# Administrative Law Section Newsletter

**Vol. XXX, No. 4** **Donna E. Blanton and Amy W. Schrader, Editors** **June 2009**


# The 2009 Amendments to the APA

**by Larry Sellers**

During the 2009 Regular Session, the Florida Legislature enacted a few changes to the Administrative Procedure Act ("APA") and related laws. Here is a brief summary of some of these amendments:

***SB 2188, Administrative Procedures***

SB 2188 contains recommendations of the Joint Administrative Procedures Committee ("JAPC"), and it was sponsored by the chair of that committee, Senator Arthenia Joyner.[1] This bill amends the APA in several respects.

***Clarifies and simplifies definition of "agency."*** Section 1 of the bill amends the definition of "agency" in the APA to clarify and simplify the definition. The clarification appears to have been prompted by an inquiry from the Hillsborough County Aviation Authority. Among other things, the revised definition makes clear that it includes those governmental entities having jurisdiction in one county or less only to the extent they are made subject to the APA by general or special law or by existing judicial decisions. Similarly, Section 1 expressly provides that the definition does not include any municipality or legal entity created solely by a municipality. Section 2 of the bill states that the changes are not intended to effect a substantive change in meaning and are intended to be consistent with existing judicial interpretations of the definition.

***Expands required public notice of meetings to agency websites.*** The bill recognizes that many agencies regularly use their websites to inform the public and that the public has come to rely on this form of notice. Section 3 of the bill amends section 120.525, governing meetings, hearings, and

*See "Amendments," page 10*

# From the Chair

**by Elizabeth McArthur**

When I used to be allowed to edit the newsletter, I would always tell the incumbent chair that this was the EASY column to write – it was the proverbial "swan song," and all he or she had to do was to wrap up, say good-bye, say how much he or she won't miss being nagged by the editor to write newsletter columns, and thank everyone (especially Jackie). But I've never been very good at saying good-bye – where does the sentiment go? The nostalgia? The pride in working as a team to accomplish good things, the regret for not doing more? Will someone else please write that part?

*Should auld acquaintance be forgot,*
*And never brought to mind?*
*Should auld acquaintance be forgot,*
*And auld lang syne?*

* * *

*And there's a hand my trusty friend,*
*And give us a hand o' thine;*
*And we'll take a right good-will draught,*
*for auld lang syne.*

By Robert Burns (with a wee bit of loose English translation)

So – to the business at hand. While this year has flown by, and we have not accomplished everything on my to-do list for the section this year, I take some comfort that we have

*See "Chair's Message," page 2*

## INSIDE:

**CHAIR'S MESSAGE**
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made some very good progress on a number of fronts and leave a great team in place with forward momentum on several ongoing projects to carry into next year. I am grateful for everyone on the executive council who contributed to such a good year of productivity and fellowship. Thank you all, my friends.

Our Volunteer of the Year award has to go to Andy Bertron, who has invested a tremendous amount of time and effort into the successful launching of a program for administrative lawyers to provide pro bono representation of needy clients in administrative proceedings, and also to help train non-administrative lawyers to handle administrative cases. We are making great progress here, but need many more volunteers – so go to our section's website and click on the links to sign up or to access a wealth of material from our training seminars. These resources are in place in large part because of Andy's dedicated work. Thank you so much, Andy.

I will not thank Donna Blanton and Amy Schrader for all of their great work rounding up articles, case notes, agency snapshots, and columns from a recalcitrant chair. Not once did they ask me to help edit the galleys. Not once. Hmmph. Donna will be turning over both reins to Amy Schrader next year, who has earned her place as sole editor of the newsletter. Congratulations, Amy – and, okay, thanks to both of you for taking such good care of the newsletter. Of course, they could not have done it without contributors like Mary Smallwood, who has consistently produced high-quality summaries of appellate cases involving interesting administrative law issues, and Larry Sellers, whom we can count on to periodically author feature articles (as he has done again for this newsletter – thanks, Larry!) or to help come up with subjects and/or volunteers for articles when he is not writing one himself.

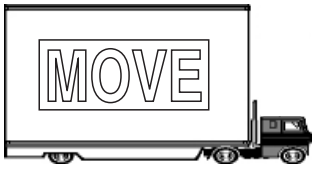
Scott Boyd has proven to be a real force on our council, and we are so glad to have him with us! Scott single-handedly tackled the finishing touches and masters-of-ceremony chores in spectacular fashion for our Pat Dore Administrative Law Conference, when some exploding litigation knocked the conference's co-chair out of circulation at the critical time. You are my hero, Scott.

Kent Wetherell and Linda Rigot continue to work hard editing the updated chapters rolling in for the Administrative Practice Manual published by The Florida Bar. This is a huge behind-the-scenes job that will translate into another great edition of this desktop essential for Florida administrative practitioners, and we are all grateful for that. Both Kent and Linda have been great contributors on a number of other fronts for our council as well: Kent has taken the lead on coordinating with the Appellate Rules Committee on recommended changes to appellate rules of procedure that address administrative appeals; Kent also has worked on boosting our liaison efforts with Florida law schools. Meanwhile, Linda worked hard throughout the legislative session to identify, summarize, track, and update the status of numerous bills of interest touching on administrative law issues; near session's end, the reports were flying, daily and sometimes more frequently. As a sign of the times, several of our council members had personal stakes in this session as they watched legislation proposing abolition of — or severe funding cuts for — their agencies. As I write this column, the session's end is near, but not near enough – here's to survival today, and better times tomorrow, for all!

And from the department of redundancy department, I must follow in the footsteps of my forefathers and foremothers to sing the praises of our own Jackie Werndli: the section glue; more priceless than any credit card commercial's priceless moment; one of the few assets that has not suffered from devaluation lately. Thank you, thank you, thank you, Jackie.

In so many ways, I feel acutely aware of being in the midst of evolution, a classic changing of the guards, out with the old (hey, I resemble that remark!), in with the new, the young, the fresh ideas, the enthusiastic energy. As part of that evolution, the executive council is excited about welcoming several new members on board who will join us at the annual meeting in June. But at the same time, we are already nostalgic and a bit sad about saying good-bye to three long-time council members: Donna Blanton, Andy Bertron, and Dave Watkins. The bar has been set high by these three, each of whom is a past chair of the section and has contributed greatly to our accomplishments and the quality of services provided to our members.

It is no coincidence that the executive council is currently working on developing the best way to tap into the collective expertise and experience held by our former chairs. This subject was a focal point of our recent long-range planning retreat. We reviewed and debated a range of alternatives and examples put into practice by other sections, including bylaw provisions making former chairs full voting ex officio members of the executive council, or making them ex officio non-voting members of the executive council, or ex officio voting-but-not-counting-for-quorum-purposes members; or the alternative, more informal standing practice of making a point to invite former chairs to council meetings or to the long-range planning retreat. A committee chaired by Debby Kearney, with Linda Rigot and Daniel Nordby, has put together three options that will be presented to the council at its annual meeting in Orlando. I expect that we will soon have in place the framework for ensuring that we reap the benefit of tapping into the wisdom and good counsel of our former chairs — *auld acquaintance* and *trusty friend*. I for one would be more than happy to share that *good-will draught, for auld lang syne*.

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# APPELLATE CASE NOTES

**by Mary F. Smallwood**

**Applicability of Administrative Procedure Act**

*The School Board of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220 (Fla. 2009) (Opinion filed February 27, 2009)

On appeal from the Fourth District Court of Appeal, the Supreme Court considered whether the provisions of the Administrative Procedure Act ("APA") apply to decisions of a county school board to terminate a charter school's charter. The process set forth in chapter 1002, Florida Statutes, provides for a decision of the county school board to be appealed to the State Board of Education, which convenes the Charter School Appeal Commission ("CSAC") to make a recommendation to the Board.

The Palm Beach County School Board voted to immediately terminate the charters of two schools operated by Survivors Charter Schools, Inc. ("Survivors") after an audit showing severe fiscal mismanagement. Representatives of Survivors were allowed to make comments at the specially noticed meeting but it was not conducted as a quasi-judicial proceeding. On appeal, the CSAC, after an informal hearing, affirmed the decision to terminate one of the charters but concluded that the other charter should not be terminated. The State Board of Education ultimately voted to terminate both charters.

The Fourth District, on appeal, considered the applicability of the APA to the School Board, CSAC, and the Board of Education. It concluded that the APA was not applicable to either the CSAC or the Board of Education, as Chapter 1002 contained specific exemptions. However, the court held that an immediate (less than 90 days) termination of a charter required APA procedures to be followed. The court concluded that, upon request, a hearing must be held with at least 14 days notice where testimony could be taken under oath.

The Florida Supreme Court quashed the decision of the Fourth District, holding that the APA does not apply to decisions of county school boards regarding charter termination. The Court noted that various parties to the case had made a number of policy arguments about the appropriateness of applying the APA to a termination proceeding. However, the Court treated the issue as purely one of statutory construction.

The Court acknowledged that, in chapter 1002, the Legislature had neither expressly exempted school boards from the APA nor specifically stated that their procedures were governed by the APA. In construing the provisions of section 1002.33(8)(d), which provides for immediate termination of charters, the Court concluded that the plain meaning of the term "immediate" did not contemplate a process that could extend over a period of weeks, or even months, as would be the case if the APA applied. The Court also relied on the fact that chapter 1002 contained detailed procedural requirements for both nonemergency and immediate termination proceedings.

The Court remanded the case to the Fourth District for consideration of other issues, including whether the procedure followed by the School Board met constitutional due process requirements.

**Adjudicatory Proceedings**

*Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 2009 WL 331660 (Fla. 2d DCA 2009) (Opinion filed February 10, 2009)

The Peace River/Manasota Regional Water Supply Authority ("Authority"), along with several counties and other parties, filed petitions challenging the issuance of permits to IMC Phosphate Company for a new phosphate mine. During the administrative hearing before the Division of Administrative Hearings, IMC challenged the standing of the petitioners. It also filed what was treated as a motion in limine to exclude introduction of any evidence related to cumulative impacts. In the recommended order, the administrative law judge determined that the Authority did not have standing. However, he also concluded that the issue was moot as the Authority had been allowed to participate in the proceeding as a party. The judge granted the motion to exclude evidence of cumulative impacts.

The Authority based its standing on the fact that it was the regional water supply authority for several counties or local governments and the sole source of water for such supply was the Peace River. The Authority asserted that Horse Creek, a tributary providing approximately 15 percent of the flow of the Peace River, would potentially be affected by the issuance of the mining permit. IMC argued that, while the Authority had properly alleged standing, the evidence presented at the final hearing failed to establish adverse impacts to Horse Creek.

On appeal, the court reversed the final order as to the Authority's lack of standing. It noted that standing is to be established prospectively. Standing cannot be retroactively eliminated by ultimate findings as to the merits of the case, here the actual impacts on Horse Creek. The court also noted that the conditions of the consumptive use permit issued to the Authority required it to monitor the environmental condition of the Peace River downstream of Horse Creek.

IMC also challenged the Authority's standing to appeal the order, arguing that it was not adversely affected under section 120.68, Florida Statutes. In part, IMC argued that the Authority was not adversely affected because the administrative law judge and the Department of Environmental Protection had determined that

*continued...*

**CASE NOTES**
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the impacts on Horse Creek would not affect the Authority's ability to withdraw drinking water from the Peace River. The court rejected this argument, noting that the results of adopting that interpretation of section 120.68 would be to prevent any party who was unsuccessful in challenging a permit below from appealing that order.

*Community Health Charities of Florida v. Department of Management Services*, 2009 WL 528800 (Fla. 1st DCA 2009) (Opinion filed March 4, 2009)

A number of charitable organizations challenged a decision by the Department of Management Services that they were not entitled to funds from the 2006 Florida State Employees Charitable Campaign. The basis for the Department's decision was that certain charities had not provided direct services in a local fiscal agent's area as required by statute. A formal administrative hearing was requested.

The administrative law judge entered a recommended order after the hearing finding that several charities did not meet the statutory requirement. In support of that finding, the judge cited to certain specified exhibits submitted into evidence by the charities that addressed the services provided by those charities. The judge did not, however, make any specific findings in the recommended order in that regard. The charities filed exceptions to the recommended order, arguing that the judge failed to cite specific facts in the order supporting the findings of fact. The Department rejected the exceptions and adopted the recommended order.

On appeal, the court reversed. It held that the administrative law judge's order must contain specific underlying facts to support any finding in the recommended order. The Department could not cure that defect in the final order by citing to record evidence in the hearing. The matter was remanded to the Division of Administrative Hearings for further proceedings.

**Licensing**

*Charlotte County v. IMC Phosphates Co.*, 2009 WL 331661 (Fla. 2d DCA 2009) (Opinion filed February 10, 2009)

Charlotte, Lee, and Sarasota counties, along with other parties, filed challenges to the Department of Environmental Protection's notice of intent to issue permits to IMC Phosphates Company for a new mine site and modification of the permit for an existing mine. The petitions were referred to the Division of Administrative Hearings for a formal hearing. Several months subsequent to that referral, the Department issued a notice of intent to deny a permit to IMC for a different mine site. Based on that denial, IMC submitted amended permit applications for the two permits subject to the pending challenge. After reviewing the amended applications, the Department issued a new notice of intent to issue. The petitioners then amended their petitions to address the modified permit applications.

After a lengthy hearing, the administrative law judge issued a recommended order finding that IMC had failed to provide reasonable assurances that it would meet the permitting criteria in all respects. However, the ALJ further stated in the order that he would recommend permit issuance if IMC would amend its application to meet certain specific conditions.

Upon review of the recommended order and exceptions filed by the parties, the Department concluded that in order to condition the permit as recommended by the ALJ, additional findings of fact would be necessary. The Department remanded the matter to the Division of Administrative Hearings for the ALJ to make findings of fact regarding certain matters, including IMC's ability and willingness to meet the additional permit conditions. The order on remand cited *Hopwood v. Department of Environmental Regulation*, 402 So. 2d 1296 (Fla. 1st DCA 1981) as authority.

A second administrative hearing was held in which all parties were allowed to present additional evidence. The ALJ subsequently issued his recommended order on remand recommending permit issuance. The Department adopted the recommended order.

On appeal, Charlotte and Lee counties argued that: (1) the ALJ did not have the authority to go beyond the evidence presented to suggest additional conditions, (2) DEP erred in remanding the matter to the Division, and (3) the remand allowed IMC to circumvent the licensing process placing the burden on the applicant to demonstrate reasonable assurances because IMC had a chance to supplement the record.

The court rejected the appellants' arguments and affirmed the final order. The court agreed that, as in *Hopwood*, the amendments to the application were relatively minor in nature. Further, the court found that the matters subject to the remand were not issues that could have and should have been addressed in the initial hearing. The court held that the counties' due process rights had not been violated since they were afforded the right to cross examine IMC's witnesses and present additional evidence of their own at the hearing on remand.

*Cambas v. Department of Business and Professional Regulation*, 2009 WL 631978 (Fla. 5th DCA 2009) (Opinion filed March 13, 2009)

After an informal hearing, the Florida Real Estate Commission ("FREC") suspended Cambas' real estate license for two years for committing a crime involving moral turpitude. Cambas admitted in his petition for hearing that he had pled guilty to driving under the influence and leaving the scene of an accident. Although Cambas requested a formal proceeding, FREC denied that request, concluding that there were no disputed issues of fact.

On appeal, Cambas argued that FREC had erred in denying him a formal hearing and holding that he had committed a crime involving moral turpitude. The court agreed with FREC that Cambas had not raised material issues of disputed fact and, therefore, was not entitled to a formal hearing. The court also affirmed the

determination that he was guilty of a crime involving moral turpitude.

The court noted that no Florida court had determined whether leaving the scene of an accident is an act involving moral turpitude. However, it cited cases from Arizona, California and South Carolina that did reach such a conclusion. At least two of those decisions involved questions of whether evidence of the crime could be used against a witness in a trial. It is not clear whether any case involved a licensing disciplinary case.

*Kaplan v. Department of Health*, 2009 WL 559874 (Fla. 5th DCA 2009) (Opinion filed March 6, 2009)

Kaplan, an osteopathic physician, was disciplined by the Department of Health for failing to practice with a level of care recognized by a reasonable prudent similar physician. After a formal hearing, the administrative law judge recommended that Kaplan be fined $6500 and be placed on three years of probation. In reaching that recommendation, the judge rejected the Department's arguments that a greater penalty was warranted because Kaplan had three prior disciplinary actions. The judge reached that conclusion because the prior complaints had been settled by stipulation between Kaplan and the Department and had not resulted in a finding of a statutory violation.

The Department, in its final order, increased the penalty to a one-year suspension of Kaplan's license followed by the three-year probationary period. It rejected the judge's conclusion that it could not consider the prior disciplinary actions.

On appeal, the court affirmed. It noted that the penalty imposed by the Department was within the statutory penalty allowed. Further, it held that the Department's rules specifically allowed the Board of Osteopathic Medicine to consider a licensee's past disciplinary record in assessing a penalty. The court found nothing in the rule that would limit that consideration to situations where a specific finding of a violation had been made. The court concluded that the Department had complied with Chapter 120, Florida Statutes, by stating with particularity its reasons for increasing the penalty.

**Rulemaking**

*Department of Business and Professional Regulation v. Harden,* 2009 WL 780007 (Fla. 1st DCA 2009) (Opinion filed March 26, 2009)

The Construction Industry Licensing Board ("CILB") denied an application from Adam Harden to be licensed as a general contractor. In doing so, CILB followed its internal procedures of having an application committee review the application and make a recommendation to the full board. At the meeting where the final vote was taken, the CILB voted generally to approve all of the recommendations of the application committee. In Harden's case, the application committee based its recommendation on the grounds that Harden had not demonstrated that he had made restitution under an order of the Hillsborough County Building Board of Adjustment.

Harden subsequently filed challenges to the CILB's policy of using an application committee to review license applications as an unadopted rule and to a specific rule of the CILB that it would not issue or reinstate a license for any applicant who fails to demonstrate compliance with requirements of "any final order." The administrative law judge issued a final order finding that the use of an application committee was a rule under the Administrative Procedure Act and had not been adopted as required. The judge further held that the adopted rule was an invalid exercise of legislative authority in that it should be limited only to final orders of the CILB.

The court affirmed in part and reversed in part. On appeal, the CILB and the Department of Business and Professional Regulation argued that the use of an application committee should fall within the exemption from the definition of a rule for internal management memoranda that do not affect the private interests of any person. The court noted that this argument could not be raised on appeal as it had not been raised below; however, it went on to state that the procedure used did affect the private interests of the applicants and was, therefore, within the definition of a rule.

With respect to the adopted rule, the court reversed. It held that there were provisions of chapter 489, Florida Statutes, that provided sufficient authority for the rule. The court noted that the administrative law judge had relied solely on the provision of section 489.129, which provided, inter alia, that the CILB could not issue a license to a person that has been ordered to pay restitution until the applicant was in full compliance with the terms of "the final order." While the court agreed that the term "the final order" should be construed to mean an order of the CILB and could not include an order of the county board of adjustment, the court found the administrative law judge failed to consider other relevant statutory provisions. In particular, the court noted section 489.129(1)(h) granted the CILB the authority to deny a license to a person who had been disciplined by a county or municipality.

**Government-in-the Sunshine and Public Records**

*Greater Orlando Aviation Authority v. Nejame*, 4 So. 3d 41 (Fla. 5th DCA 2009) (Opinion filed February 13, 2009)

Lafay and others filed a Public Records Act request with the Greater Orlando Aviation Authority ("GOAA") seeking any documents in the possession of GOAA related to the eligibility of Carol Hojeij as a Disadvantaged Business Enterprise ("DBE"). Hojeij had filed a personal net worth statement with supporting documentation with GOAA in support of her request to be designated as a DBE. GOAA declined to provide the requested documents, citing 49 C.F.R. § 26.67(a)(2)(iv). That provision provided that notwithstanding any provision of either state or federal law, the personal net worth statements and supporting documentation of any DBE applicant may not be provided to another party without the written consent of the applicant. Lafay filed suit in circuit court seeking the documentation. After reviewing the documents *in camera,* the court ordered them to be produced. GOAA appealed.

The requested documentation consisted of an internal memorandum

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written by one GOAA attorney to another analyzing whether Hojeij was entitled to deduct from her net worth a loan request made to a bank. Attached to the memorandum was a letter from the bank addressed to "whom it may concern."

The court affirmed the lower court's decision requiring production of the documents. It did not find either document to be "supporting documentation" under the federal rule. Further, the court noted that the public has a very broad right to inspect public documents under the Public Records Act unless there is a clear and specific exemption from the Act.

**Attorney's Fees**

*Thompson v. Department of Health*, 2009 WL 724047 (Fla. 2d DCA 2009) (Opinion filed March 20, 2009)

The Department of Health filed an administrative complaint against Thompson, a physician, alleging that he had deviated from the accepted standard of care by leaving a patient on whom he was conducting a surgical procedure for several minutes. The complaint was filed after a meeting of the probable cause panel. After a formal administrative hearing, the administrative law judge found no basis for the claim and recommended dismissal. The Department adopted the recommended order. Thompson then sought an award of attorney's fees pursuant to section 57.111(4)(a), Florida Statutes, as a prevailing small business party. The administrative law judge denied the request, concluding that the Department's actions were substantially justified.

On appeal, the court reversed. It noted that the probable cause panel had acted without significant discussion of the matter and without noting that a number of pages of the documents it was to review were illegible. Further, the court noted that the circumstances under which Thompson had left the patient were justifiable. Thompson had arranged for another physician to cover obstetrical duties for him while he performed the surgery. However, during the course of the surgery, he was notified that another one of his patients was in labor and no attending physician was available. At the same time, he became aware certain surgical implements were not sterilized and that a delay of fifteen minutes in surgery would occur while sterilization occurred. Thompson left the surgical patient for that fifteen minute period while he went to an adjacent facility to deliver the baby.

**Declaratory Statements**

*Carr v. Old Port Cove Property Owners Association, Inc.*, 2009 WL 690807 (Fla. 4th DCA 2009) (Opinion filed March 18, 2009)

Carr, the owner of a condominium unit, sought a declaratory statement on the issue of whether the master condominium association was authorized under chapter 718, Florida Statutes, to lobby the Florida Legislature. The association intervened in the proceeding, arguing that Carr was not entitled to a declaratory statement, as his question raised issues of whether the First Amendment to the U.S. Constitution gave the association a constitutional right to lobby and of whether the condominium documents authorized lobbying. The Department concluded that Carr was not entitled to a declaratory statement, as it had no authority to construe constitutional rights or interpret condominium documents.

On appeal, Carr argued that the Department should have considered only the statutory question raised in his petition and not the arguments of the association. The court affirmed the Department's denial of the petition. The court held that the petition implicated the constitutional issues raised by the association, as it is incumbent on the agency to construe a statute in a manner that is not in conflict with the Constitution. Since the Department has no authority to construe constitutional provisions, it could not issue the requested declaratory statement.

**Agency Authority**

*Department of Environmental Protection v. Landmark Enterprises, Inc.*, 3 So. 3d 434 (Fla. 2d DCA 2009) (Opinion filed February 25, 2009)

Thunderbird Hills Wastewater Treatment Plant, owned and operated by Landmark Enterprises, Inc., was the subject of an enforcement action by the Department of Environmental Protection. The enforcement action was resolved by a consent order; however, Landmark was not able to comply with that order. The Department brought an action in circuit court to require compliance with the consent order. Because of ongoing problems with compliance, Landmark ultimately abandoned the wastewater facility. Landmark filed a petition with the circuit court requesting that the Department be appointed as receiver for the facility.

Over strenuous objections by the Department, the circuit court entered an order appointing the Department as receiver, and the Department appealed. The circuit court order was based on the court's determination that the Department was a "person" within the meaning of section 367.165, Florida Statutes.

The appellate court reversed and remanded. After a review of the Department's statutory authority, the court concluded that, except for the phosphogypsum management program, there was no provision of law that either authorized the Department to serve as a receiver or appropriate funds to hire a receiver. The court further noted that the authorizing statutes of certain other agencies had specifically provided for the agencies to serve in such a capacity.

**Res Judicata**

*DelRay Medical Center, Inc. v. Agency for Health Care Administration*, 5 So. 3d 26 (Fla. 4th DCA 2009) (Opinion filed January 28, 2009)

In 2003, Bethesda Health Care Systems, Inc. ("Bethesda") filed a Certificate of Need ("CON") application for a satellite hospital in an area of Palm Beach County where it operated another facility. JFK Medical Center ("JFK") filed a similar CON application seeking to transfer some of its beds at another facility to a new hospital in West Boynton. The Agency for Health Care Administration ("AHCA") issued

a preliminary approval of Bethesda's application but denied JFK's application. After an administrative hearing before the Division of Administrative Hearings, the administrative law judge recommended denial of both applications. AHCA issued a final order of denial as to both applications.

In 2005, Bethesda filed a second CON application for essentially the same project, which AHCA proposed to approve. JFK and other competitors filed a challenge arguing, inter alia, that the application should be denied based on the doctrine of res judicata. The administrative law judge denied the challengers' motion for summary recommended order, and AHCA entered a final order adopting the recommended order.

On appeal, the court affirmed. The court noted that the doctrine of res judicata must be applied in administrative proceedings with great caution, as administrative agencies are often concerned with deciding issues based on changing circumstances. The court contrasted this with judicial proceedings where the law is applied to factual situations that remain static. In this case, the administrative law judge had entered a recommended order making findings of fact regarding the numerous legal and factual differences between the first CON application and the second one. In particular, the court noted that a rule for evaluating the need for acute care beds that had been in effect for the first application was repealed before the second application. That necessitated a different legal analysis of the need for new beds. Further, numerous factual circumstances had changed, including population trends and the effect of the 2004 and 2005 hurricanes on provision of medical services.

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

# Agency Snapshot

## The Department of Community Affairs

**by Cathy M. Sellers**

The Department of Community Affairs ("DCA") is the state's land planning and community development agency. DCA is created by, and its purposes and general responsibilities are established in, section 20.18, Florida Statutes. DCA administers or participates in a range of land use programs established by numerous substantive statutes. DCA contains three statutorily created divisions: the Division of Community Planning, the Division of Housing and Community Development, and the Division of Emergency Management. Following is a brief discussion of the programs these divisions administer.

**DCA's Divisions**

**1. Division of Community Planning ("DCP")**

The DCP's mission is to assist Florida's communities as they plan for the impacts of growth and development. To fulfill this mission, DCP administers several programs and statutes, including:

A. The Local Government Comprehensive Planning and Land Development Regulation Act, Chapter 163, Part II, Florida Statutes ("1985 Growth Management Act").

The 1985 Growth Management Act requires Florida's counties and municipalities to adopt comprehensive land use plans and implement land development regulations to guide future growth and development within the local government's jurisdiction. The DCP reviews local comprehensive plans and plan amendments for compliance with the Growth Management Act and provides technical assistance to local governments in meeting Growth Management Act requirements. Also, as part of its responsibilities in administering the Growth Management Act, the DCP implements the Rural Land Stewardship Program and provides technical assistance to local governments in water supply planning, coordinated land use and transportation planning, hazard

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

**Elizabeth W. McArthur, Tallahassee** (emcarthur@radeylaw.com) .....**Chair**
**Seann M. Frazier** (fraziers@gtlaw.com) ..... **Chair-elect**
**Cathy M. Sellers** (csellers@broadandcassel.com) .....**Secretary**
**Allen R. Grossman** (a.grossmans@mgfblaw.com)..... **Treasurer**
**Donna E. Blanton** (dblanton@radeylaw.com) .....**Editor**
**Amy W. Schrader** (aschrader@gray-robinson.com).....**Editor**
**Jackie Werndli, Tallahassee** (jwerndli@flabar.org) .....**Program Administrator**
**Colleen P. Bellia, Tallahassee** (cbellia@flabar.org) .....**Layout**

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mitigation planning, and springs protection.

B. Development of Regional Impact ("DRI") Program. DRIs are developments that, because of their size, character, or location, would have a substantial effect on the health, safety, or welfare of the citizens of more than one county. These developments are required to undergo comprehensive regional review prior to local government approval. Through the DCP, DCA is responsible for administering and enforcing the DRI program on a statewide basis pursuant to section 380.06, Florida Statutes, and related statutes, including appealing local government development order issuance to the Florida Land and Water Adjudicatory Commission pursuant to section 380.07, Florida Statutes.

C. Areas of Critical State Concern ("ACSC") Program. On behalf of DCA, the DCP also administers the ACSC program for the state. Created by section 380.05, Florida Statutes, the ACSC program is intended to protect resources and public facilities of major statewide significance, within designated geographic areas, from uncontrolled development that would cause substantial deterioration of such resources. Apalachicola Bay, the Florida Keys, the City of Key West, the Green Swamp, and the Big Cypress Swamp are currently designated as ACSC. Under the ACSC program, DCA recommends to the Administration Commission for adoption by rule areas for designation as ACSC and specific principles for guiding development ("principles") within the ACSC. Once an ACSC has been designated, the DCP reviews the local government's comprehensive plans, plan amendments, and local land development regulations ("LDRs") for consistency with the principles, and DCA approves or rejects the plans, amendments, or LDRs on that basis. Also, based on input from the DCP, DCA may appeal local government issuance of development orders that are inconsistent with the principles to the Administration Commission.

Other programs in which the DCP is involved in implementing or providing technical assistance include: the Florida Quality Developments Program, section 380.061, Florida Statutes; the Wekiva River Parkway and Protection Act, Chapter 369, Part III, Florida Statutes; and the Waterfronts Florida Program, section 342.201, Florida Statutes.

**2. Division of Housing and Community Development ("DHCD")**

The DHCD administers a range of programs aimed at assisting communities in economic development, community revitalization, and improving housing, streets, utilities and public facilities. Specifically, the DHCD administers the following programs:

A. Florida Building Code

The Florida Building Commission ("FBC") is created pursuant to section 553.74, Florida Statutes, and is responsible for adopting the Florida Building Code. DCA provides administrative and staff support services to the FBC, and is statutorily charged with implementing and discharging all decisions of the FBC. In fulfilling this responsibility, DCA has established and maintains the Building Code Information System ("BCIS") website, which provides a comprehensive collection of information regarding the FBC; meeting schedules and agendas; the Florida Building Code and amendments; declaratory statements interpreting the Florida Building Code; information on building industry professionals licensed by the Department of Business and Professional Regulation and Florida Board of Professional Engineers; along with other information.

B. Special District Information Program.

Under this program, the DHCD administers the Uniform Special District Accountability Act of 1989, Chapter 189, Florida Statutes. In this role, the DHCD collects and maintains special district noncompliance status, maintains a master list of dependent and independent special districts in the state, and publishes the Florida Special District Handbook

C. Small Cities Community Development Block Program

This program provides funding under the federal Community Development Block Program for use in rural areas for housing preservation and rehabilitation; water, sewer, drainage, and streets improvement; economic development; downtown revitalization; parks and recreation projects; and low- and moderate-income job creation.

D. Community Services Block Grant Program

The DHCP administers this federal program, which provides funding to local governments and non-profit agencies for the provision of anti-poverty services, including skills training, emergency health services, food, and housing provision, job counseling, transportation assistance, and homelessness prevention.

E. Front Porch Florida Program

Through this program, the DHCD provides planning, technical, and program assistance to help distressed communities to revitalize, rebuild, and preserve core neighborhood values.

F. Low-Income Energy Assistance and Weatherization Assistance Programs

The DHCD administers the Low-Income Energy Assistance Program, through which federal funding is provided to non-profit agencies and local governments to assist low-income families in paying home heating and cooling costs. DCA, through the DHCP, works collaboratively with the Florida Energy Affordability Coalition to identify and recommend legislative proposals to address affordable home energy for low-income residents. The DHCD also administers the federally-funded Weatherization Assistance Program, which provides grant funds to local governments, Indian tribes, community action agencies, and non-profit agencies to assist low-income residents in weathering homes, installing insulation, repairing heating, cooling, and water heating systems, and installing solar screens and reflective coating.

**3. The Division of Emergency Management**

DCA administratively houses the Division of Emergency Management ("Division") and collaborates with the Division on nonemergency response

matters, such as disaster recovery programs, grant and mitigation programs, and emergency matters related to local comprehensive plans. The Division is headed by a director appointed by the Governor, and is not subject to control, supervision, or direction by DCA.

In addition to these programs, DCA's Office of the Secretary houses the Florida Communities Trust Program, which administers two state land acquisition grant programs that provide funds to local governments and non-profit organizations to acquire open space, greenways, parks, and projects supporting Florida seafood harvesting and aquaculture industries.

**Agency Head**
Secretary Thomas G. Pelham, AICP
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Secretary Tom Pelham was appointed Secretary of DCA by Governor Charlie Crist in January 2008. Secretary Pelham previously served as Secretary of DCA from 1987 to 1991, and he played a central role in the initial implementation of the Growth Management Act. Secretary Pelham is an attorney and Certified Planner with over thirty years' experience in land use law, planning and growth management, and environmental matters. Secretary Pelham received his Bachelor's and Juris Doctor degrees from Florida State University, received a Master's degree in Political Science from Duke University and a Master of Law degree from Harvard Law School.

**Agency Clerk**
Paula Ford, Clerk
Room 315G
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100
(850) 922-1682

DCA accepts document filing by facsimile and electronic mail, as well as by mail, overnight courier, or hand delivery of a hard copy. The facsimile filing number is (850) 487-6769.

E-filings should be sent to *paula.ford@dca.state.fl.us* or *mariam.snipes@dca.state.fl.us*. The agency requests that when documents are filed by facsimile or e-filing, that a hard copy *not* also be filed.

Public records requests should be directed to the Agency Clerk's Office, to the attention of Leslie Anderson-Adams.

**General Counsel**
Shaw Stiller
Room 315A
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100
(850) 488-0410

Shaw Stiller has served as DCA's General Counsel since January 2007. Before becoming General Counsel, Mr. Stiller served as Assistant General Counsel with DCA. Mr. Stiller also practiced land use law in the private sector, representing private interests, local governments, and citizens' groups in state and federal courts. Mr. Stiller received his Bachelor of Arts, *magna cum laude*, from Loyola University in New Orleans, Louisiana, in 1988, and his Juris Doctor with high honors from the Florida State University College of Law in 1991.

**Office of the General Counsel**

There are ten attorneys in DCA's Office of General Counsel. As of this writing, the agency had one vacant attorney position. All attorneys are located at DCA's headquarters, 2555 Shumard Oak Boulevard, Tallahassee, Florida, telephone 850-488-0410.

**Types of Cases**

**1. Comprehensive Plan Compliance and LDR Challenges**

A substantial portion of DCA's cases involve litigation of DCA compliance and noncompliance determinations regarding local government comprehensive plans and plan amendments, pursuant to sections 163.3184(9) and (10), Florida Statutes. DCA refers these cases to the Division of Administrative Hearings ("DOAH") for formal evidentiary hearings pursuant to section 120.57(1), Florida Statutes. Depending on DCA's initial determination and the Administrative Law Judge's ("ALJ's") recommended order determination regarding compliance, either DCA or the Administration Commission enters the final order in these cases, as provided in sec-

*continued...*

**AGENCY SNAPSHOT**
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tions 163.3184(9) and (10), Florida Statutes.

DCA also is a party to land development regulation ("LDR") challenges brought by substantially affected persons, as provided in section 163.3213, Florida Statutes, on the ground that the LDR is not consistent with the local comprehensive plan. DCA refers these cases to DOAH for formal evidentiary hearings pursuant to section 120.57(1); however, if the ALJ determines the LDR is consistent with the comprehensive plan, the ALJ issues a final order that is appealable under section 120.68, Florida Statutes. If the ALJ determines the LDR is inconsistent with the plan, the Administration Commission issues the final order, which solely determines whether sanctions should be imposed.

Additionally, if DCA determines that a local government has failed to adopt LDRs, it is authorized under section 163.3202, Florida Statutes, to institute an action in circuit court to require the local government to adopt the LDRs.

**2. DRI and ACSC Proceedings**

DCA is authorized by section 380.07, Florida Statutes, to challenge local government issuance of DRI development orders and local government issuance of development orders for development proposed in ACSC. These cases are referred to DOAH for a section 120.57(1) hearing, and the final order is entered by the Florida Land and Water Adjudicatory Commission.

DCA is authorized by section 380.11, Florida Statutes, to bring an action for injunctive relief in circuit court against any person or developer who violates Chapter 380, Florida Statutes, or any rules, regulations, or orders issued under the authority of Chapter 380. Section 380.11 also authorizes DCA to institute administrative proceedings to prevent, abate, or control activities that violate Chapter 380; enjoin development in violation of ACSC statutory requirements, rules or development orders; and enforce binding letters, rules, agreements, orders, and development orders.

**3. Enforcement of Development Agreements**

Section 163.3243, Florida Statutes, authorizes DCA to file an action in circuit court to enforce the terms of a development agreement or to challenge compliance of the development agreement with the Florida Local Government Development Agreement Act, sections 163.3220 - 163.3243, Florida Statutes.

**Practice Tips**

Practice before DCA entails complex matters involving numerous statutes and rules and extensive administrative and judicial case law. The agency encourages attorneys to review its website at: *http://www.dca.state.fl.us/* to obtain basic information regarding DCA's substantive programs and practice areas and to review the applicable substantive statutes, rules, and orders. DOAH's website at: *http://www.doah.state.fl.us/internet/default.cfm*, also contains a wealth of information regarding the procedural requirements and substantive standards for initiating or intervening in growth management and other cases and provides numerous examples of pleadings and other documents filed in these cases.

***Cathy M. Sellers** is a partner with Broad and Cassel in Tallahassee.*



**AMENDMENTS**
*from page 1*

workshops, in two respects. First, the bill expands the required public notice by requiring the notice to also be published on the agency's website not less than seven days before the event. In addition, the bill requires the agenda, along with any meeting materials available in electronic format (excluding confidential and exempt information) to be published on the agency's website at least seven days before the event.

***Requires statement of agency organization and operations to be published on agency website.*** Similarly, Section 4 of the bill revises section 120.54(5)(b)7 to provide that the Uniform Rules of Procedure must

require that the statement concerning the agency's organization and operations be published on the agency's website. Presently, the uniform rules simply require the agency head to provide a copy of the statement upon request.[2] The agency statement contains considerable useful information, such as whether documents may be filed by electronic mail or facsimile transmission and, if so, the applicable address or telephone number.[3] As such, publication of the statement on the agency's website should prove particularly helpful to administrative lawyers who practice before the agency.[4]

***Revises rulemaking requirements.*** Section 4 of the bill makes several other changes to the rulemaking requirements in section 120.54. These include:

***Emphasizes that staff must be available at public hearing.*** The bill revises section 120.54(3)(c) to provide that when a public hearing is held on a proposed rule, the agency must ensure that staff are available to explain the agency's proposal and to respond to questions or comments regarding the proposed rule. Since 1996, similar language has been in section 120.54, in paragraph (2)(c), dealing with rule development and public workshops.[5] Adding it to paragraph (3)(c), regarding rule adoption and public hearings,[6] was thought to provide the public with better notice that this requirement also applies to public hearings.

***Clarifies what materials must be considered and may provide a basis for change.*** The bill revises section 120.54(3)(c) and (d) to clarify that material submitted to the agency within 21 days after publication of notice of proposed rulemaking and between the date of publication of the notice and the end of the final public hearing must be considered by the agency and may serve as a basis for modification of the proposed rule.

***Revises notice of effective date***. The bill revises section 120.54(3)(e) to require that the effective date of a rule be specified in the notice of proposed rule.

***Effective date.*** Section 6 of the bill provides that it is to take effect on July 1, 2009.

* * *

Two other bills may be of interest to administrative lawyers, although these bills do not amend the APA.

***HB 935, Area Agencies on Aging.***

This bill is a legislative response to the decision of the Fourth District Court of Appeal in *Mae Volen Senior Center v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.,* that an area agency on aging is an "agency" subject to the APA for purposes of a bid protest proceeding.[7] The First District Court of Appeal reached the opposite conclusion in a case in which only a per curiam affirmed decision was issued.[8] A similar issue is currently pending before the Third District Court of Appeal.[9]

HB 935 makes several revisions to the applicable statutes to clarify that an area agency on aging is a non-governmental, independent, not-for-profit corporation and is not a state "agency" as that term is defined in the APA. Accordingly, this legislation confirms that an area agency on aging is not subject to any aspect of the APA, including but not limited to the bid protest procedures in the APA.

However, the bill also requires the Department of Elderly Affairs to adopt, by August 1, a rule creating a dispute resolution mechanism with respect to the designation of lead agencies by area agencies on aging under the Community Care for the Elderly Program. This rule must establish standards for a bid protest and a procedure for resolution that incorporate many of the principles of the APA. These include the opportunity for a hearing to be held by a qualified, independent decision-maker and then an opportunity for review by a qualified impartial reviewer. HB 935 was approved by the Governor on May 20 and became effective on becoming a law.[10]

***HB 7089, Exceptional Students.***

This measure provides that exceptional education due process hearings must be conducted by an administrative law judge ("ALJ") from the Division of Administrative Hearings ("DOAH") pursuant to a contract between the Department of Education and DOAH. The decision of the ALJ is final. Any party aggrieved by the ALJ's order may bring an action in circuit court; however, if the student is identified as gifted, then judicial review may be sought in the district court of appeal as provided in section 120.68. This act takes effect on July 1, 2009.

***Larry Sellers*** *is a partner in the Tallahassee office of Holland & Knight LLP.*

**Endnotes:**

[1] A similar measure was filed in the House as a proposed committee bill, PCB GAP 09-15, by the Governmental Affairs Policy Committee. It was assigned HB 7047.

[2] *See* R. 28-101.001(3), Fla. Admin. Code.

[3] *See* R. 28-101.001(2)(e), Fla. Admin. Code.

[4] As this requires the amendment of the Uniform Rules of Procedure, it could provide the Administration Commission with an opportunity to update these rules.

[5] *See* § 120.54(2)(c), Fla. Stat. ("When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed.") For a discussion of this requirement, see Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform,* 48 Fla. L. Rev. 93, 119-20 (1996).

[6] The language added to paragraph (3)(c) is not identical to the language that is still found in paragraph (2)(c). The existing language requires the agency to ensure that the "persons responsible for preparing the proposed rule" are available, while the new language only requires the agency to ensure that "staff" are available. The latter recognizes that the persons responsible for preparing the proposed rule may no longer be employed by the agency.

[7] 978 So. 2d 193 (Fla. 4th DCA 2008). For a discussion of this decision, see Amy W. Schrader, *New Opinion Issued by Fourth DCA in Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.*, Vol. XXIX, No. 4 Admin. L. Section Newsletter 8 (June 2008), and Amy W. Schrader, *Protest-Proof Procurements?: A Commentary on Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach / Treasure Coast, Inc.,* Vol. XXIX, No. 1 Admin. L. Section Newsletter 11 (Sept. 2007).

[8] *First Quality Home Care, Inc. v. State of Fla., Dep't of Elder Affairs*, Case No. 1D05-4969 (per curiam) (Fla. 1st DCA 2006).

[9] *First Quality Home Care, Inc. v. Alliance for Aging, Inc.*, Case No. 3D08-2949 (oral argument held February 17, 2009).

[10] Regarding pending litigation, HB 935 provides that, "[f]or any lead agency designation conducted prior to the effective date of this subsection that is the subject matter of litigation on the date on which this subsection becomes law, the litigants shall be entitled to proceed with discovery under the Florida Rules of Civil Procedure immediately upon the date on which this subsection becomes law, and the litigants shall further be entitled to participate in the bid protest procedures enacted by rule pursuant to this subsection."

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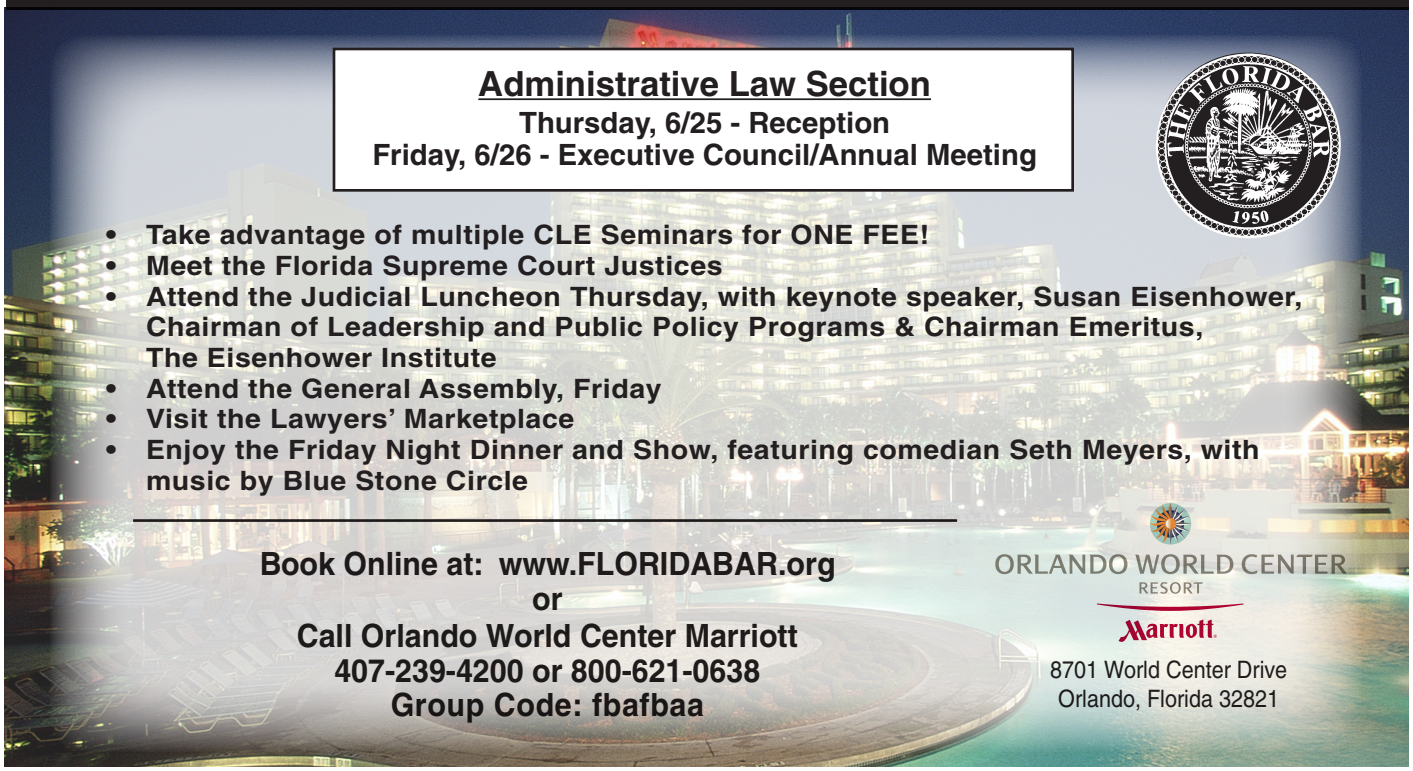

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