Administrative Law Section Newsletter

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From the Chair

by Mary F. Smallwood

In my last column, I indicated that the Administrative Law Section would be notifying Section members of a Special Meeting to be held to consider proposed modifications and additions to the Section's approved legislative positions. After being duly noticed, that meeting took place on January 16, 2001, here in Tallahassee. I was pleased to see that it was well attended by representatives of both private and public entities. The comments and suggestions received and questions raised by attendees were extremely helpful to the Executive Council members. This was particularly true because the Administrative Procedure Act applies to such a broad spectrum of administrative proceedings. Because of the substantive statutes that are being implemented, it was helpful to have input from practitioners in a variety of areas.

Based on these comments and discussion at the Special Meeting, the Executive Council voted to adopt the following five legislative positions:

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

Points of Entry:
Opposes any amendment to Chapter 120, Florida Statutes, or other legislation, to deny, limit, or restrict points of entry to administrative proceedings under Chapter 120, Florida Statutes, by substantially affected persons.

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

Mediation:
Supports voluntary use of mediation to resolve matters in administrative proceedings under Chapter 120, Florida Statutes, and supports confidentiality of discussions in mediation; but, opposes mandatory mediation and opposes imposition of involuntary penalties associated with mediation.

Uniformity of Procedures:
Supports uniformity of procedures in administrative proceedings under Chapter 120, Florida Statutes, and

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The New and Improved APA: Three Questions, Three Answers

by Susan L. Kelsey

A. What is an agency's "substantive jurisdiction"?
B. If an agency disagrees with an ALJ's ruling on a conclusion of law outside the agency's substantive jurisdiction, can the agency immediately seek interlocutory appellate review of that conclusion of law before entering a final order?
C. How specific must the "specific powers and duties" delegated to agencies be in order for rulemaking to be valid?

I. APA Amendments: Conclusions of Law Outside Agency's Substantive Jurisdiction.
The first two questions listed above arise from the Florida Legislature's

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supports modification of such procedures only through amendment of or exceptions to the Uniform Rules of Procedure.

In general, there appeared to be broad support within the membership for these changes to the Section's legislative positions. There was a question raised as to whether the Section should adopt any legislative positions in light of the potential differences of opinion on these topics. Admittedly, the Section's membership is very diverse, and the potential for disagreement does exist. However, the broad support for these positions suggests that, at least with respect to the issues addressed at the Special Meeting, there is a consensus of the membership.

Clearly, there are certain areas where it would be difficult, if not impossible, to reach such a consensus. For example, one participant at the meeting asked whether the Executive Council had considered adopting a position on the question of what statutory authority is necessary or appropriate for an agency to engage in rulemaking. While this issue has undoubtedly been one of the most pressing topics in administrative law in recent months, it also engenders a great deal of controversy. The likelihood of reaching agreement on a legislative position on such an issue is negligible.

The proposed legislative positions were submitted to the Board of Governors and approved at its February 9, 2001, meeting in Tallahassee, Florida.

I would like to personally thank each and every member of the Section who took the time to attend the Special Meeting or submit written comments. Each and every one of those comments was seriously considered; and I believe the resulting changes in the draft positions have clarified and improved the language.

Coming May 2001

Florida Administrative Practice (6th ed. 2001)

This joint project of CLE Publications and the Administrative Law Section provides a one-volume desk reference for attorneys practicing administrative law. The sixth edition updates all statutes, rules, and cases through March 2001. An appendix includes the full text of F.S. Chapter 120 (2000), the Uniform Rules (Fla. Admin. Code Rules 28-101-28-110), and a table cross-referencing old and 1996 APA citations.

Chapter titles and authors are **The Administrative Process and Constitutional Principles**, Charles Stampelos; **Overview Of The Administrative Procedure Act**, F. Scott Boyd; **Procedure For Adoption Of Rules**, Dan R. Stengle; **Administrative Adjudication**, G. Steven Pfeiffer and Katherine Castor, **Proceedings In Which There Are No Disputed Issues Of Material Fact**, Lisa Shearer Nelson; **Professional And Occupational Licensing**, Edwin A. Bayo, Gregory A. Chaires, and John J. Rimes; **Regulatory Agencies**, Robert S. Cohen; **Environmental Agencies**, Mary Smallwood and Cathy Sellers; **Department Of Revenue**, Cynthia S. Tunnicliff; **Public Service Commission**, Patrick K. Wiggins; **Bid Dispute Resolution**, Mary M. Piccard; **Judicial Review**, Margaret-Ray Kemper; and **Attorneys' Fees And Cost Awards**, Mary Smallwood. **Steering Committee members** are Linda Rigot and William Williams.

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THE FLORIDA BAR

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Chapter 2000-141, Florida Laws:
Administrative Procedural Aspects of the New Building Code Law — Part II

by Suzanne H. Schmith

Background

The 1998 Legislature passed HB 4181, directing the creation of a single, statewide building code, thereby heralding a significant policy departure from the current system in which local governments adopt, amend, interpret and enforce a variety of minimum building codes. The 1998 law directs the state, through the Florida Building Commission created therein, to develop a single statewide building code to be adopted by state rule. Never before has the state's building code been subject to the Administrative Procedure Act[1] and all that it involves. The implications are broad and perhaps not fully understood by all the affected parties: the code is subject to all state rulemaking requirements, including review by the Joint Administrative Procedures Committee (JAPC), and subject to challenge as a proposed rule, interpretation through declaratory statements and amendment through the chapter 120 process.

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

Variances and Waivers

As amended in 1996, the Administrative Procedure Act requires all agencies to provide for waiver of, or variance from, its rules and regulations.[2] The intent is to provide relief from the strict technical requirements of the rule based upon the individual's set of circumstances.[3] Since the Florida Building Code is adopted by agency rule, the variance or waiver requirement must also apply. Under chapter 120, the Florida Building Commission would be required to accept, consider and rule upon petitions for waiver or variance from the Florida Building Code, a code which is adopted by state rule, but which is enforced essentially at the local level by local building officials. This is one of the areas of confusion created by the convergence of locally-administered building codes with the state administrative processes.

The commission considered this issue in February, 2000 at its meeting in Orlando. During the public comment portion of the meeting, the commission heard from local building officials who insisted that the Florida Building Code is a minimum code from which there should be no waivers or variances.[4] There was also some concern about the commission acting upon such petitions which are essentially a local issue.[5] However, the commission noted that the code as drafted contains a provision authorizing building officials to accept alternative methods of compliance with the intent of the code.[6] As a result, the commission voted to recommend to the Legislature that petitions for waiver or variance not be accepted by the commission and that the existing "variance" procedure be preserved to allow for flexible application at the local level of this statewide regulation.

The commission's recommendation was codified by the Legislature in section 1 of chapter 2000-141, Laws of Florida, by creating subsection (16) of section 120.80, Florida Statutes, to read as follows:

> **(16) FLORIDA BUILDING COMMISSION.—**
>
> (a) Notwithstanding the provisions of s. 120.542, the Florida Building Commission may not accept petition for waiver or variance and may not grant any waiver or variance from the requirements of the Florida Building Code.
>
> (b) The Florida Building Commission shall adopt within the Florida Building Code criteria and procedures for alternative means of compliance with the code or local amendments thereto, for enforcement by local governments, local enforcement districts, or other entities authorized by law to enforce the Florida Building Code. Appeals from the denial of the use of alternative means shall be heard by the local board, if one exists, and may be appealed to the Florida Building Commission.

In this way, the Legislature addressed the need to provide flexible application of the code for the regulated industry, design and construction professionals, while preserving the local administration of the statewide code. This reconciles statewide rule adoption with local administration and enforcement.

Declaratory Statements

While the Florida Building Commission retained many of the powers and duties of its predecessor, the

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Board of Building Codes and Standards, it was also granted many new powers and duties by the Legislature through chapter 98-287, Laws of Florida. For example, the commission received the authority to develop a product approval system[7] and an education and training system[8] to ensure compliance with the new code, and to hear appeals of local government interpretations of the code,[9] as discussed above. The commission retained the Board's authority to issue its own interpretations of code documents and parts of chapter 553, Florida Statutes; however, that authority, which previously existed as advisory and binding opinion authority, was transformed in 1998 to declaratory statement authority[10] to be more consistent with the Administrative Procedure Act.

The 1998 Legislation created conflicts between the commission's declaratory statement authority and some of its new powers, which were addressed by the 2000 Legislature through chapter 2000-141, Laws of Florida. The first conflict arose in the area of product approval. The legislation authorized the commission as follows:

> Upon written application by any substantially affected person or local enforcement agency, issue declaratory statements pursuant to s. 120.565 relating to new technologies, techniques, and materials which have been tested where necessary and found to meet the objectives of the Florida Building Code.[11]

Further, this language was repeated in another section of the commission's declaratory statement authority.[12] The commission was concerned that this authority may be used by parties to circumvent the product approval system also under development by the commission. Because this authority, as applied to the existing minimum codes, had been used by the commission to issue opinions which were not strictly product approvals,[13] the commission recommended its modification rather than deletion. The Legislature implemented the commission's recommendation by amending the law to clarify that the declaratory statement authority is inapplicable to products required to be approved through the statewide product approval system.[14]

A second conflict arose in the area of hearing appeals from local government interpretations of the code. First, the law granted the commission the authority to issue declaratory statements regarding the "interpretation, enforcement, administration or modification by local governments" of the Florida Building Code.[15] At the same time, the Legislature revised the statute to grant the commission the authority to hear appeals regarding the "interpretation decisions of local building officials,"[16] and the authority to hear challenges regarding local amendment of the Florida Building Code.[17] Realizing that the legislation set up duplicative methods for reviewing local interpretations of and local amendments to the code, the commission requested that the statute be amended to eliminate the duplication. The Legislature addressed this issue in chapter 2000-141, Laws of Florida, by striking references to a local government's interpretation or modification of the code in the commission's declaratory statement authority.[18] Further, the Legislature clarified that the commission's authority to hear appeals is the exclusive remedy for addressing local interpretations.[19]

Finally, on the issue of declaratory statements, chapter 2000-141, Laws of Florida, authorizes the commission to amend the code once a year to incorporate its opinions expressed as declaratory statements.[20] This is a change from the 1998 law, which limited yearly amendments to those which met specific criteria.[21] The purpose of this change was to address the concerns of the commission that the declaratory statement is not an efficient tool to provide answers to the code user in the field faced with uncertainty as to the code's application to the project at issue. The declaratory statement does not provide a quick answer and the project may be upheld, costing thousands of dollars, while the petitioner waits for the administrative process to play out. The commission hopes that code users will be better served by yearly amendments to the code that give statewide application to specific interpretations.

Licensing

Finally, the 2000 legislation also touched on a couple of licensing issues. First, chapter 2000-141, Laws of Florida, transfers the licensing function for Special Inspector of Threshold Buildings from the commission to the appropriate professional licensing boards. Section 82 strikes the commission's authority to establish a qualification program for special inspectors, while retaining and refining the duties of the special inspector during the permitting and inspection process.[22] Sections 37 and 38 create the authority to certify special inspectors within the governing statutes for the Board of Architecture and Interior Design[23] and the Florida Board of Professional Engineers,[24] respectively. This change places the responsibility for licensing special inspectors with the professional licensing boards, which is more appropriate than with the commission charged with developing the Florida Building Code.

Second, the law strikes the commission's authority to adopt rules to establish the product approval system, requesting instead a recommendation from the commission for the 2001 Legislative Session.[25] This change creates uncertainty over the status of the product approval system and the issue becomes whether the criteria and procedures for the state's product approval system will be established in law, where they can be changed only by the Legislature, or by commission rule, where they are subject to the rulemaking procedures of chapter 120, Florida Statutes. Neither the 1998 nor the 2000 legislation directly addressed the issue of whether the statewide product approval system would be a licensing program governed by section 120.60, Florida Statutes. However, the Administrative Procedure Act defines the term "license" to mean "a franchise, permit, certification, registration, charter, or similar form of authorization required by law."[26] The system proposed by the commission thus far includes certification of product evaluation entities, quality assurance agencies, and issuance of certificates of approval for statewide use of a product. Without specific exemption by the Legislature, it is difficult to see how the system could be con-

sidered outside of the licensing requirements of the Act. Implementing such a vast licensing program will pose significant challenges for the commission and its staff.

Conclusion

Chapter 2000-141, Laws of Florida, reconciles the 1998 legislation, establishing the Florida Building Commission and directing it to develop a single statewide building code, with the various requirements of the Administrative Procedure Act. The law exempts the commission from the variance and waiver requirements, deferring instead to the existing system of accepting alternative methods and materials to achieve the purposes of the code, as determined at the local level; reconciles conflicts between the commission's declaratory statement and other authorities; and transfers a licensing function from the commission to two of the state's professional licensing boards. Implementing the 1998 legislation has presented, and will continue to present, the commission with a challenge as it adjusts to using the Administrative Procedure Act to develop building codes which have heretofore been within the realm of local government ordinance. The commission will face perhaps its biggest challenge as it implements the state's product approval system within the requirements of the APA's licensing provisions. The commission will follow the 2001 Legislature's actions with great anticipation and interest.

Endnotes:

[1] Ch. 120, Fla. Stat. (2000).
[2] §120.542, Fla. Stat. (2000).
[3] §120.542(1), Fla. Stat. (2000).
[4] *See* Minutes of the Board Meeting of the Florida Building Commission, Public Comment Section, February 14, 2000.
[5] *See Id.*
[6] §103.7, Florida Building Code.
[7] Ch. 98-287, §§46 and 54, 1998 Laws of Fla. at 2544, 2556.
[8] *Id*, §52, 1998 Laws of Fla. at 2554.
[9] *Id*, §46, 1998 Laws of Fla. at 2543-44.
[10] *Id.*
[11] §553.77(1)(c), Fla. Stat. (1999); fn.1.
[12] §553.77(3), Fla. Stat. (1999); fn.1.
[13] *See* In the Matter of Edward F. Hubert, P.E., DCA99-DEC-046, April 20, 1999 (recognizing a computer software program to implement the wind design calculation procedures of section 1606.2 of the Standard Building Code, 1997 edition).
[14] Ch. 2000-141, §79, 2000 Laws of Fla. at 493, 495.
[15] Ch. 98-287, §46, 1998 Laws of Fla. at 2543.
[16] *Id.*
[17] *Id*., §40, 1998 Laws of Fla. at 2534.
[18] Ch. 2000-141, §79, 2000 Laws of Fla. at 493.
[19] *Id.*
[20] Ch. 2000-141, §75, 2000 Laws of Fla. at 485.
[21] Ch. 98-287, §40, 1998 Laws of Fla. at 2535-36.
[22] Ch. 2000-141, §82, 2000 Laws of Fla. at 497-98.
[23] *Id*., §37, 2000 Laws of Fla. at 449.
[24] *Id*., §38, 2000 Laws of Fla. at 449-50.
[25] *Id*., §90, 2000 Laws of Fla. at 509-510.
[26] §120.52(9), Fla. Stat. (2000).

Make Plans to Attend!

2001 Annual Meeting of The Florida Bar

June 20-23
Orlando World Center Marriott

Administrative Law Section Activities

Thursday, June 21
6:30 – 7:30 p.m.
Section Reception

Friday, June 22
8:00 – 100:00 a.m.
Executive Council/
Section Annual Meeting

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Emerald Oaks v. Agency for Health Care Administration, 25 Fla. L. Weekly 2595 (Fla. 2d DCA 2000)

AHCA issued a conditional license to Emerald Oaks, a licensed nursing home, based on findings that several patients received deficient care. On appeal, one of the issues raised was the proper burden of proof in establishing whether a patient's pressure sore was "unavoidable." Emerald Oaks argued that the burden had been improperly shifted to the licensee.

The court agreed with the administrative law judge that the nursing home had the burden of demonstrating that the pressure sores were unavoidable, citing 42 CFR § 483.25(c). That provision states that the licensed nursing home "must ensure that" a patient who does not have pressure sores when they enter the home "does not develop pressure sores unless the individual's clinical condition demonstrates that they were unavoidable." Based on this language, the court held that AHCA only has the burden of demonstrating that the patient did not have pressure sores at the time of admission to the nursing home and developed such sores after admission. The licensee, "in the nature of an affirmative defense," must then demonstrate that the sore was unavoidable.

Heburn v. Department of Children and Families, 25 Fla. L. Weekly 2529 (Fla. 1st DCA 2000)

Heburn applied to the Department for an exemption under Section 435.04, Fla. Stat., which would have allowed him to be employed as a mental health counselor at a hospital. He had previously been convicted of possession of marijuana on school property with intent to sell and armed robbery. Those crimes occurred in 1986 and 1991, respectively. The Department found that Heburn did not meet the statutory criteria and denied his request.

Section 435.04 requires the individual requesting an exemption to demonstrate by clear and convincing evidence that he is entitled to the exemption when considering such factors as the time elapsed since the crime, the circumstances surrounding the incident, the harm to the victim, and the history of the individual since the crime was committed.

After an administrative hearing, the administrative law judge entered an order recommending that Heburn be granted an exemption. He concluded that Heburn had demonstrated, in consideration of the statutory criteria, that he would not present a danger if employed in a position of public trust. The ALJ noted that Heburn had demonstrated that he had positively changed his life.

The Department adopted the findings of fact in the recommended order; however, the final order denied the exemption on the grounds that "the severity of the offenses and the amount of time since the petitioner's last incarceration" indicated "insufficient evidence of rehabilitation."

On appeal, Heburn argued that the Department had incorrectly rejected the ALJ's conclusion without a review of the entire record since it was an ultimate finding of fact. The transcript of the hearing was not a part of the record on appeal.

The court affirmed the final order of the Department. It held that the approval of the exemption was within the discretion of the Department, noting that the degree of discretion involved was at least as great as in licensing actions. Because the evidence relating to the severity of the crimes and the length of time elapsed since incarceration was not in dispute, the court held that the Department was not required to review the transcript of the proceeding before reversing the recommendation of the ALJ.

Department of Transportation v. OHM Remediation Services Corp., 25 Fla. L. Weekly 2682 (Fla. 1st DCA 2000)

The Department filed an appeal from an order of the administrative law judge denying the Department's request for a protective order. OHM had challenged the decision of the Department to award a bid to a competitor and sought to depose counsel for the Department. On appeal, the court agreed with the Department that work product privilege was dispositive. The court remanded the case to DOAH with directions to the administrative law judge to make a determination as to (1) whether the information being sought by OHM was fact related or opinion related and (2) whether OHM had need of the information and was unable to obtain it elsewhere without undue hardship.

Veal v. Escambia County, 25 Fla. L. Weekly 2863 (Fla. 1st DCA 2000)

The appellants had challenged a provision of the Escambia County land development code as inconsistent with the comprehensive plan. During the development process for the code provisions, there was a significant amount of correspondence from the appellants to the County objecting to the proposal, including at least one letter that asserted inconsistency with the comprehensive plan and stated that the appellants would be filing a verified petition. The Department of Community Affairs issued an order in the matter, which was challenged. Before the Division of Administrative Hearings, the County moved to dismiss the petition for hearing, arguing that the appellants had failed to give notice to the County as required by Section 163.3213(3), Fla. Stat. That provision requires that, as a condition precedent to challenging any land development regulation, the "affected person shall file a petition with the local government . . . outlining the facts on which the petition is based and the reasons that the substantially affected person considers the land development regulation to be inconsistent with the local comprehensive plan." The Administrative Law Judge dismissed the petition, concluding that the correspondence between the appellants and the County did not meet the requirements of Section

163.3213(3).

On appeal, the dismissal was affirmed. The court found that the correspondence from the appellants did not provide "the factual specificity and particularized reasons contemplated by [the statute]." Judge Benton dissented. He noted that prior court decisions regarding a "closely related statute" had liberally construed the statutory language to grant broad access to citizens to seek injunctive relief against a local government to prevent it from approving a development order that is not consistent with the comprehensive plan under Section 163.3215. The dissenting decision does not indicate that the actual language of the two statutory provisions is slightly different, although the intent of requiring advance notice to the local government is clearly similar.

The effect of the majority decision is apparently to require the petition filed with the local government to be very specific in raising factual disputes. While this is also true with petitions filed pursuant to Section 120.57 now that the pleading requirements in administrative cases have been tightened up, the timing under Chapter 163 does not allow for amendment of an inadequate petition. Conversely, petitioners under Section 120.57 must be allowed at least one opportunity to amend a deficient petition.

Wentworth v. Department of Environmental Protection, 25 Fla. L. Weekly 2733 (Fla. 4th DCA 2000)

DEP proposed to grant Wentworth a sovereignty submerged lands lease to construct a single-family residential dock at his property. Regulatory approval to build the dock was granted under a noticed general permit. In the letter granting the proprietary approval, the Department recommended that Wentworth publish notice of the approval. However, he decided not to undertake such publication. After construction of the dock had commenced, Wentworth's neighbors sought to challenge the approval. Wentworth argued that he did not have to publish notice because the dock was being constructed under a noticed general permit.

The Department granted a petition for hearing filed by the neighbors as a timely challenge of the authorization to use state-owned lands, even though the construction had already commenced. After a hearing in the matter, the Department issued a final order allowing construction to continue.

On appeal, the court wrote primarily to address the timeliness of the petition challenging the dock. It affirmed the Department's position that the neighbors' petition was timely because Wentworth had failed to publish notice of the authorization to use state-owned lands. As the court noted, the general permit was insufficient to allow construction to proceed since sovereignty lands were involved. There was apparently no factual dispute that the neighbors had filed a petition for hearing as soon as they had actual notice of the construction and that they had never received written notice of the Department's approval of the project.

Rulemaking

State of Florida v. Miles, 25 Fla. L. Weekly1082 (Fla. 2000)

After being convicted of DUI/manslaughter, Miles appealed his conviction challenging, inter alia, a rule of the Florida Department of Law Enforcement (FDLE) which established blood testing procedures. He argued that the rule was invalid because it did not contain adequate methods for preserving the blood samples prior to sample analysis.

Section 316.1933, Fla. Stat., grants FDLE the authority to adopt rules establishing "satisfactory techniques or methods" for blood testing. Pursuant to this authority, FDLE adopted Rule 11D-8.012, which contains requirements for labeling of samples and a requirement that an anticoagulant be used in the sample. The rule, however, does not include any procedures for preservation of the samples. Testimony at the trial level from both sides clearly established the importance of sample preservation. In fact, the State argued that sample preservation was so fundamental to sample integrity that it did not need to be set out in the rule.

In *State v. Bender*, 382 So. 2d 697 (Fla. 1980), the Supreme Court had upheld the constitutionality of the "implied consent" law that compels DUI suspects to submit to testing to determine blood alcohol levels. The Court did note in *Bender* that the purpose of the implied consent law was to "ensure reliable scientific evidence for use in future court proceedings," although it did not specifically address the validity of the rules. The *Miles* court held that this purpose was not met when the rules failed to provide adequate procedures for maintenance of samples. It cited the trial evidence that the blood alcohol levels in a sample could be impacted by failure to properly preserve the sample. Accordingly, the Court found the rule to be invalid.

School Board of Broward County v. Bennett, 25 Fla. L. Weekly 2713 (Fla. 4th DCA 2000)

Bennett and the Broward Paraprofessional Association challenged a policy of the School Board that called for training of teacher's aides to perform urinary catheterizations on students. Section 232.465(2)(a), Fla. Stat., authorizes the School Board to assign "nonmedical assistive personnel" to perform certain health-related services, including "cleaning intermittent catheterization," provided that such personnel are trained and monitored. Following an administrative hearing, the ALJ concluded that the School Board's training policy constituted a rule under Section 120.52(15), which had not been properly adopted.

The court agreed. It rejected arguments by the School Board that requiring it to comply with the APA's rulemaking procedures was "excessive judicial micro-management" of routine job assignments, noting that the procedure involved risks to both the students and the school personnel performing the procedure. Clearly the court was not convinced that the procedure was in any way routine, nor was the court sympathetic to the School Board's arguments that the rule adoption process was difficult or time-consuming.

Southwest Florida Water Management District v. Save the Manatee Club, Inc., 25 Fla. L. Weekly 2749 (Fla. 1st DCA 2000)

The *Save the Manatee Club* case provided the First District an opportunity to address the 1999 amendments to Section 120.52(8), Fla. Stat., governing the required authority of

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agencies to engage in rulemaking. Previously, in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), the court had construed that provision of Chapter 120 to create a "class of powers" test. Under that test, a rule was valid if it regulated matters within a class of powers identified by the Legislature. Following the decision in the *Consolidated-Tomoka* case, the Legislature amended Section 120.52(8) with the clear intent to limit agencies' rulemaking authority. The amended provisions stated that it was not sufficient for a rule to fall within a class of powers granted to the agency; rather, it must "implement or interpret the *specific* powers or duties granted by the enabling statute." Section 120.52(8), Fla. Stat. (emphasis added).

Subsequent to the change in Section 120.52(8), the Save the Manatee Club filed a petition with the Division of Administrative Hearings challenging certain provisions of Rule 40D-4.051, Fla. Admin. Code, which created exemptions from wetlands permitting for a variety of activities. The grounds for the challenge was that the District did not have specific statutory authority to adopt permitting exemptions. The Administrative Law Judge held that the rules were invalid.

The rule challenge stemmed from a development which sought approval to remove a berm between an existing upland canal system and another water body. The developer requested a standard general permit for the project, asserting that Rule 40D-4.051 established exemptions from permitting for certain developments approved prior to October 1984. Accordingly, the District took the position that it would not consider the impacts on wetlands and wildlife habitat from the project.

The court agreed with the Administrative Law Judge that no authority existed for the rule. The District argued that Section 373.414(9), Fla. Stat., directed the District to adopt implementing rules based "primarily on the existing rules of the department and the water management districts." However, the court relied on language in the same statutory provision that stated that permit exemptions could only be adopted where they did not "allow significant adverse impacts." In construing the 1999 amendment to Section 120.52(8), the court looked at the dictionary definition of "specific." It concluded that the intent of the Legislature was that a rule must be based on an explicit power or duty set forth in the statute. In this case, the exemption was based on whether a project was approved before a certain date, not whether it would have a significant adverse impact. Thus, the court concluded that the exemption was not based on a specific power or duty granted to the District.

In dicta, the court noted that rules may still be more detailed in nature than the underlying statute, stating: "The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is *specific* enough."

Public Utilities

Florida Cities Water Company v. Florida Public Service Commission, 25 Fla. L. Weekly 2599 (Fla. 1st DCA 2000)

Florida Cities Water Company challenged the manner in which the Public Service Commission established its rate base for water service. The issue revolved around the determination of "used and useful" property of the utility. That determination is made by establishing a percentage in which the denominator of the fraction is the capacity of the facility and the numerator is the customer demand. Both parties agreed that the denominator should be the capacity of the plant as permitted by the Department of Environmental Protection. However, the parties disagreed on how to calculate the numerator. Florida Cities Water argued that the demand of the plant should be based on the average daily flow during the peak month while the PSC argued that the correct numerator was the annual average daily flow.

The appellate court had previously rejected the PSC's use of the annual average figure, holding that it represented "a considered break with agency policy" that was not adequately explained by the agency or supported by evidence in the record. *Florida Cities Water Company v. Florida Public Service Commission*, 705 So. 2d 620 (Fla. 1st DCA 1998). The court had remanded the matter to the PSC for further proceedings. On remand, the PSC held a hearing at which it considered evidence from both sides about the appropriate calculation. It issued an order concluding that the numerator and denominator should "match" in the sense that they should both be based on annual average flow.

On appeal, the court affirmed the PSC's order. It held that the PSC had sufficiently articulated its basis for the decision in the second order. Moreover, it held that the arguments made by Florida Cities Water essentially requested that the court adopt its interpretation of the evidence over the PSC's interpretation. Accordingly, the court declined to substitute its judgment for that of the PSC.

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recent efforts to "level the playing field" between state agencies and private litigants. In 1996, it substantially amended the APA to restrict agency authority, principally in rulemaking and in administrative litigation.[1] Again in 1999, the Legislature further amended the APA to reinforce the restrictive intent of its 1996 amendments. The 1999 amendment has the effect of forbidding agencies to reject conclusions of law outside their particular substantive jurisdiction:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law *over which it has substantive jurisdiction* and interpretation of administrative rules *over which it has substantive jurisdiction*.

§ 120.57(1)(l), Fla. Stat. (1999) (emphasis added).

Although the modifying phrase "over which it has substantive jurisdiction" entered the statute in 1996 (immediately after the phrase "interpretation of administrative rules"), the First District refused to interpret it as applying to both administrative rules and conclusions of law. *Department of Children and Families v. Morman*, 715 So. 2d 1076, 1077-78 (Fla. 1st DCA 1998) (Ervin, J., concurring, stating that any other interpretation would be a "substantial and profound change" in an agency's authority). The 1999 amendment clarified the intended scope of the 1996 amendment by placing the modifying phrase "over which it has substantive jurisdiction" after *both* the reference to administrative rules and the reference to conclusions of law. *See* David M. Greenbaum and Lawrence E. Sellers, Jr., *1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing*, 27 Fla. St. U. L. Rev. 499, 520-21 & n.145 (2000) (final bill analysis states that the amendment "makes clear" the scope of the agency's authority). The First District has subsequently recognized the effect of the 1999 amendment. *L.B. Bryan & Co. v. School Board of Broward County*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999) (describing the 1999 amendment as "a departure from the long-standing law of this state," although not applicable in that case because it predated the 1999 amendment).

These amendments to section 120.57 raise two immediate questions. First, what is an agency's "substantive jurisdiction"? Second, may an agency that disagrees with an ALJ's conclusions of law outside the agency's substantive jurisdiction get immediate appellate review of that conclusion of law?

An Agency's "Substantive Jurisdiction." The statute does not define "substantive jurisdiction," nor does the legislative history expand on the phrase. Lacking such guidance, the only case to apply the language after the 1999 amendments employed a commonsense approach with no discussion. In *L.B. Bryan & Co. v. School Board of Broward County*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999), the court noted that "The School Board of Broward County *obviously* lacks substantive jurisdiction over the Florida Insurance Code, especially over those provisions of the code relating to surplus lines coverage." (Emphasis added.) This approach suggests that an agency's "substantive jurisdiction" obviously extends only to the subject matter as to which the agency has been given regulatory authority, and stops short of the line where any other agency's authority begins (unless both agencies have been given authority over the same area).

Concurring in an earlier case interpreting the 1996 amendments, Judge Ervin of the First District adopted a similar approach while discussing in general terms the scope of an agency's jurisdiction: "An agency clearly has jurisdiction over its own rules … . Similarly, an agency has jurisdiction in regard to certain laws which delegate to it the right to regulate … ." *Department of Children and Families v. Morman*, 715 So. 2d 1076, 1078 (Fla. 1st DCA 1998) (Ervin, J., concurring). The dissenter in *Morman* also discussed the issue of "substantive jurisdiction," noting that the "substantive jurisdiction" of the Department of Children and Families must be limited to its "putative expertise in families and children, … [and determining] compliance with departmental rules or with laws the Department administers." 715 So. 2d at 1079 (Benton, J., dissenting).

Judge Benton's dissent in *Morman* further developed the analysis by describing what is <u>not</u> within an agency's "substantive jurisdiction." He stated that procedural questions — in *Morman*, determining the facial adequacy of pleadings to give adequate notice of charges — are the province of the ALJ and are not within an agency's substantive jurisdiction: "The Legislature has entrusted just this type of procedural question to administrative law judges, who stand as neutrals in section 120.57 proceedings … ." *Id.* Judge Benton gave the granting of continuances as another example of a procedural question outside the agency's substantive jurisdiction. *Id.* He used as a guideline the question of whether the issue involves a matter as to which the "agency as litigant must be held to the same standards as parties against whom it is litigating disputed facts." *Id.*

A handful of earlier cases illustrate the same kind of self-evident limits on an agency's "substantive jurisdiction." A school board has substantive jurisdiction to determine whether a teacher's misconduct impairs the teacher's effectiveness in the school system. *Purvis v. Marion County School Board*, 766 So. 2d 492, 498-99 (Fla. 5th DCA 2000). The Department of Transportation has substantive jurisdiction over its own bidding rules. *State Contracting and Engineering Corp. v. Department of Trans.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1998). In contrast, an agency does *not* have substantive jurisdiction over procedural and evidentiary rulings made during a hearing. *Florida Power & Light Co. v. Florida Siting Board*, 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997).

Based on the scant authority available to define "substantive jurisdiction," it seems safe to say that a commonsense, plain meaning approach is appropriate. An agency has substantive jurisdiction over the subject matter(s) that the Legislature or Florida Constitution has authorized it to regulate. The agency has subject matter jurisdiction over its own valid rules and regulations promulgated to implement its delegated authority. The agency *lacks* substantive jurisdiction over matters outside that scope, over matters within the exclusive scope of another agency's delegated authority, and over procedural and evidentiary issues not peculiar to its own rules

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and regulations.

ALJ's Conclusions of Law. The APA as amended in 1996 and 1999 does *not* allow an agency that disagrees with an ALJ's recommended conclusion of law outside the agency's substantive jurisdiction to obtain an immediate, interlocutory opinion from an appellate court as to whether the conclusion of law is correct. Nothing in the statute itself or its legislative history suggests that the Legislature intended to create or authorize this interlocutory level of judicial appellate review in administrative proceedings, nor to introduce the delay and expense to private litigants that such review would create. Rather, the Legislature intended for finality to attach to an ALJ's conclusions of law on matters of substantive law outside the agency/litigant's substantive jurisdiction. Section 120.57(1)(l), as amended in 1999, allows an agency to reject a conclusion of law only if that conclusion of law is within the agency's substantive jurisdiction. Thus, faced with an ALJ's recommended order containing a conclusion of law *outside* the agency's substantive jurisdiction, an agency has no choice but to adopt the conclusion of law in the agency's final order.

The First District, in a recent unpublished order, has denied an agency's attempt to obtain interlocutory review of an ALJ's conclusion of law outside the agency's substantive jurisdiction. *Agency for Health Care Admin. v. Avante, Inc.*, Case No. 1D00-2673 ("Per Curiam Denied" rendered Dec. 27, 2000 in response to agency's petition for review of nonfinal administrative action). The issue in *Avante* was whether the private litigant demonstrated good cause for its untimely request for a hearing. The ALJ concluded in the recommended order that the litigant demonstrated sufficient grounds to be entitled to a hearing, whether the theory of relief was called excusable neglect or equitable tolling. The Agency sought review of the recommended order on the grounds that it disagreed with what it considered the ALJ's conclusion that the two theories were interchangeable. After full briefing on both sides, the Court refused to entertain the petition.

Denial of an agency's petition for interlocutory review of an ALJ's recommended conclusion of law outside the agency's substantive jurisdiction is consistent with longstanding legal principles. The amended APA necessarily renders such conclusions of law unreviewable: "Since the 1996 revisions speak only to the authority of an agency to reject conclusions of law over which the agency has substantive jurisdiction, other conclusions of law contained in a recommended order may not be rejected by the agency and are, for all intents and purposes, final." *See* Stengle & Kiser, *Adjudicatory Proceedings*, at 41.

As has long been the law, the agency cannot appeal its own final order. *Florida Dept. of Law Enforcement v. Dukes*, 484 So. 2d 645, 647 (Fla. 4th DCA 1986) (relying on *Cushing v. Dep't of Prof. Reg.*, 416 So. 2d 1197, 1998 (Fla. 3d DCA), *rev. denied*, 424 So. 2d 761 (Fla. 1982)); *Collier County School Bd. v. Steele*, 348 So. 2d 1166 (Fla. 1st DCA 1977). The agency's lack of authority to appeal its own final order does not, however, create a right of interlocutory review. The APA has always restricted review of nonfinal orders of an ALJ to limited circumstances. The effect of the 1996 and 1999 amendments to section 120.57(1)(l) is to further restrict such review.

Section 120.68(1), Florida Statutes (1999), permits interlocutory review of nonfinal administrative orders only in rare circumstances: "A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable *if review of the final agency decision would not provide an adequate remedy.*" (Emphasis added.) In accordance with this statute, previous cases have recognized that an ALJ's recommended order is reviewable only under limited circumstances. *E.g., Florida Comm'n on Hurricane Loss Projection Methodology v. State Dept. of Ins.*, 716 So. 2d 345, 346 (Fla. 1st DCA 1998). The First District has noted that "the opportunity to review a nonfinal order exists only in those cases in which the court must address an issue immediately to protect a substantial right that would be lost in the interim." *Holmes Regional Med. Ctr., Inc. v. Agency for Health Care Admin.*, 731 So. 2d 51, 53 (Fla. 1st DCA 1999). *See also State Dep't of Community Affairs v. Division of Admin. Hearings*, 588 So. 2d 272, 274 (Fla. 1st DCA 1991) (denying petition for review of nonfinal order of hearing officer because review of final order would provide adequate remedy). In short, a party must have a legally cognizable and "substantial right," under genuine and imminent threat of being lost, before it may obtain review of a nonfinal administrative order. No such right exists merely because an agency disagrees with a conclusion of law outside its substantive jurisdiction. An agency's interlocutory appeal from the recommended order would merely circumvent the restrictions of section 120.57(1)(l). An agency in that situation has no substantial right at stake, and therefore is not entitled to review of the recommended order.

An additional level of interlocutory review is improper for the additional reason that it would introduce significant delay and greater expense in the resolution of a case. That would directly contravene the longstanding intent of the APA, and particularly the intent of the 1996 and 1999 APA amendments, which were designed to effect a fundamental restriction on agency power and to provide an advantage, not an additional disadvantage, to private litigants. *See Life Care Centers of America, Inc. v. Sawgrass Care Center*, 683 So. 2d 609, 614 (Fla. 1st DCA 1996) ("An important purpose of the Administrative Procedure Act ... is to *simplify* the process of administrative adjudication, so as to improve access and *reduce expense.*") (emphasis added). In keeping with these principles, an agency cannot be permitted an additional level of interlocutory review of an unfavorable conclusion of law outside its substantive jurisdiction. The agency's final order must adopt conclusions of law outside the agency's substantive jurisdiction.

II. APA Amendments: Specific Powers and Duties.

State agencies have less rulemaking discretion than they used to have, largely as a result of the APA amendments enacted in 1996 and 1999. A number of restrictions on agency

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rulemaking authority were added in 1996, including the so-called "flush left" language inserted after subparagraph (g) of section 120.52(8) (so called because that is how it was typeset when inserted in the statute books, with no indentation or subparagraph designation). The "flush left" paragraph added in 1996 provided that "An agency may adopt only rules that implement, interpret, or make specific *the particular powers and duties* granted by the enabling statute. … Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than *the particular powers and duties* conferred by the same statute." § 120.52(8), Fla. Stat. (Supp. 1996) (emphasis added). The same language appeared in section 120.536(1), Florida Statutes (Supp. 1996).

Despite the legislative intent to restrict rulemaking authority, the First District interpreted the 1996 amendments to have limited impact, in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), *rev. denied*, 727 So. 2d 904 (Fla. 1999). The ALJ in *Consolidated-Tomoka* had invalidated proposed rules on the grounds that the 1996 amendments to the APA, requiring "particular" statutory powers and duties to support rulemaking, demanded greater statutory detail than was present, and thus the rules exceeded the water management district's delegated authority. 717 So. 2d at 76-77. On appeal, the First District reversed, interpreting "particular" as requiring only that a rule or proposed rule be "within the range of powers" statutorily granted to the agency, and valid if "within the class of powers and duties identified in the statute to be implemented." *Id.* at 80.

Reacting in large part to *Consolidated-Tomoka*, the Legislature amended sections 120.52(8) and 120.536(1) again in 1999, expressly stating that its intent was "to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and … to reject the class of powers and duties analysis," but "not to reverse *the result of* any specific judicial decision." Ch. 99-379, § 1, Laws of Fla. (emphasis added).[2] The legislative history of the 1999 amendments reveals that the Legislature intended to emphasize a more restrictive standard for agency rulemaking in response to what it considered inappropriately broad judicial interpretations of the 1996 amendments to the APA, expressly including *Consolidated-Tomoka*:

> [The bill] rejects a judicial interpretation of this standard which created a functional test to determine whether a challenged agency rule is directly within the class of powers and duties identified in the statute to be implemented. [specifically citing *Consolidated-Tomoka*]

House Staff Final Analysis, ch. 99-379, Laws of Fla., at p.5 (June 30, 1999); *see also* Kent Wetherell, *Sour Grapes Make Sweet Wine*, Fla. Bar Environ. and Land Use Law Section [ELULS] Reporter, Vol. XXI, No. 1, at 1, 3 (Dec. 1999) ("*Consolidated-Tomoka* … did not survive the legislative session following its rendition as it was effectively overruled by legislation adopted in the 1999 Session. … The 1999 legislation explicitly rejects the 'class of powers and duties' test created by the court in *Consolidated-Tomoka* … ."). The First District has recently acknowledged that the Legislature has rejected the *Consolidated-Tomoka* standard. *Southwest Florida Water Mgmt. Dist. v. Save the Manatee Club*, 2000 WL 1760116 at *4 (Fla. 1st DCA Dec. 1, 2000).

With this restriction of agency rulemaking authority as its recently stated intent, the 1999 Legislature amended the "flush left" paragraph of section 120.52(8), and section 120.536(1), to replace the phrase "particular powers and duties" with the phrase "*specific* powers and duties," and to reject expressly the judicial "class of powers and duties" analysis:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the *specific powers and duties* granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious *or is within the agency's class of powers and duties*, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the *specific powers and duties* conferred by the same statute.

§§ 120.52(8), 120.536(1), Fla. Stat. (1999) (emphasis added). These amendments raise the question of how to define "specific powers and duties."

"Specific" Means "Explicit," But Not Fully Detailed. The First District has recently rendered the first decision that attempts to delineate the "specific powers and duties" as used in the 1999 APA amendments. In *Manatee*, that court acknowledged that a mere "class of powers and duties" as per *Consolidated-Tomoka* is insufficient to validate rulemaking. 2000 WL 1760116 at *4. The court stated that it would not resort to extrinsic aids to interpret the APA amendment because the language was clear and unambiguous. *Id.* Rather, using only the dictionary definition of "specific," and expressly rejecting any suggestion that it develop some sort of test or guidelines for sufficient specificity, the court required "an *explicit* power or duty identified in the enabling statute." *Id.* (emphasis added). At the other end of the spectrum, the First District stated, this does *not* mean the enabling statute must contain a full level of regulatory detail. Rules will necessarily be more detailed than enabling statutes. *Id.*

This analysis creates the temptation to conclude that the requisite specificity in any given enabling statute may lie somewhere on a continuum between a generality and full detail, but the court stated that the question of authority "is not a matter of degree … [e]ither the enabling statute authorizes the rule at issue or it does not." *Id.* at *5. Refusing to adopt any tests or guidelines for satisfaction of the statutory standard, the *Manatee* court determined that the issue must be determined on a case-by-case basis. *Id.* On the facts presented, the court interpreted the APA narrowly, holding that DEP's statutory authority to grant

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exemptions to permitting requirements based on "significant adverse impact" did *not* carry with it the authority to grant exemptions for any other reason, specifically exemptions based on prior approval. *Id*.

Manatee is a good start in building a body of caselaw that will properly implement the restrictive intent of the Legislature's 1996 and 1999 APA amendments to agency rulemaking authority. Until that body of law develops more fully, however, the bench and bar must continue to look to the intent of the statute. It hardly needs saying that the legislative intent is the polestar of statutory construction. *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494, 500 (Fla. 1999) ("The essential purpose of statutory construction is to determine legislative intent."). The Legislature expressly stated an intent to clarify the restrictions on agency rulemaking authority, and to reject the "class of powers and duties" analysis that the First District employed in *Consolidated-Tomoka*. Because the Legislature's intent was to reinforce a more restrictive boundary on agency rulemaking authority, the Legislature must be presumed to have intended the 1999 use of the word "specific" to be more restrictive and to create a higher hurdle than the 1996 word it replaced, "particular."[3]

The Legislature's intent to have a significant impact on agency rulemaking authority is quite clear for the additional reason that, along with the amendments in both 1996 and 1999, the Legislature established a comprehensive system for all agencies to fix their existing rules to meet the new standards. Under the 1996 and 1999 rule review and authorization process, all agencies are provided a safe harbor period in which to examine their rules, submit to a reviewing committee any rules that might not meet the new standards of additional specificity, and have them fixed with a rule authorization bill while sheltered from attack § 120.536(2), Fla. Stat. (1996). Literally thousands of rules have been processed in this manner. *See* Greenbaum and Sellers, *1999 Amendments*, at 514-17 & nn.98-112.

Many examples exist to instruct the process of drawing the line between the old, ineffective grants of general rulemaking authority or the "classes of powers and duties" authority, and the new requirement of "specific" enabling legislation. The legislative history of the 1996 amendment includes a memorandum from the Senate President explaining the higher level of specificity required even before the 1999 clarification and reinforcement:

> A statute relating to minimizing children's exposure to lead does not authorize a rule requiring that fences be painted even if this would minimize exposure by eliminating paint chips. *In order to comply with the new rulemaking standard, the law must specifically reference fence painting*, for example, the lack of fence painting as a [sic] contributing to the problem or fence painting as a means of correcting the problem. A rule from this scheme would implement, interpret or make specific the specific law pertaining to fence painting (e.g., what type of paint to use, what constitutes a fence, what constitutes painting, etc.).

Greenbaum and Sellers, *1999 Amendments*, at 514-15 n.104 (emphasis added). This example illustrates perfectly that an agency may not rely upon a general grant of authority as a basis for specific rulemaking, and that the enabling statute must specifically reference a subject of regulatory authority in order to authorize rulemaking. If the statute in the example did not reference fence painting, the agency could not adopt rules regulating fence painting. As in *Manatee*, because the statute did not mention exemptions for grandfathering (even though it mentioned exemptions for another purpose), it did not authorize rulemaking that granted exemptions for grandfathering. Both illustrations are consistent with the principle that where reasonable doubt exists as to the "lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." *Radio Tel. Communications, Inc. v. Southeastern Tel. Co.*, 170 So. 2d 577, 582 (Fla. 1965). The recent amendments to the APA have significantly curtailed agency rulemaking authority.

Endnotes:

[1] *See* James P. Rhea & Patrick L. Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 Fla. L. Rev. 1 (1996); Lawrence E. Sellers, Jr., *The Third Time's The Charm: Florida Finally Enacts Rulemaking Reform*, 48 Fla. L. Rev. 93 (1996); Dan R. Stengle & S. Curtis Kiser, *Adjudicatory Proceedings and Pending Proceedings*, Fla. Bar J., Mar. 1997, at 40.

[2] The 1999 Legislature was careful not to reverse *the result of* any particular case decided between 1996 and 1999, in order to avoid an avalanche of challenges to rules promulgated then, and to avoid reversing the outcome of individual cases decided during that period. *See* David M. Greenbaum and Lawrence E. Sellers, Jr., *1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing?*, 27 Fla. St. U. L. Rev. 499, 507-10, 513-16 (2000).

[3] *Carlile v. Game & Fresh Water Fish Commission*, 354 So. 2d 362, 364 (Fla. 1977) (material legislative amendments are presumed to evidence intent to change the law, and courts should therefore give appropriate effect to such amendments); *see also Escambia County Council on Aging v. Goldsmith*, 465 So. 2d 655, 657 (Fla. 1st DCA 1985) ("The differing language in the amended statute indicates a different meaning was intended.").

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