ADMINISTRATIVE LAW SECTION NEWSLETTER

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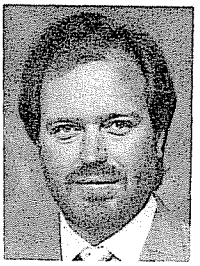
Chairman's Column

Legislative Shields to Rulemaking

by William L. Hyde



In recent years a new animal has crept into the administrative law zoo: the legislative shield to rule challenges. These legislative shields, enacted by the Florida Legislature, shield in whole or in part an administrative agency's rules by prohibiting or placing exacting conditions on a substantially affected party's initiating a rule challenge, whether it be pursuant to Sections 120.54(4), 120.54(17), or 120.56, Florida Statutes. Some persuasive reasons have been offered in justification of these legislative shields, and it is not my intent to impugn the motives of either the administrative agency that requested such legislative relief or the Florida Legislature and Governor who granted it to them. However, it cannot be denied that these legislative shields do deny to substantially affected persons rights that they would otherwise possess under the Administrative Procedure Act. In other words, substantially affected persons are deprived of an otherwise available forum to debate and challenge major policy evolution prior to its adoption and application by a given agency. Is this wise, and have the administrative agencies adequately justified their legislative shields?

For example, pursuant to the Beach and Shore Preservation Act, Section 161.011, *et. seq.*, Florida Statutes, the Department of Natural Resources, Division of Beaches and Shores regulates coastal construction and excavation in the State of Florida. The Department is authorized by Section 161.053(1)(a), Florida Statutes, to establish coastal construction control lines on a county basis along the sand beaches of the state fronting on the Atlantic Ocean, the Gulf of Mexico, and the Straits of Florida.

Section 161.053(2), in turn, provides that the Department can establish such lines only after it has determined from a comprehensive engineering study and topographic survey that the establishment of such a line is necessary for the protection of upland properties and the control of beach erosion. This statute further requires the Department to hold a public hearing in the affected county as well as one before the Governor and Cabinet, at which affected persons have the opportunity to appear. This hearing, moreover, must satisfy all the requirements for a public hearing pursuant to Section 120.54(3), Florida Statutes, and is to be noticed in the *Florida Administrative Weekly* in the same manner as a rule.

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So far, so good. However, Section 161.053(2), Florida Statutes, goes on to provide:

> Any coastal construction control line adopted pursuant to this section shall not be subject to a s. 120.54(4) rule challenge or a s. 120.54(17) drawout proceeding, but, once adopted, shall be subject to a s. 120.56 invalidity challenge. The rule shall be adopted by the Governor and Cabinet (the collective head of the Department) and shall become effective upon filing with the Department of State, notwithstanding the provisions of s. 120.54(13).

The statute also provides that coastal construction control lines are subject to review if and when shoreline changes render those lines to be ineffective for the purposes of the act or at the written request of officials of affected counties or municipalities. An affected property owner shall also be granted a review of the line upon written request, and after such review the Department shall decide if a change in the line as established is justified and shall so notify the person or persons making the request. This decision is subject to judicial review as provided in Chapter 120.

The avowed purpose for this limited legislative shield is that unless such a shield is in place, substantially affected persons can delay the formal adoption of such coastal construction control lines as rules and during that period of delay construct a dwelling or other structure that could not be constructed at all or could only be constructed under certain conditions if the lines were in place and effective. In other words, precluding such pre-adoption rule challenges renders more difficult the ability of persons to become improperly "grandfathered" under the circumstances existing just prior to the Department's notice that a new coastal construction control line would be established for the area in question.

There is some historic justification for this policy. It is indeed true that in the early years of the Department's coastal construction control line permitting program, Section 120.54(4) and Section 120.54(17) rule challenges did delay the effective adoption of coastal construction control lines in certain counties and municipalities, thereby resulting in non-conforming dwellings and structures being otherwise permitted and built during that period of delay.

While this justification appears reasonable on its face, it is also one that could be used in a variety of different circumstances. After all, when any administrative agency proposes to adopt new rules, those newly proposed rules often can and do preclude or render more difficult certain activities. Furthermore, a fundamental purpose of a Section 120.54(4) or Section 120.54(17) rule challenge is to test the administrative agency's policy on the front end prior to its adoption and implementation. Should substantially affected persons be required to wait until after the rule has become adopted and effective before they can initiate a challenge to the merits of that rule?

The Department believed, as did the 1985 Legislature, that the public policy underlying the establishment of coastal construction control lines outweighs this competing policy of public debate and challenge to major policy evolution prior to that policy's adoption and application as a rule. Given the fact that the Florida Legislature debated these competing policies and affirmatively decided the Department's commendable practice of establishing coastal construction control lines was being undermined, at least in part, by the availability of Section 120.54(4) or 120.54(17) rule challenges, I really have no particular problem with this particular shield. It should be emphasized that this shield is, in fact, limited; the Legislature did not preclude a subsequent Section 120.56 rule challenge after the rule had become effective. Therefore, even though pre-adoption rule challenges had been precluded, substantially affected persons still possessed a statutory mechanism to challenge the wisdom of a particular coastal construction control line.

There are, however, far more restrictive legislative shields. An example of one of these more restrictive legislative shields is found in Section l63.3177(10)(k), Florida Statutes.

In 1985 the Florida Legislature also adopted the Local Government Comprehensive Planning and Land Development Regulation Act, §163.3161, *et seq.*, Florida Statutes. Pursuant to this act, local governments were directed to prepare comprehensive plans to be submitted to the Department of Community Affairs (DCA) for review and determination of compliance according to the requirements of state law. The act required that each local comprehensive plan be consistent

with the requirements set forth in Chapter 163 and Chapter 187, Florida Statutes, relating to the State Comprehensive Plan, and the appropriate regional policy plan.

Additionally, the legislature directed DCA to adopt by rule minimum criteria for the review and determination of local plan compliance with state law. Local plans were to be consistent with the requirements of this rule, which was eventually adopted as Florida Administrative Code Rule 9J-5.

Initially, the process used by DCA to develop Rule 9J-5 was comprehensive and open. DCA established a staff working group, held several statewide workshops, entertained many criticisms submitted by various interest groups, and as a result made many changes and revisions to the proposed rule. The rule was also reviewed by the Governor's Growth Management Advisory Committee (GMAC), and once again DCA made changes to accommodate GMAC's recommendations. The rule was ultimately adopted by DCA and submitted, as required by the act, to the Senate President and House Speaker on February 14, 1986.

The 1986 Florida Legislature, after review of proposed Rule 9J-5, adopted the following expression of legislative intent in Section 163.3177(10)(k):

> It is the intent of the Legislature that there should be no doubt as to the legal standing of chapter 9J-5, F.A.C., at the close of the 1986 legislative session. Therefore, the Legislature declares that changes made to chapter 9J-5, F.A.C., prior to October 1, 1986, shall not be subject to rule challenges under s. 120.54(4), or to drawout proceedings under s. 120.54(17). The entire chapter 9J-5, F.A.C., as amended, shall be subject to rule challenges under s. 120.56, as nothing herein shall be construed to indicate approval or disapproval of any portion of chapter 9J-5, F.A.C., not specifically addressed herein. No challenge pursuant to s. 120.56 may be filed after July 1, 1987. Any subsequent amendments to chapter 9J-5, F.A.C., exclusive of the amendments adopted prior to October 1, 1986 pursuant to this act, shall be subject to the full chapter 120 process. All amendments shall have effective dates as provided in chapter 120 and submission to the President of the Senate and Speaker of the House of Representatives shall not be required.

According to an Issue Paper prepared by the Senate Community Affairs Committee, subparagraph (k) was carefully drafted to accommodate a number of objectives. More importantly, the Legislature did not want the rule to be left open indefinitely for post-adoption rule challenges which could disrupt the comprehensive plan review process in midstream. Therefore, all rule challenges to existing rule 9J-5, as amended prior to October 1, 1986, were prohibited after July 1, 1987. This date was approximately one (1) year before the first comprehensive plans were to be submitted to DCA for review. It should also be noted that the Legislature in enacting Section 163.3177(10)(d) expressly did not approve or disapprove of the rule. Therefore, the Legislature has never given its imprimatur to this rule, unlike some other rules which have received or must obtain express legislative approval. See, e.g., §380.0651(1), Fla. Stat. (approving standards and guidelines for developments-of-regional-impact adopted as rules by the Administration Commission) and §403.817(3) (requiring that amendments to the Department of Environmental Regulation's rules relating to dredging and filling and which invoke additions or deletions to DER's vegetation or soils indicators or exemptions must be legislatively approved).

Just prior to the 1989 legislative session, "urban sprawl" emerged as a controversial issue in DCA's reviews of local government comprehensive plans. Prior to that time, however, it had not been controversial. In fact, it was not until DCA's rejection of the Charlotte County comprehensive plan that the issue of urban sprawl was first litigated. In August 1989, Charlotte County challenged as unadopted rules DCA's urban sprawl poli-

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cies which were then being applied to local governments. The Florida Home Builders Association joined in the case and additionally challenged, as an invalid exercise of delegated legislative authority, two particular underlying portions of existing Rule 9J-5, in particular Rule 9J-5.006(3)(b)7. and Rule 9J-5.011(2)(b)3., where the phrase "discourage urban sprawl" is mentioned, as well as the urban sprawl policies interpreted therefrom. A DOAH hearing officer, however, declined to hear the home builders' rule challenge to any existing portions of Rule 9J-5 because of the prohibition provided in Section 163.3177(10)(k), Florida Statutes, against any Section 120.56, Florida Statutes, rule challenge to existing Rule 9J-5 after July 1, 1987. The only remedy, the hearing officer determined, was to be found in a Section 120.57, Florida Statutes, hearing when those urban sprawl policies are applied by DCA.

While it is not my intent to challenge here the wisdom of DCA's urban sprawl policies, it is indisputable that those policies derived from Rule 9J-5 have been applied without allowing for substantially affected persons to attack DCA's authority to apply such policies in a rule challenge proceeding. In other words, there has been no formal process available to debate DCA's emerging policies in advance of their application. As such, this shield allows DCA to determine major policy without allowing for a delegation challenge pursuant to Section 120.54(4), Florida Statutes. Furthermore, as noted earlier, the Legislature has never given its formal endorsement to these policies.

The staff of the Senate Community Affairs Committee concluded that this ability to challenge policies once applied in a Section 120.57 hearing does not create certainty in process and is inadequate to resolve major growth management policy issues. It therefore recommended that all emerging policies either be reviewed by the Legislature prior to their effectiveness or application or that DCA be directed to proceed to rulemaking regarding all emerging policies as soon as appropriate or practicable.

Unless and until that is done, DCA has its Section 163.3177(10)(k) legislative shield. Rule 9J-5, as it currently stands, cannot be challenged, period. [This shield may yet be legislatively repealed; however, repeal of Rule 9J-5's shields may be relief that is too little and too late to afford affected persons any meaningful remedy.] Interpretations and application of Rule 9J-5 can only be heard in a Section 120.57, Florida Statutes hearing, on a case-by-case basis, which effectively means that major growth management policy issues of statewide import are being decided without broad public input, as afforded by the rulemaking process, but in adjudicative proceedings where the only players are the litigants with their own particular goals and purposes. This, it seems to me, is an unsound way to establish policy of general applicability throughout the state. As I noted in an earlier Chairman's Column, it allows the agency too much flexibility to apply a policy in situations where it desires to do so and to not apply it when it suits its purposes. This can lead to inconsistent, perhaps even arbitrary, application of that policy, an evil which rulemaking (and rule challenges) are specifically intended to prevent.

I am therefore very uncomfortable with this type of legislative shield. It is one thing to temporarily immunize an administrative agency's rules and policy making from rule challenges for compelling policy reasons, as the 1985 Florida Legislature did in Section 161.053(2), Florida Statutes. It is quite another, however, to effectively immunize an agency from all subsequent rule challenges, as the 1986 Legislature did in Section 163.3177(10)(k), especially where legislative oversight and review has been, at best, haphazard and fleeting.

Such a legislative shield fundamentally undermines one of the central tenets of the Administrative Procedure Act, i.e., the ability to challenge a rule, or even a proposed interpretation of a rule, as an invalid delegation of legislative authority. I would therefore suggest that the Florida Legislature be particularly careful in enacting such legislative shields in the future, make them of limited duration, review them at least annually, and only enact them for the most compelling of reasons. This has not been done for Rule 9J-5, and its political legitimacy has been suspect for that very reason. Perhaps this legislative shield afforded by Section 163.3177(10)(k) is but an anomaly, never to be repeated. However, virtually every year some administrative agency has some emergency bill that, by the administrative agency's lights, requires some drastic or draconian so-

lution. Before such drastic or draconian solutions are enacted, however, I think it would be well to consider just how far we are going in undermining the Administrative Procedure Act. Unless we do, we may well end up with an Administrative Procedure Act that is so riddled with exceptions that it ceases to be a law of general applicability.

Administrative Law Update

by Mary F. Smallwood
Ruden, Barnett, McClosky, Smith, Schuster, & Russell, P.A.
Tallahassee

I. Licensing

A. Revocation and Suspension

1. *Andres Bustillo. M.D. v. Department of Professional Regulation,* 15 FLW 1116 (Fla. 3d DCA 4-24-90).

Facts: Dr. Bustillo entered into a consent decree with the DPR requiring his abstention from the consumption of controlled substances, and random urine and blood testing for two years. On two occasions thereafter the Doctor refused to allow collection of urine samples at the time when the Department representatives arrived, suggesting they return later. The hearing officer recommended that the Doctor had substantially complied with the terms of the consent order. The Board concluded, however, that Dr. Bustillo had violated the consent decree.

Held: Affirmed. The consent decree required random testing, meaning that the testing should be performed at the time and place of the agency's choosing, which was not a matter of negotiation.

2. *Bajrangi v. Department of Business Regulation,* 15 FLW 1304 (Fla. 5th DCA 5-10-90).

Facts: Respondent received a notice to show cause why his license should not be revoked or suspended by DBR for selling an alcoholic beverage to a minor. Respondent requested an administrative hearing and represented himself. He argued that he had never been in violation before and that the proposed penalty — a $1,000 fine and an 18 day license suspension — were excessive. At the hearing DBR offered testimony that the "penalty guidelines" called for a $1,000 penalty and 20 day suspension; but, the hearing officer recommended only a 3 day suspension concluding that the applicable statute provided for a range of penalties and that a first offense did not justify such a long suspension. The agency adopted the hearing officer's findings of fact but rejected his recommendation regarding the length of suspension.

Held: Reversed. After thoroughly reviewing the state of the law on modification of penalties, including *Department of Professional Regulation v. Bernal,* 531 So.2d 967 (Fla. 1988), and subsequent district court decisions, the court held that "the circumstances under which the agency would be justified in substituting its judgment concerning the appropriate penalty for that of the hearing officer should not arise except where one or more of the hearing officer's recommended findings of fact or conclusions of law are properly rejected, substituted or amended by the agency." While in this case the agency did reject a conclusion of law regarding the standards for imposing a penalty, the court found that the agency improperly rejected that conclusion as there were no adopted penalty guidelines.

Holding that a mere difference of opinion with the hearing officer does not justify modification of a recommended penalty, the court did not accept the agency's position that "the need to protect the underage persons of this state from the evils of alcohol abuse" was a sufficient basis to increase the penalty.

3. *Allied Education Corp. v. DOE,* 16 FLW 283 (Fla. 1st DCA 1-18-91)

Facts: On November 8, 1990, the Board of Independent Post Secondary Vocational, Technical, Trade and Business Schools ("Board") filed an administrative complaint against Barclay School and issued a cease and desist order pursuant to §246.2265, Florida Statutes. The order acknowledged the administrative complaint but did not recite the allegations contained therein nor did it expressly incorporate the complaint by reference. Barclay was ordered to cease any advertising and from enrolling any new students and also was prohibited from accepting

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any further fees or tuition payments; and, existing funds were escrowed to be administrated by a financial officer of a bank or a member of the Florida Bar. A DOAH Hearing Officer denied Allied's request to abate or modify the cease and desist order. Allied petitioned the First District for relief.

Allied argued that neither the administrative complaint nor the cease and desist order alleged or identified any threat or danger to public health, safety or welfare. Allied further argued that it needed access to current revenues in order to maintain its operation. The order, Allied alleged, effectively closed down the school even though the administrative complaint did not expressly seek to revoke their license.

Held: Petition Granted. The Court had previously granted relief to Allied by unpublished order, quashing the cease and desist order without prejudice to the agency's right to proceed in accordance with section 120.69(8). The Court's opinion herein explained the reasons for that order.

The First District held that section 246.2265 clearly authorized the action taken by the board; however, that subsection does not contain the procedural safeguard encompassed in section 120.60(8) of the APA. Section 120.60(8) authorizes emergency suspension, restriction, or limitation of a license and incorporates by reference section 120.54(9) which requires that:

> If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated ... provided that ... the agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety or welfare and its reasons for concluding that the procedure used is fair under the circumstances.

The court determined that in order to construe section 246.2265 so as to find it constitutional, it had to be read *in pari materia* with section 120.68(8) and found that the procedure set forth in the APA must be followed by the Board when issuing a cease and desist order to the licensee. The court found that in the instant case, the board action did not comply with section 120.68 in any material respect.

B. Standards for Issuance and Denial

1. *DOT v. Calusa Trace Development Corp.*, 15 FLW 3018 (F1a. 2d DCA 12-14-90).

Facts: On March 24, 1989, Calusa filed a driveway connection permit application. When DOT did not act on the application various Calusa personnel met with DOT staff. According to affidavits filed, at that meeting Calusa was told that the application would not be approved unless certain conditions were met. Pursuant to Section 120.60(2), Florida Statutes, Calusa filed a mandamus action in the circuit court seeking to compel issuance of the driveway connection permit in that DOT neither approved nor denied Calusa's application within the requisite ninety day time frame. Section 120.60(2), Florida Statutes, requires that "every application for a license shall be approved or denied within ninety days . . . otherwise it shall be deemed approved." Subsection (3) requires that each applicant shall be given written notice either personally or by mail that the agency intends to grant or deny or has granted or denied the application for license." Calusa argued that the "deemer" provision, section 120.60(2), requires that the approval or denial of the application be in writing.

Held: Reversed and remanded. There was no dispute regarding the fact that there was no written denial or approval of Calusa's connection permit application within the required ninety days. However, the *"deemer" provision,* section 120.60(2), does not expressly demand or even mention that the approval or denial of the application must be in writing in order to avoid the operation of the deemer provision. As held in *Sumner v. DPR,* 555 So.2d 919 (Fla. 1st DCA 1990): "If the legislature had intended to specifically require written notice within ninety days, it would have been a simple matter to have inserted the limitation in this statute."

C. Burden of Proof — The general rule is that the permit applicant bears the burden of proof of entitlement to a license at all stages of a proceeding. An exception exists where the project is a Development of Regional Impact.

1. *Young v. DCA,* 15 FLW 1628 (Fla. 3d DCA 6-19-90).

Facts: The Youngs obtained three land clear-

ing permits from Monroe County, Florida. The subject property was within an area of critical state concern. Pursuant to section 380.07, F.S. (1987), the permits constituted development orders which could be appealed by the State Land Planning Agency, the Department of Community Affairs, or the Florida Land and Water Adjudicatory Commission.

DCA appealed issuance of the permits, and a hearing was held pursuant to Chapter 120. In advance of that hearing the parties submitted the question to the hearing officer as to who had the burden of proof. The hearing officer determined that the burden of proof fell on the Youngs as applicants. When the hearing convened, the Youngs adhered to their original position that the burden of proof, and the burden of going forward, rested with the Department because the department had initiated the appeal. The Youngs declined to proceed. The hearing officer ruled that the Youngs failed to carry their burden of proof and recommended denial of the permits. The Commission denied the permits and the Youngs appealed that decision.

Held: Affirmed. The Commission was correct. As stated in *Florida Department of Transportation v. J. W. C. Company, Inc.*, 396 So.2d 778, 787 (Fla. 1st DCA 1981): "We view it as fundamental that an applicant for a license or permit carries the 'ultimate burden of persuasion' of entitlement through all proceedings, of whatever nature, until such time as final action has been taken by the agency." Also, the hearing officer had the discretion to require that the applicants go forward with the case.

Note: On suggestion for certification the Third District certified that it "had passed upon a question of great public importance by holding that, in an appeal by the state planning agency pursuant to section 380.07, Florida Statutes (1987) the burden of persuasion, and the burden of going forward, rested on the applicant for the permit." 15 FLW 2573.

II. Rule Challenges

1. *Board of Trustees of the Internal Improvement Trust Fund v. Board of Professional Land Surveyors*, 15 FLW 2324 (Fla. 1st DCA 9-13-90).

Facts: This case is an appeal of a final order entered by DOAH upon an administrative rule challenge to certain rules proposed by the Board of Professional Land Surveyors ("Board") which purported to delineate the way in which the ordinary high water line OHWL of certain bodies of water were to be established by survey. Subsequent to the rule challenge, hearings were held pursuant to 120.54(4), and the hearing officer entered a final order finding most of the rules invalid but concluding that certain specified rules constituted a valid exercise of the Board's delegated legislative authority. (Rules 21HH-6.002(l), 6.002(2), 6.002(2), 6.002(8), 6.002(8), 6.002(12), (14), 6.0052(2) (h), 6.0052(2) (j) and the preamble to 6.0052(2) (i).) The statute upon which the Board relied for rule making authority was Section 472.027 which directed the Board to adopt rules relating to the practice of land surveying which would establish "minimum technical standards" to assure the achievement of minimum degrees of accuracy and completion.

Held: The First District affirmed the hearing officer's order invalidating certain of the contested rules and reversed the hearing officer's order validating certain other of those rules.

The hearing officer's determination of invalidity was based primarily on the conclusion that the proposed rules were a pronouncement of the surveyor's choice among legal principals for finding the OHWL and that the proposed rules did not precisely restate or embody the case law of Florida relating to the scope of sovereign submerged land own-

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Executive Council Elections

Elections for 1991-92 officers and Executive Council members will be held at the Administrative Law Section's Annual Meeting on Friday, June 28, 1991, 2:30 pm.–5:30 pm., at the Orlando Marriott's World Center Resort.

Any Section member who is interested in serving on the Executive Council should submit a cover letter and resume to Peg Griffin, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, no later than June 14, 1991.

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ership and the concept of the ordinary high water line.

The First District found it unnecessary to decide whether the proposed rules accurately restated the decisional law on sovereign submerged land ownership because the contested rules, with certain exceptions, constituted an invalid exercise of the Board's delegated legislative authority. Section 120.52, Florida Statutes, provides that a proposed rule is an invalid exercise of delegated legislative authority if it goes beyond the powers, functions and duties delegated by the legislature. If the agency has exceeded its grant of rule making authority, or if the rule enlarges, modifies, or contravenes the specific provisions of law implemented, such infractions are among those requiring a conclusion that the proposed rule is an invalid exercise of delegated legislative authority.

The only authority granted to the Board pursuant to section 472.027 was to promulgate rules which provided "minimum technical standards" to ensure that the surveyors accurately measured, completed and were of sufficient quality to provide legally defensable real property boundaries. The First District did not read Section 472.027 to provide a predicate for the surveyors to define any such fixed point as the ordinary high water line or to circumscribe thereby the legal consequences that flow from the fixing of such a point. "The determination of rights of parties to a riparian boundary dispute is instead a matter subject ultimately to judicial resolution under all applicable law."

2. *Waste Management of Florida, Inc. v. Department of Environmental Regulation,* ER FALR '90:118

Facts: DER proposed to adopt landfill regulations. During the pre-adoption process one draft of the rule contained language prohibiting landfill liners to be located below the 10-year seasonal high water level. After workshops and comments from the public, DER deleted this requirement from the rule which was noticed on March 8, 1990. A Section 120.54(4) rule challenge was filed, alleging, *inter alia,* that the economic impact statement was inadequate. On April 12, the Environmental Regulation Commission (ERC) met to consider the proposed rule. At the rule adoption hearing, the ERC adopted an amendment similar to the language deleted from the prior draft.

Held: After an administrative hearing, the hearing officer found that: (1) the ERC members adopted the amendment based on a "gut" reaction that landfills should be prohibited in groundwater, (2) there were no studies or data to support a prohibition, (3) the DER staff testified that it was possible to design a landfill with a bottom liner below the 10-year high groundwater level and protect groundwater quality, (4) it would be difficult to obtain approval of this design under an alternative design procedure provision since the rule seemed to contain an absolute prohibition, and (5) that the EIS prepared *prior to* the hearing did not consider the economic impact of the new language. The hearing officer concluded that the rule amendment was arbitrary and capricious. She further concluded that the failure to include an evaluation of the economic impact of the amendment in the EIS which was prepared *prior to* the rule hearing constituted failure to follow the requirements of 120.54(2) (b).

Query: Can a rule ever be amended at a rule adoption hearing under this analysis unless there is no economic impact to the amendment? Prior DOAH final orders have raised questions as to the validity of the notice where amendments are made to a proposed rule at a rule adoption hearing; but, to date, no appellate decision has addressed this issue.

A. Standing

Phibro Resources Corp. ("Phibro") and Salomon, Inc. ["Salomon") v. DER et. al., 16 FLW 302 (Fla. 1st DCA 1-23-91).

Facts: Phibro and its corporate parent Salomon appealed a DER final administrative order dismissing their petitions for formal administrative hearing. They challenged two consent orders entered into by the Department with Conserv, Inc., the current owner and operator of a phosphate fertilizer manufacturing facility, and with Mobil, a former owner of the facility. The reasons that Phibro and Salomon challenged the two consent orders were because they felt that the remedial acts in the proposed orders would not be adequate. The remedial acts involved construction of a remediation system, which would consist of a number of wells surrounding a

portion of the facility, designed to act as a hydraulic barrier to prevent the further migration of contaminated groundwater. Phibro and Salomon alleged that this would not restore the groundwater to its former condition and in fact would allow continued migration of pollutants "thereby increasing the liability which DER had asserted against Phibro." The consent orders specifically recited that the facility had been discharging pollutants into the groundwater on or before 1982, during a period of time which coincided with Phibro's ownership and operation of the facility.

In dismissing Phibro's and Salomon's petitions, DER determined that they lacked the requisite standing as a substantially interested party under §120.57, in that their petition merely alleged speculative injury to an entity which might at "sometime" in the future be held liable for its actions. Further the Department determined that Salomon's petition was untimely because it was not filed within the required 21 day period from receipt of notice of the consent orders.

In 1985, DER had issued "warning notices" to Phibro and Mobil reciting that pollutants exceeding levels permissible in Class II groundwaters had been detected at the property boundary of the facility and warned that former owners could be held responsible for contamination.

Held: Reversed and remanded. The First District rejected the Department's argument that the Petition merely alleged speculative injury. The First District held that Phibro and Salomon's substantial interests were affected.

Section 120.57, Florida Statutes, provides that "[t]he provisions of this section apply to *all* proceedings [formal or informal] in which the substantial *interests* of a party are determined by an agency." The key word stressed was "interests".

APA was modified in 1974. Prior to that time a protected right, privilege or immunity had to be affected in order for §120.57 to be applicable. Section 120.57 now simply provides that substantial "interests" must be affected. Furthermore, petitioners need not have their substantial interests determined, but demonstrate only that their substantial interests will be affected in an action in which the substantial interests of another party are determined.

Additionally, Phibro was already a party to the proceeding by statute when "it was served a written notice of a warning which specified the provisions of the statute and rule alleged to have been violated ... in accordance with the procedure delineated under Section 403.121(2)(c)." The "notice of a warning" was subsequently identified as Notice of Violation. "Florida Administrative Rule 17-103.110(1) (b) provide[s] that a person served with a notice of violation (NOV) shall be entitled to a section 120.57 administrative hearing within twenty days following service of notice." Consequently, Phibro was made a party pursuant to the above statutory and regulatory provisions. (The court is somewhat confusing in its analysis because it interchangeably uses the term NOV with "notice of warning" or "warning" when in fact there is a substantial difference between the two. The court's statutory and rule citation, however, support the conclusion that it was a NOV which was served.)

Finally, Salomon's petition was filed more than 21 days after it received notice that DER intended to enter the consent orders. The Department ruled that the petition was untimely despite the fact that Salomon was the corporate parent of Phibro, and "despite the fact that Phibro's petition was timely filed." The First District reversed the De-

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Volunteers Wanted

The Administrative Law Section has the opportunity each year to place individuals on various committees of interest to all practicing lawyers as well as staffing those committees essential to the continued operation of the Section. For those of you with particular activities in mind, or simply open to expanding your professional horizons, now is a good time to step forward for a possible committee or task assignment. All Section members will be receiving shortly a Committee Preference Form, routinely used by Florida Bar sections. Please complete it thoughtfully and provide any additional details which may be of importance to you on that form or give me a call to discuss your interests and preferences.

Charles G. (Gary) Stephens
Chair-Elect
(813) 281-8711

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partment's final order regarding the untimeliness of Salomon's petition concluding that "under the circumstances, we fail to see how DER or any other party was prejudiced by the delay."

Typically, time requirements for filing pleadings is a jurisdictional matter and cannot be waived. The First District's reversal of DER's final order dismissing Salomon's petition opens the door for others to argue that late filing, without prejudice, does not preclude jurisdiction. Granted, Salomon was the parent corporation, but relationship to a timely filed petitioner has, to this author's knowledge, never been used to circumvent filing requirements.

B. Point of Entry

1. *Florida Optometric Association et al. v. Department of Professional Regulation. Board of Opticians ("Board")*, 15 FLW 2250 (Fla. 1st DCA 9-5-90).

Facts: The Professional Opticians of Florida, Inc. and Charles Arnold, an optician, filed a petition for a declaratory statement with the Board. The petition acknowledged that it was unlawful, pursuant to Chapter 484, Florida Statutes, to engage in diagnosis of the human eyes or attempt to determine the refractive powers of the human eyes. The petition however raised the following question: Is an optician permitted to use vision screening equipment such as a Titmus Vision Tester to check a consumer's visual acuity (both far and near), with or without a correction?

Pursuant to section 120.565, the Board published notice of the petition in the April 21, 1989, edition of Florida Administrative Weekly. One week early, on April 14, 1989, a notice of a May 5, 1989, meeting was also published in the Florida Administrative Weekly. In that notice there was no reference to a hearing on the petition although the agenda listed other matters as being set for "hearings" and "final order action." The petition for declaratory statement was simply mentioned without any further information provided.

On May 2, 1989, the optometrists filed a petition to intervene in the declaratory statement proceedings and requested a formal hearing pursuant to section 120.57(1). The optometrists asserted that their substantial interests would be determined by an affirmative answer to the question presented in the petition and that the Titmus Eye Tester could be used to determine refracted power of the human eyes which opticians, by law, were expressly prohibited by law from doing. At the May 5th meeting the Board conducted a hearing on the declaratory statement. Counsel for the optometrists was present and argued in support of its petition to intervene. The Board did not allow him to participate at the hearing however.

At the August 4, 1989, meeting the Board voted to deny the optometrists' intervention petition for two reasons: 1) it was untimely, and 2) the optometrists lacked standing to participate. A final order issued October 17, 1989, allowing the opticians to use the Titmus Vision Tester as long as the optician did not engage in the diagnosis of the human eye. The optometrists appealed that final order.

Held: The declaratory statement was set aside and remanded for further proceedings. The court determined the following:

a. The optometrists did not fail to allege a substantial interest sufficient to warrant intervention. A two part test is applied in evaluating if a person has alleged a "substantial interest": 1) whether he suffered injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing and 2) whether his substantial injury is of a type or nature which the proceeding is designed to protect. The optometrists met the two-pronged test.

b. The Board erred in finding that the optometrists' petition to intervene was untimely. The optometrists correctly argued that neither of the notices published in the April 14 and April 21, 1989, editions of the Florida Administrative Weekly, nor the agenda item for the May 5, 1989, meeting, nor the agency file, gave them any indication that the Board would be holding a 120.57(1) hearing at the May 5, 1989, meeting. Therefore, there was no way that the optometrists could meet the requirement of filing their petition 5 days prior to the hearing in order to avoid the procedural bar of Rule 28-5.207, FAC, which requires same. Rule 28-5.207 must be read in conjunction with Rule 28-5.111 which provides:

Persons requesting a hearing on an agency deci-

sion which does or may determine their substantial interest shall file a petition with the agency within 21 days of receipt of written notice of the decision, or within 21 days of receipt of written notice of intent to render such decision .... The notice shall state the time limit for requesting a hearing and shall reference the agency's procedural rules.

Since no statute or rule superceded Rule 28-5.111 the Board was required to comply with the Rule by giving notice of the declaratory statement proceedings. Published notice failed to comply with Rule 28-5.111 in that it neither specified the time limit for requesting a hearing, nor referenced the relevant procedural rules. The Board's failure to provide the optometrists notice of the declaratory statement proceedings in the manner prescribed by Rule 28-5.111, and an opportunity to petition for a hearing under section 120.57 within the 21 day period thereafter, deprived the optometrists of the clear point of entry due persons with standing to initiate proceedings under section 120.57. Further, the failure of the optometrists to "timely" intervene in the formal hearing proceedings, which were already underway but of which the optometrists were not even aware, did not constitute a waiver of their right to a clear point of entry.

c. The optometrists suggested that the declaratory statement should be set aside because it was not limited to a particular petitioner, nor a particular set of circumstances. The First District found it unnecessary to decide that issue because the declaratory statement had to be set aside as a result of a. and b. discussed above. However, the Court did state that declaratory statements may not be used as a short cut method of announcing a rule, thereby avoiding the rule adoption procedures of section 120.54. The Court noted that although the line between the declaratory statement and a rule is not always clear, a declaratory statement should not be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require a response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of section 120.54 governing rulemaking.

Mark Your Calendars!

The Eighth Administrative Law Conference has been scheduled for September 13-14, 1991, and will again be held at the Florida State Conference Center in Tallahassee. Complete details will be provided to section members sometime during the month of July. We hope to see you there!

Council of Sections Report

Several prominent Bar leaders attended a recent Council of Sections meeting to share and exchange views concerning the role of sections in Florida Bar programs and governance. The Council of Sections has functioned for the last three or four years as an informal caucus of section leaders attempting to communicate the special concerns of section members to the Board of Governors. These concerns have ranged from CLE programs to overall budget matters to issues of professional responsibility.

I have made an effort to attend such meetings in the past year or so in order to understand better how policies reflecting various sections have been arrived at. I have discovered — but claim no originality for this insight — that small unrepresentative groups can speak for very large numbers of people if there is no broad sense of participation and that the opportunities to improve the quality of decision-making in Bar matters are endless.

Bar leaders, particularly those who have slogged their way through the campaign trenches are particularly mindful of the role sections play in providing a professional home and focus for an increasing number of Florida lawyers. Consequently, discussions are underway to provide the Council of Sections a more enduring (and legitimate) framework for its activities. If any of these opportunities interest you, please give me a call at (813) 281-8711.

— Charles G. (Gary) Stephens

On the Federal Side

by Walter S. Crumbley

In July, 1990 Congress passed and the President signed into law the "Americans with Disabilities Act" (Public Law 101-336). Subsequently, the Equal Opportunity Commission has begun Proposed Rulemaking [56 CFR857B (1991)]. The purpose of this article is to acquaint the reader of some of the more significant provisions of this important legislation and its supporting rules, so that they may properly serve their clients in the future. Perhaps equally important, lawyers in mid-size to large firms need to recognize the applicability of such legislation to their own law firm, and be governed accordingly, in not only their advice to their clients, but in their own day to day operations in recruiting and hiring and design and layout of their facilities in the future. I would certainly encourage those who advise their clients in the areas of recruitment and hiring, business practices, building design and layout, and public facilities to go over this legislation in detail, as the rules of the game will change considerably over the next few years.

As of July, 1992 any business with 25 or more employees will be subject to the law prohibiting discrimination against handicapped persons in the employment context. This initial quantitative figure will reduce to 15 or more employees in July, 1994. Thus the medium sized law firm, operating as a professional corporation, will be subject to the act within the next few years, if presently exempt.

Under the Americans With Disabilities Act (hereafter "ADA") an individual with a disability is a person who (1) has a physical or mental impairment that substantially limits one or more major life activities, or (2) an individual who has a record of such an impairment, or (3) an individual who is *regarded* as having such an impairment (emphasis supplied). An impairment includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the major body systems, or any mental or psychological disorder, such as mental illness, retardation, or specific learning disabilities. This paragraph alone could be the subject of one or more books, trying to set out exactly what is meant with each of the words of art. The ADA excludes from its definition homosexuals, sexuals, bisexuals, transsexuals,pedophiles, exhibitionists, voyeurs, those with gender identity disorders, compulsive gamblers, kleptomaniacs, pyromaniacs, and illegal drug users. However, it may be that a person who once suffered from an excluded condition or impairment may qualify as an individual with a disability at a later time when they have been "cured" or "rehabilitated."

The ADA defines a qualified individual with a disability as one who, with or without reasonable accommodation, can perform the essential functions of the job that he or she holds or applies to hold. The employer is the one who decides what the "essential functions" of the job are, and the EEOC and courts will give this some consideration. It instructs the courts to consider any written job description the employer may have as containing evidence of essential functions, but this evidence is rebuttable. This means that close scrutiny will be paid to written job descriptions and the identification of essential functions, as well as any non-essential functions which may have been added to preclude employment of qualified persons with disabilities. Under the ADA an employer must establish why an individual with a disability cannot qualify or be qualified for a particular job with a reasonable amount of accommodation. For instance, a requirement that a secretary have a drivers' license and the ability to operate a motor vehicle may seem like a valid essential function, when in fact this attribute would seldom, if ever, be required. In that circumstance this would not likely be held to be an "essential" function of that job. If this could be easily transferred to another employee, then reasonable accommodation would be required. As in other civil rights litigation, such requirements as a high school education, work experience or certain specialized training, etc. will be upheld only to the extent that the employer can demonstrate its true job relatedness and business necessity.

The ADA imposes upon employers an affirmative obligation to reasonably accommodate any known disability of an applicant or employee. The employer may avoid such accommodation on the basis of "undue hardship on the operation of the business." Where accommodation may require no more than

building a wheelchair ramp or moving some office furniture then the defense of undue hardship may not prevail. Reasonable accommodation could also require that jobs be restructured to assign non-essential tasks to another employee, acquire or modify equipment, reassign persons to vacant positions, provide interpreters or readers, or otherwise modify existing policies, examinations, and training materials to accomplish the required accommodation. Some factors to be considered are the nature and cost of the accommodation; the size, type and financial resources of the facility where the accommodation would be required; the size, type and financial resources of the employer who would have to make the accommodation; and the employer's overall operation, including the composition, structure and functions of its workforce. The ADA does not specifically define reasonable accommodation, and as in similar EEO type litigation, it is dealt with on an individual case by case basis. Unfortunately, this provides little or no guidance to the employer, especially the smaller one, with little or no expertise in such areas. The overall tenor of the ADA seems to state a policy of something more than a de minimus accommodation being required. The proposed rulemaking suggests that this accommodation might be best accomplished by the employer and employee sitting down with each other to discuss and reach some agreement as to what accommodation might be required and its reasonableness. This suggestion, while laudable and no doubt desirable, assumes a greater knowledge of the law and its requirements on the part of the employer and potential employee than reality supports. Clearly then, absent undue hardship on the employer, if an applicant with a disability is otherwise as equally qualified (or worse, better qualified) as an applicant without a disability, an employer cannot reject the individual with a disability if the reason is the need for such reasonable accommodation.

It must also be noted that the ADA prohibits any inquiry into areas that might disclose disabilities or impairments during the selection process, to include pre-employment offer medical examinations or medical tests. Following an offer of employment a medical test may be obtained, but only if such tests are given to all similarly situated employees and applicants, the tests remain confidential, and they cannot be used to discriminate. It may be that the employer may not even know of the disability until after the employment offer has been made, and then the concept of reasonable accommodation would be required.

As most lawyers understand today, this type of litigation requiring back pay, attorneys' fees and costs, and other "make whole" requirements can be very expensive for clients. Those attorneys who represent or deal with many employers in the 15 to 50 employees range need to be aware of this legislation and its ramifications so they can advise their clients accurately, and hopefully in advance of major problems. The smaller companies do not usually have the benefit of a large and well trained personnel department, or a specialized labor-management law firm, and will therefore have to rely on the personal attorney who handles most of their legal business for the wealth of technical advice required.

Congratulations FAWL!

The Administrative Law Section
Congratulates
the Florida Association for
Women Lawyers
on its 40th Anniversary

Administrative Law Section Annual Meeting

The Administrative Law Section's Annual Meeting will be held in conjunction with the Annual Meeting of The Florida Bar on Friday, June 28, 1991, 2:30 pm.–5:30 pm., at the Orlando Marriott's World Center Resort. The Annual Meeting will be followed by a reception which will be cosponsored by the Environmental and Land Use Law Section and the newly formed Government Lawyers Section. All section members are cordially invited and encouraged to attend both of these events.

For further information on The Florida Bar's Annual Meeting and registration forms, see the Annual Meeting section of your April 15 Bar *News*.

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