, and their compliance with local plans are also anticipated to spark considerable activity after the plan reviews are completed.

This provision will involve hearing officers on a much more intense level with local development activities.

One proposal which did not pass which would have impacted DOAH was a proposal on statewide-review of concealed gun permits.

The Division of Administrative Hearings is handling 4,600 cases per year with the current staff of 25 hearing officers. Three new hearing officers were authorized by the 1985 Legislature. The new hearing officers will be hired on a staggered basis beginning in September and through the end of the year.

Ron Carpenter, formerly a hearing officer with the Public Service Commission who came to DOAH when the hearing officer staffs were consolidated, will retire at the end of September.

At present, the hearing officer salaries are in the range of $34,000 to $58,000, or in the same pay category as general counsels of state agencies.

However, the 1985 Legislature authorized a change in compensation which will raise the pay of hearing officer to the same pay as that of county judges. For hearing officers who have been with DOAH for five years or more, the pay increase will take place January 1, 1986, and for those hearing officers who have been with DOAH less than five years, it will take place Janaury 1, 1987.

The three new hearing officers were authorized by the Legislature on the basis of a caseload study conducted of the current DOAH caseload, by type of case, with projections in the future. Consideration was also given to the adoption of of the legislation mandating the expedited schedule for hearings on bid disputes, Chapter 85-180.

No additional specialized hearing officers were authorized, such as was the case during the 1984 Session. In 1984, the Legislature added two hearing officers for the purpose of hearing cases involving the Hospital Cost Containment Board. These two positions are filled by William Sherrill and Larry Sartin.

For the present, DOAH will rent additional space at its present location, 2009 Apalachee Parkway, in the Oakland Building, to accommodate the additional personnel.

Also, additional secretaries and clerk's office personnel were authorized to handle the caseload.

In terms of the assignment of cases to hearing officers, Division Director, Sharyn Smith, has followed basically a random selection process according to subject matter of the cases while attempting to assign hearing officers to certain

geographical areas of the state in order to reduce travel costs.

At present, in addition to the statutorily mandated HCCB hearing officers, there are three subject matters which are assigned to specific hearing officers. Baker Act cases are presently being handled by Hearing Officers Cave, Pollock, Ruff and Bradwell. Beverage cases are heard by Hearing Officers Parrish and Johnston and DOT sign cases are heard by Hearing Officer Thomas.

A new Chapter 22I, FAC, was adopted by the Division effective March 17, 1985. According to Smith and principal draftsman Hearing Officer Bob Benton, the two initial decisions which were made concerning the rules were: (1) the decision to repeal the entire existing Chapter 22I and start over rather than to amend the existing rules; and (2) the decision not to attempt to deviate from the model rules.

Since the adoption of the rules, there have been no particular problems with their implementation. Administrative Law Section Chair George Waas has appointed a committee to work with DOAH in identifying any potential need for amendments.

Other than the reference in Section 22I-6.31, concerning the submission of proposed recommended orders, the chapter represents a complete statement of rules necessary to practice before DOAH and reference to the model rules, Chapter 28-5, should not be necessary during the pendency of the DOAH proceeding. Pre- and post-hearing matters will still require use of Chapter 28-5.

APA Changes (1985)

The following is a list of session laws from the 1985 Legislative Session which impacted but did not directly amend chapter 120, Florida Statutes.

Chapter 85-3 (CS/SB 154) — relating to deceptive and unfair trade practice. This act amends section 501.207, Florida Statutes, to provide that the head of the enforcing authority shall review an alleged violation of chapter 501, Florida Statutes, and determine if an enforcement action would serve the public interest. The determination is required to be in writing but is not subject to the provisions of chapter 120, Florida Statutes.

Chapter 85-54 (CS/SB 489) — relating to child care. This act was a major piece of legislation and provided amendments to several sections of the Florida Statutes. This act provides that all positions within the Florida Department of Health and Rehabilitative Services are deemed to be positions of special trust and responsibility and a person is not qualified for employment pursuant to s. 110.1127, F.S., if that person has been found guilty or entered a plea of nolo contendere or guilty to any felony enumerated in the act, including being found delinquent. In addition employment may be prohibited if a person has been judicially determined to have committed child abuse as defined in s. 39.011(2) and (7), F.S., had a substantial indicated report of child abuse as defined in s. 415.503, F.S., or committed an act of domestic violence, as defined in s. 741.30, F.S., or if the person is found guilty of a misdemeanor enumerated in the act. The department may grant an exception for these last four violations if the department has "clear and convincing" evidence to support a reasonable belief that the person is of good character as to justify an exemption. The person requesting the exemption has the burden of setting forth "sufficient evidence of rehabilitation". any department decision regarding the exemption may be contested through a chapter 120 hearing. The act also provides the same provisions for caretakers pursuant to s. 393.063, F.S., and establishes minimum standards under s. 393.0655, F.S., for treatment resource personnel pursuant to ss. 396.042 and 396.0425, F.S., and child care personnel under s. 402.305, F.S., and eligibility similar to above including exemption procedures pursuant to chapter 120, F.S.

The act also substantially rewrites s. 402.3055,

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F.S., dealing with licensing of child care facilities. It provides hearing procedures under chapter 120, F.S., for denying, suspending, or revoking a license to own or operate, or being employed by a child care facility or other child care program, and pursuant to s. 409.175, F.S., family foster homes, residential child care agency or child placement agency.

Chapter 85-55 (CS/HB 287) — relating to growth management. This act is another major piece of legislation. The act uses the procedures established in chapter 120, F.S., extensively. It substantially amends s. 163.3167, F.S., which provides the scope of the Local Government Comprehensive Planning and land Development Regulations Act or require the regional planning agencies to adopt rules, pursuant to chapter 120, F.S., for any missing elements or amendments to the comprehensive plan within specified time periods. The local government is required to pay any direct verifiable costs incurred. Any dispute as to the costs shall be determined in a s. 120.57, F.S., hearing

The act requires the state land planning agencies to adopt by rule minimum criteria for the review and determination of compliance of local government comprehensive plan elements required by the act, but such rules are not subject to rule challenges under s. 120.54(4) or drawout proceedings under s. 120.54(17), F.S. The state land planning agency may adopt procedural rules for the review of local government comprehensive plan elements.

The act provides that the state land planning agency shall review each local government's adopted comprehensive plan. And questions of compliance or noncompliance are to be resolved pursuant to a hearing conducted under s. 120.57, F.S. The act also establishes procedures under chapter 120, F.S., dealing with s. 380.06, F.S. — Developments of Regional Impact creating conceptual agency reviews.

Chapter 85-57 (HB 1338) — relating to the State Comprehensive Plan. The act establishes the state plan to coordinate the administration of government policies on all levels. It provides goals and policies and for the submission of the agency functional plans. Each agency is required to hold public workshops of their functional plans including a 21-day period for public comment. All workshops notices are to be published in the Florida Administrative Weekly. The agency functional plans are not rules and are not subject to the provisions of chapter 120, F.S.

Chapter 85-173 (HB 1319) — relating to public swimming and bathing places. This act substantially amends s. 514.03, F.S., to provide approval of construction plans for public swimming pools or bathing places. It provides that denial of approval for the proposed construction, development, or modification of a public swimming pool or bathing place shall be pursuant to the provisions of chapter 120, F.S.

Chapter 85-177 (HB 1387) — relating to insurance and health maintenance organizations. The act amends s. 641.22, F.S., to provide to procedures for the issuance of a certificate of authority by the Department of Insurance. It provides that an HMO must notify both the Department of Insurance and the Department of health and Rehabilitative Services of any intent to expand its geographic coverage area at least 60 days prior to providing health services to that area. Before enrolling any new members in the area, the HMO must certify to HRS that it has capacity to service the new area. HRS must notify the Department of Insurance if it determines that the HMO cannot service its expanded area. The Department of Insurance, upon such notification, may issue an order prohibiting the HMO from expanded area. The Department of Insurance, upon such notification, may issue an order prohibiting the HMO from expanding into the new area. Any such order may be challenged pursuant to chapter 120, F.S., and the Department of Insurance has the burden of establishing that the HMO is incapable of providing comprehensive health care services to its projected number of subscribers in the new area.

The act creates s. 641.3907, F.S., to provide procedures for enforcing the provision of the act dealing activities. If the Department of Insurance has reason to believe that any persons, entity or HMO has engaged or is engaging in any unfair method of competition or any unfair or deceptive act or practice as defined in s. 641.3903, F.S., or if an HMO is operating without a certificate of authority required by statutes, the Department of Insurance may conduct a hearing into the matter pursuant to chapter 120, F.S.

The act limits the sanctions authorized in s. 120.58, F.S., to $1,000 and provides service of charges by "certifying and mailing" a copy to the person, entity, or HMO affected.

If the Department of Insurance determines that the person, entity or HMO has engaged in those prohibited acts mentioned above, it is required to issue a final order pursuant to s.

120.59, F.S., and may: (1) suspend or revoke the HMO's certificate of authority if the HMO knew or reasonably should have known it was in violation of the statutes and/or (2) assess a penalty of $1,000 for each HMO contract offered or effectuated. Any appeals are pursuant to s. 120.68, F.S.

Chapter 85-234 (SB 289) — relating to saltwater fisheries. The act amends s. 370.021, F.S., dealing with the regulation of saltwater fishing, harvesting and possession of specific marine species. It provides for suspension and revocation of licenses issued pursuant to ss. 370.06 and 370.07, F.S., pursuant to chapter 120, F.S.

Chapter 85-312 (CS/SB 490) — relating to insurance. The act amends s. 628.461, F.S., to provide for procedures by the Department of Insurance for the acquisition of voting securities. The department is authorized, on its own initiative or upon request by a substantially affected party, to conduct a hearing on the appropriateness of the proposed filing for acquisition. The department may temporarily disapprove a proposed acquisition through an order pursuant to s. 120.59(3), F.S., if it finds the existence an immediate danger to the public health, safety and welfare of the domestic policyholders.

Chapter 85-333 (CS/SB 755) — relating to alcoholism. The act creates s. 396.178, F.S., to provide procedures for denial, suspension and revocation of license for a treatment resource or prevention resource pursuant to s. 396.172 F.S. The Department of Health and Rehabilitative Services is given the authority for such licensure and if it determines that the applicant or licensee is not in conformance with the provisions of chapter 396, F.S., and rules adopted pursuant to that chapter it may deny, suspend, revoke, or impose reasonable restriction on the license pursuant to chapter 120, F.S.

The following is a citator of acts which authorized rulemaking authority under chapter 120, Florida Statutes.

85-42
85-102
85-109
85-146
85-224
85-242
85-297
85-347

APA Standing and Competitive Economic Injury

by Professor Pat Dore

FSU Professor Pat Dore is in the final stages of authoring a law review article on Florida APA standing.

The article will review legislative and judicial authorities on the subject and make suggestions for reform.

The following excerpt of the draft of the article explores standing and adjudicatory proceedings, specifically in the area of competitive economic injury.

Footnotes have been abridged.

The opportunity for an adjudicatory proceeding, either formal or informal, before an agency determines the substantial interests of a party was intended to be broadly available. Three legislative decisions were critical to achieving the goal of broad availability. First was the decision to make the right to adjudicatory proceedings depend solely on the terms of the administrative procedure act itself. The legislature could have followed the example set by the overwhelming majority of states and made the right to a hearing less readily available by requiring some law external to Chapter 120 to require a hearing to be held before one would be available under section 120.57. It chose not to do so. Second was the decision to make adjudicatory proceedings available when substantial interests were determined by an agency. Again the legislature could have followed the majority of states and stayed with the choice it made when it enacted the 1961 Act and made the opportunity for hearing available only when an agency would determine the legal rights, duties, privileges or immunities of a party. It chose not to be so restrictive. Third was the decision to make adjudicatory proceedings available to a person whose substantial interests will be affected though not determined by agency action which will determine the substantial interests of another person. The legislature could have restricted the right to adjudicatory proceedings to those persons whose substantial interests were being determined by agency action. It chose instead to permit the greater access. Taken together, these three decisions effectively make access to adjudicatory proceedings in Florida the most generous in the country.

The access criteria for invoking section 120.57

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adjudicatory proceedings must be consistent with these legislative policy choices. No law external to Chapter 120 must require a hearing; substantial interests, not legal rights, must be at stake in the proceeding; a person whose substantial interests will be affected in a proceeding which will determine the substantial interests of another is entitled to a hearing. The access criteria drawn from the plain meaning of the statute's language satisfy these policy choices. In summary, each of the following persons should be able to initiate either a formal or informal proceeding: (1) any specifically named person whose important or significant concerns will be decided, settled, or resolved finally by an agency; (2) any person with a legally recognized or protected right, derived from the constitution, statute or agency rule, to participate in a proceeding in which important or significant concerns of a party are decided, settled or resolved finally by an agency; (3) any person whose important or significant personal concerns will be acted on or changed in some way in a proceeding in which he makes an appearance and in which the substantial interests of a party are decided, settled or resolved finally by an agency; (4) any person allowed by an agency, in its discretion, to intervene or to participate in a proceeding in which the substantial interests of a party are determined by an agency.

Analysis of Cases Concerning Access to Adjudicatory Proceedings

Generally, the cases concerning access to adjudicatory proceedings have involved one of two questions. First, what is the meaning of "substantial interests" as used in the definition of "party" and in the access language of section 120.57? Or second, what is the relationship between section 120.57's access language and other statutory provisions that confer a right to initiate or to participate in proceedings upon specifically identified persons?

Section 120.57 requires an adjudicatory proceeding when "the substantial interests of *a party* are determined by an agency." Thus, even if the party whose substantial interests are being determined does not request an adjudicatory proceeding, any other person who is a party has a right to initiate a proceeding under section 120.57. This situation is likely to occur when, after free form proceedings have concluded, an agency informs an applicant that it intends to grant a requested license. The license applicant is a party whose substantial interests are determined by the agency's decision to grant the license. Because the applicant succeeded in getting what he wanted from the agency through free form proceedings, he obviously will not request a hearing. But third persons may have interests that will be affected by the agency decision to grant the license to the applicant. If these third persons can establish party status, they can force an adjudicatory proceeding on the correctness of the agency's decision to issue the license. Thus, in these circumstances, the definition of "party" plays a critically important role.

In *Gadsden State Bank v. Lewis,* 348 So.2d 343 (Fla. 1st DCA 1977) the court ruled that Gadsden, a competitor bank, could initiate an adjudicatory proceeding under section 120.57 on the Department of Banking and Finance's decision to grant a branch banking application to Quincy State Bank. The Department's position that a competitor bank was not a party to another bank's branch application was rejected by the court because the Department had by rule identified parties to proceedings before it as including persons who oppose the granting of an application. Gadsden did oppose the granting of Quincy's application for a branch bank and thus was a person who by "provision of agency regulation [was] entitled to participate" in the proceeding. Gadsden had acquired party status through the Department's rule, therefore, it had "the right to a hearing even if the agency and the party whose substantial interests are to be determined agree to omit compliance with Section 120.57."

Because of the Department rule making protesting banks parties to proceedings on another bank's application, the court had no occasion to consider whether in the absence of such a rule an economic competitor nevertheless could gain party status as a person whose substantial interests would be affected by an agency decision to license a competing bank. There is a suggestion in the opinion that potential competitive injury could support party status only if it were made a legally recognized concern by statute or rule. That suggestion no doubt was precipitated by the Florida Supreme Court's decision in *ASI, Inc. v. Florida Public Service Commission,* 334 So.2d 594 (Fla. 1976).

In *ASI,* the Supreme Court ruled that ASI could not compel the Public Service Commission to conduct a section 120.57 adjudicatory proceeding on an application by Airco Air Freight Delivery, Inc. for a for-hire permit "to transport 'delayed, misplaced and/or misrouted baggage..

. from the Jacksonville International Airport' to specified points in northeast Florida." The court noted that the statute under which the Commission acted required for-hire permits to issue "as a matter of right and of course" and then stated:

> We are unable to conclude that the Commission's grant of a permit to Airco constitutes 'substantial interests of [ASI being] . . . determined by an agency,' within the intendment of Section 120.57, . . . even assuming that ASI will experience competition from Airco, operating under its new for-hire permit. *The fact is that ASI has no legally recognized interest in being free from competition.* On the contrary, the statutory scheme is one of free and unfettered competition among for-hire motor vehicles on public highways. . .. The procedural requirements established by the administrative procedure act evince no purpose either to alter this substantive policy or to require hearings to find facts which can have no bearing on agency action.

The court's analysis is flawed in several respects. First, it fails to appreciate that any party has a right to an adjudicatory proceeding when the substantial interests of a party are determined by an agency. By substituting ASI by name for the statutory phrase "a party" in its quotation of the section 120.57 access language, the court implies that the right to an adjudicatory proceeding belongs only to the party whose substantial interests are determined in the proceeding. The language does not support such a restrictive view. On this point, the *Gadsden State Bank* court's more careful analysis yielded a result more in keeping with the plain meaning of the statutory language.

Second, the court seems to equate "substantial interests" with "legally recognized interest." This is especially troublesome in light of the legislative history and the multifaceted definition of "party." The phrase "substantial interests" was chosen deliberately to make adjudicatory proceedings available to persons whose important or significant interests were affected or determined by agency action whether or not those interests were recognized technically as protected legal rights. Indeed, to equate "substantial interests" with "legally protected interest" as the *ASI* court did renders the definition of "party" inexplicably redundant. As defined, "party" includes specifically any "person, who as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate . . . in the proceeding, *or* whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party." A person whose interests are legally recognized by the constitution, by statute or by rule is a party under the first part of the provision; a person whose interests are not legally recognized but nevertheless are important or significant and will be affected by the proposed agency action is entitled to party status under the second part of the provision. ASI may not have had a legally recognized interest in being free from competition. But that should have been only the beginning not the end of the court's inquiry. The next step was to decide whether the proposed agency action—the issuance of a permit to Airco to engage in certain ground transportation activities for compensation—would affect any important or significant interests of ASI. I am inclined to agree with Professor Levinson's response:

> a competitor should be regarded as having a substantial interest in any proceeding which would have a substantial impact upon him, such as a proceeding to issue a permit to another party in the same business if favorable action on the application would have a significant impact upon others in the business.[1]

Third, the court fails to appreciate that the right to initiate an adjudicatory proceeding is controlled access language of section 120.57 but that the scope of the proceeding is governed by the for-hire permit statute. If the court analyzed the access language of section 120.57 and concluded that ASI was entitled to party status in the Airco proceeding because its substantial interests would be affected if the permit issued, it would then have to turn to the for-hire permit statute to determine the scope of ASI's participation in the proceeding. Granting a competitor access to the proceeding because his substantial interests will be affected by the proposed agency action does not mean that evidence and argument about potential competitive economic injury must be entertained by the agency. The questions that may be put in issue in the proceeding as well as the evidence and argument that must be received are governed solely by the substantive statute which authorizes the agency action. Again Professor Levinson's analysis is persuasive:

> The extent of [the competitor's] participation would depend on the law applicable to the granting of permits for the specific type of business activity involved. In a situation such as that in ASI, where the statute does not require an applicant to demonstrate public convenience and necessity, the agency might strike as irrelevant any matters asserted by the competitor relating to public convenience and necessity. The competitor might find himself without any remaining arguments for submission to the

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> agency—but this result would follow from defining the scope of the competitor's participation, not from excluding him for lack of substantial interest.

The court's failure to distinguish between the right to an adjudicatory proceeding and the scope of one's participation in that proceeding, and its failure to recognize the relationship between the procedural requirements of Chapter 120 and the substantive requirements of other law caused it to undermine one of the distinctive features of section 120.57—the right to invoke its procedural protections is conferred by its own terms without reference to other law. As a consequence, persons entitled to request adjudicatory proceedings by the terms of section 120.57, principally economic competitors, are denied the right because competitive economic impact is not made a concern in the issuance of a license by statute or rule. This manipulation of the section's access criteria is unfortunate and unnecessary but the *ASI* court's error has been repeated by the district courts of appeal.

Since the early 1960's, sulphur, a necessary ingredient in fertilizer, has been brought into Florida in liquid or molten form. Agrico Chemical Company, a manufacturer of fertilizer, purchased molten sulphur from the Freeport Sulphur Company. Freeport transported the molten sulphur in a specially designed ship and brought it into the state through the Port of Tampa where it was handled by Sulphur Terminals Company until its transfer to Agrico. When a method of transporting sulphur in solid form, referred to as "prill," became available through a Canadian supplier, Agrico filed an application with the Department of Environmental Regulation (DER) for construction permits to build a facility to handle prill sulphur. Agrico applied for an air pollution source permit and a waste water facility permit. DER issued the waste water permit and a letter of intent to issue the air permit. Freeport and Sulphur Terminals filed petitions for section 120.57 proceedings to contest the issuance of the air and waste water permits. Both petitions were referred to the DOAH and assigned to the same hearing officer.

The hearing officer recommended to DER that the petition challenging the waste water permit be dismissed because that permit had already been issued. In its final order, DER dismissed the petition for lack of "standing." It concluded that Freeport and Sulphur Terminals failed to establish that the proposed waste water treatment facility would harm their environmental interests and that the real nature of their substantial interest was future economic impact, a concern not within the "zone of interest" protected by the environmental permitting statute.[2]

Freeport and Sulphur Terminals then amended their petition for hearing on the air permit application to allege that environmental injury would result from the proposed prill sulphur facility. The hearing officer found that Freeport and Sulphur Terminals had the right to a section 120.57 proceeding on the proposed air permit for three reasons: (1) their substantial interests — adverse economic impact — were affected; (2) DER allowed them to intervene by forwarding their petition to the DOAH; (3) a DER rule entitled them to party status. At the conclusion of the hearing on the permit application, the hearing officer recommended that DER deny the air pollution source permit. DER's final order, approved by the Environmental Regulation Commission, rejected the first two grounds proffered by the hearing officer for permitting Freeport and Sulphur Terminals to initiate the proceeding, but agreed with the hearing officer that a DER rule gave them party status. The final order accepted the hearing officer's recommendation on the substantive question and denied Agrico's air pollution source permit.

On review, the court held that it was error to permit Freeport and Sulphur Terminals, economic competitors of Agrico, to participate in Agrico's permit proceedings and directed DER to proceed with the issuance of the air pollution source construction permit. The court's discussion of the economic competitors right to initiate an adjudicatory proceeding on another's permit application was in two parts. First, whether potential economic injury qualifies as a "substantial interest" which will be affected in an environmental permitting proceeding; second, whether DER could and did by rule extend party status to these competitors.

With regard to the meaning of "substantial interests," the court accepted DER's view that the interest must be within the "zone of interest" protected by the permitting statute. The court articulated its standard in these terms:

> we believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of

injury. The second deals with the nature of the injury. While petitioners in the instant case were able to show a high degree of potential economic injury, they were wholly unable to show that the nature of the injury was one under the protection of [the environmental permitting statute].

While it is true that the court did not call its access test by the name "zone of interest" and it did not cite the United States Supreme Court decision that first announced the test, the federal "zone of interest" test is precisely what the court grafted onto section 120.57.[3] The federal "zone of interest" test is not an all purpose rule even in federal law. It was the result of the Supreme Court's effort to give meaning to the federal administrative procedure act's provision extending a right to judicial review to a person "*adversely affected or aggrieved* by agency action *within the meaning of a relevant statute*." 5 U.S.C. §702 (1966). When the statute to be construed requires adverse affect "within the meaning of a relevant statute," it may make sense to say that the interest injured must be one arguably within the zone of interests to be protected by the statute under which the agency action is taken. But the statute construed by the *Agrico* court does not say a person is a party if his substantial interests are adversely affected or aggrieved by agency action within the meaning of a relevant statute. It simply says a party is a person whose substantial interests will be affected by proposed agency action. There is no justification for using the "zone of interest" test to construe that language.

The *Agrico* court fell into the same error the *ASI* court did. It failed to recognize that the right to initiate section 120.57 proceedings is controlled by that section's own terms, but that that the scope of the proceeding is governed by the substantive statute which authorizes the agency's action. The hearing officer did appreciate the point. He conducted what the parties referred to as a "mini-trial" on "standing" during which he allowed Freeport and Sulphur Terminals to introduce evidence of the potential economic injury they would suffer if the permit issued. This evidence was allowed and used to establish that Freeport's and Sulphur Terminals' substantial interests would be affected by the proposed agency action. During the substantive portion of the hearing, the evidence proffered and admitted went not to the economic effects but to the environmental effects of handling prill sulphur. Freeport and Sulphur Terminals did not try to persuade either the hearing officer or DER to protect their "profit and loss statement" under a statute designed to protect the environment. What the threat of an enormous economic injury gave them a strong incentive to do was help DER protect the environment. With the financial resources to match Agrico lawyer for lawyer and expert witness for expert witness, Freeport and Sulphur Terminals were able to convince the hearing officer, DER, and the Environmental Regulation Commission that DER's initial decision to issue the air pollution source construction permit was unsound because of potential damage construction of a prill sulphur facility would cause to the environment.

The hearing officer recognized that the plain meaning of section 120.57's access language entitles persons who can show that their important or significant interests will be affected by the proposed agency action to party status without regard to whether their interests are protected by the statute which authorizes the agency action. He also recognized that the environmental permitting which all parties had to try the case. If that statute permitted DER to consider the competitive economic impact of its permitting decisions, then evidence of economic consequences would be admissible; if that statute permitted DER to consider only environmental impact, then only evidence of environmental consequences would be received and used as a

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Florida State University Law Review Set to Publish Inaugural Review of Florida Legislation

The Florida State University Law Review will publish the *Review of Florida Legislation* in October and it is the first publication of its kind to directly address Florida legislation and one of only three legislative journals published nationwide.

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basis for decision. This approach to the problem of economic competitors participating in environmental permitting proceedings maintains the integrity of section 120.57 and the environmental permitting statute. The *Agrico* court and others that have adopted its "zone of interest" test to control access to section 120.57 proceedings have sacrificed the section's central integrity by forcing it to serve ends better served by the scope of participation concept. See Shared Services, Inc. v. HRS, 426 So.2d 56 (Fla. 1st DCA 1983).

The second part of the court's discussion of competitors rights to participate in another's permitting proceeding concerned whether DER had by rule allowed economic competitors to participate. DER's position was that it could make "potential competitive economic injury cognizable in its licensing proceedings" and that it had here through its Latest Reasonably Available Control Technology rule (LRACT).[4] In making its decision on Agrico's permit, DER was required to determine and apply LRACT. The rule said, in part, "[i]n making the determination the Department shall give due consideration to 'among other things' the social and economic impact of the application of technology." DER's interpretation of this rule was that "'[e]conomic impact' is broad enough to reasonably include consideration of the potential economic impacts application of LRACT would have on competitors of the applicant."

The court rejected DER's interpretation of its own rule saying that it was not persuaded that the rule's reference "to 'social and economic impact' can be reasonably read to include the economic impact on a business entity when a competitor is first on the market with a less expensive product." Rather, in the court's view, LRACT when "read in the context of DER's statutory framework" is better interpreted as a cost/benefit directive to DER that it consider the costs to business of complying with the new technology requirements and weigh those costs against the benefits the technology is expected to bring to environmental interests. Thus, the court concluded, LRACT

> does not require DER to balance the cost of new technology to the affected business against possible economic loses to a business competitor. Thus, the LRACT Rule is not a 'provision of agency regulation' which allows a competitor to object, *solely on the basis of potential competitive economic injury*, to the issuance of the permit. . . .

By rejecting DER's conclusion that LRACT was an agency regulation which conferred party status on the two competitors in Agrico's permitting proceeding the court also rejected DER's claimed "right to grant standing to economic competitors if it chooses to do so, even though its final decision to issue or deny a permit may not be based on the economic effect on an applicant's competitor." DER's position is supported by two aspects of the definition of "party" in Chapter 120. A party is (1) any "person who, . . . [by] provision of agency regulation, is entitled to participate . . . in the proceeding . . ." Section 120.52(11)(b), and (2) "[a]ny other person, . . . allowed by the agency to intervene or participate in the proceeding. . .." Section 120.52(11)(c). But the court's inability to divorce the substance of the proceeding from the access question prevented it from seeing that on this point DER was correct. Although the court did not explain why DER could not allow economic competitors to participate in permitting proceedings if it chose to do so, the opinion suggested that DER's authority to grant party status by rule or otherwise was limited by the statute which authorized its action on the merits in the same way that affected substantial interests were limited to those within the "zone of interests" protected by that statute. Recall that the court read LRACT "in the context of DER's statutory framework." If the court meant to suggest that the agency discretion to give party status to any other person, conferred on the agency in Chapter 120's definition of "party," is limited to persons asserting injury to an interest protected by the agency's substantive statute, it is clearly wrong. Neither the plain meaning of the language used nor the legislative history supports the court's suggestion.

Competitive economic injury is a substantial interest, and if persons claiming economic injury will be affected by proposed agency action, they are entitled to party status. That does not mean that the substantive policy which an agency is responsible for implementing will be misappropriated "to redress or prevent injuries to a competitor's profit and loss statement." *Agrico,* 406 So.2d at 482. It does not mean that hearings will be required "to find facts which can have no bearing on agency action." *ASI,* 334 So.2d at 596. Rather, it means that persons with a financial incentive will help the agency serve the public interest, not their own private interest, by marshaling competent and substantial evidence to support facts upon which the agency is required to act to make an informed decision. Only facts

material and relevant to the agency's decision may be put in issue in the proceeding. What is material and relevant to the agency's decision depends on the terms of the substantive statute which authorizes the agency action.

FOOTNOTES

[1] England and Levinson, *Administrative Law*, 31 U. Miami L. Rev. 749,757, n. 44 (1977). Professor Levinson's comments on the ASI decision were not joined in or commented upon by his coauthor, Justice England.

[2] Agrico Chemical Co. v. Department of Environmental Regulation, 406 So.2d 478, 479 (Fla. 2d DCA 1981), *pet. for rev. denied, sub nom* Freeport Sulphur Co. v. Agrico Chemical Co., 415 So.2d 1359 (Fla. 1982).

[3] The "zone of interest" test was announced in Association of Data Processing Service Organizations v. Camp, 397 U.S. 150 (1970).

[4] Fla. Admin. Code R. 17-2.03 (1981). LRACT was repealed before the final hearing was held on the Agrico permit. It was replaced with the Best Available Control Technology rule (BACT). Fla. Admin. Code R. 17-2.03. BACT provided that any proceeding involving a determination of LRACT in process on the effective date of the rule change was to be governed by LRACT. Fla. Admin. Code R. 17-2.03(3)(b).

Administrative Law Section

Detail Statement of Operations

(Ending as of 6/30/85) For fiscal year 1984-85

Title	Year to Date	Annual Budget
Revenues		
Dues	$8,745	9,000
Dues Retained by TFB	4,373-	4,500-
Net Dues	4,372	4,500
Videotape Sales	204	
Audio Sales	15	
Seminar I	1,538	650
Seminar II	920	730
Seminar III		530
Interest	1,017	1,500
Total Revenues	8,066	7,910
Expenses		
Postage	535	500
Printing	131	400
Officers Office Exp		750
Newsletter	60	600
Membership	49	100
Supplies		100
Photocopying	119	100
Committee Expense	54	300
Board or Council	152	300
Bar Annual Meeting	2,478	2,750
Section Annual Meeting		1,000
Mid-Year Meeting	378	500
Administrative Conference	3,656	3,500
Awards		200
Other		100
Total Expenses	$7,612	11,200
Current Op. Loss	454	3,290-
Beg Fund Balance 7/1/84	$9,345	7,520
Fund Balance Ending 6/30/85	$9,799	4,230

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Amendments to Section Financial Policies

The amendments reflected below are applicable to the financial policies approved by the Executive Council earlier this year. These changes should be noted in those policies for future reference. The amendments are as follows:

I. Budget Policies
   H. Budget Amendments
      During any fiscal year, by action of its Executive Council, a section may make budget amendments without Budget Committee approval of up to an aggregate of 10% of their total disbursement budget provided no new line item or program is added by the section. *The Executive Council may delegate this authority to its duly authorized Executive Committee provided actions of the Executive committee are ratified by the full Council.* All budget amendments that are more than 10% of the aggregate disbursement budget and all new programs must be approved by the Board of Governors. (Recommended by Budget Committee & approved by BOG 5/15/85)

II. Disbursement Policies
   E. Section Reimbursement Policy
      (1) Telephone Charges: Telephone charges must be itemized as to amount and least one of the following:
      party called ~~and date~~, (b) telephone number, or (c) purpose of the call. (Recommended for deletion by Executive Director on 8/7/85

      (5)h — Expenses may not be paid for companions, spouses, associates, etc., that would not otherwise be payable directly to that companion, spouse, etc. *This policy shall not prohibit payment of spouse expenses of a non-Florida Bar member speaker. Such spouse expenses related to a CLE course shall be deemed "excess speaker expense" under I(J) of this policy and shall be charged to the applicable section budget category.* (Recommended by Budget Committee & approved by BOG 5/15/85)