ADMINISTRATIVE LAW SECTION
Newsletter
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2021 Legislative Update: Yet Another Quiet Year

By Larry Sellers

The 2021 Legislative Session was another quiet one for administrative lawyers. The Legislature again enacted no significant changes to the Administrative Procedure Act (APA). But it did approve a few measures of interest to administrative practitioners, including legislation requiring new due process protections for students and student organizations. In addition, a number of the most high-profile and controversial bills require or authorize the adoption of implementing rules, some of which are the subject of legal challenges. The Legislature also considered, but did not pass, several others bills, including some filed in prior years. The Joint Administrative Procedures Committee (JAPC) again recommended changes to the APA, but these again failed to pass. Likewise, legislation that would transfer some of the functions of the Governor and Cabinet to the Governor was not enacted, although a trimmed-down version passed the House, but not the Senate. Here is a brief summary of what passed and what died, including a few that you might see again in 2022.

BILLS THAT PASSED

Due Process Protections for Students and Student Organizations

The general due process provisions of the APA, and specifically those in sections 120.569 and 120.57,

See "2021 Legislative Update," page 18

From the Chair

By Stephen C. Emmanuel

I am very excited to begin my term as Chair of the Administrative Law Section! We are planning what promises to be a fun and educational year for members.

The Section's Executive Council met in Tallahassee at The Edison on July 29, 2021, to finalize plans for the upcoming Bar year. Immediately following the meeting, the Council hosted a reception for all members, to welcome the Division of Administrative Hearings' new Chief Judge Pete Antonacci.

Thanks to our CLE Committee co-chaired by Judge Cathy Sellers and Brittany Adams Long, the Section will again sponsor a number of signature in-person educational events including the DOAH Trial Academy in September, our annual Pat Dore Administrative Law Conference in October, and our Advanced Administrative Law Topics seminar in the spring.

Our Membership and Technology Committees have done a terrific job this past year keeping members engaged, increasing the Section's presence on social media, and start-

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ing a monthly Section Bulletin with information about upcoming events and spotlighting members. Many thanks to Maria Pecoraro-McCorkle, Gigi Rollini, Judge Gar Chisenhall, Tabitha Jackson, Paul Drake, Gregg Morton, and the other members of those two committees for their efforts on the bulletin.

In June the Section hosted a social event at Proof Brewing in Tallahassee that raised funds for the Animal Shelter Foundation. A local band featuring Judge Darren Schwartz on keyboard provided great music. Special thanks to Judge Brian Newman for organizing this event and to Gregg Morton for arranging the charitable beneficiary.

Our Young Lawyers Committee led by Tabitha Jackson will be holding a number of other social events for members at venues around the state throughout the year. The events will be advertised on the Section's website and in our new Section Bulletin.

Our Publications Committee led by Jowanna N. Oates oversees publication of our *Newsletter*, which provides Section news, summaries of recent appellate and DOAH cases, and scholarly articles on administrative law topics that appear in *The Florida Bar Journal*.

The Florida Bar recently published a new 13th Edition of *The Florida Administrative Practice Manual*, an excellent resource for research on administrative law issues. Much appreciation goes to Judges Elizabeth W. McArthur, E. Gary Early, and Lisa Shearer Nelson for their guidance as the Steering Committee for the Manual.

Our State and Federal Government Administrative Practice Certification Committee led by Judge Chisenhall has been extremely active in encouraging more members to become Board-certified. The Committee revised the content of the certification exam to place increased emphasis on Florida practice over federal practice, and also collected and placed on the Section's website resources to help attorneys studying for the exam. Many thanks to Angela Morrison, Gregg Morton, Meghan Silver and Judge Chisenhall for shepherding this project.

We owe special thanks to our Immediate Past Chair, Bruce Lamb, for leading us last year; to Clark Jennings, who served diligently on the Executive Council for many years and recently moved to Washington, D.C. to work for the Federal Maritime Commission; and to our officers for the upcoming year: Chair-Elect, Tabitha Jackson; Secretary, Judge Suzanne Van Wyk; and Treasurer, Marc Ito.

Whether you are an experienced administrative practitioner, or are new to administrative law, the Section needs your active participation. Please reach out to me or any member of the Executive Council if you would like to become more involved or have any suggestions for improving the Section.

Thank you for the opportunity to serve as your Chair.

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

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A Well-Deserved Retirement for Ernest "Ernie" Reddick

By Brittany B. Griffith

For administrative law practitioners who work in government, I'm sure it comes as no surprise to hear that one of your colleagues has moved to another position or even retired. It happens every day. Boxes are carried out, the "good chair" is quietly moved to another office, and office supplies, once plentiful, disappear into the ether of other desks. How your colleagues kept their offices will either be forgotten or become the stuff of legend. But those colleagues who made a true impact, the ones who made you laugh during what seemed like dark times or the ones who taught you everything without even trying to do so, are remembered most fondly.

In reflecting on this fact, it is only right that the Administrative Law Section recognizes the well-deserved retirement of Ernie Reddick, the former Program Administrator of the Florida Administrative Code and Register at the Florida Department of State. Ernie began his retirement at the end of May 2021 after 35 years of service to the State of Florida.

Ernie's granddaughter, Charlotte, taking him for a walk in the North Carolina mountains.

Ernie was born and raised in Cullman, Alabama. He received his bachelor's degree at Auburn University and his juris doctor from the Florida State University College of Law. Like his parents who met at the Sweet Shop just off the Florida State University campus, Ernie is a proud Florida State Seminole fan.

Ernie began his legal career working in a private firm that handled mostly criminal law. Without knowing what to expect of working for the government, he applied to a position with the Florida Department of Corrections. He was hired in March 1985 to primarily handle employment law for an agency that at that time had approximately 28,000 employees. He described this work as "high pressure," but he greatly enjoyed the litigation aspect of the job.

In December 2009, Ernie made the tough decision to leave his long-held position and transition to the Florida Department of State. There he handled "a little of everything except elections work." He provided legal support to many of the Department's Divisions, including Corporations, Cultural Affairs, Historical Resources, and Library and Information Services. Ernie noted that the Department of State was full of "wonderful people both within and outside of the agency," and that the work kept him interested and learning every day. At the Department of State, his work ranged from litigating over undersea treasure to plundering through the state archives to see important documents like the original constitution of the State of Florida or archived state music.

In 2014, Ernie accepted the position of Program Administrator of the Florida Administrative Code and Register. In this role, he was responsible for running the office that issues a daily online publication of statutorily required notices submitted to the Department of State; continually updating the Florida Administrative Code as new rules were adopted, amended, or repealed; and receiving other statutorily required documents such as bills signed or vetoed

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by the Governor and executive orders from the Governor or state cabinet for filing. He also oversaw the Department's transition to electronic filings for rules during the recent COVID-19 pandemic. In describing this work, Ernie emphasized that he was surrounded by great people who performed their duties extremely well. Their success generated his success, and he was grateful for their talents and dedication.

But those compliments certainly go both ways. As an example, Ernie's last General Counsel, Brad McVay, had this to say: "Ernie Reddick has managed the Florida Administrative Code and Register throughout my time as General Counsel at the Florida Department of State. He takes great pride in his work and genuinely cares about his employees and coworkers. He is a great attorney and someone who the Department will truly miss."

In addition to his coworkers, Ernie served countless agency customers who benefitted from his experience, helpfulness, and mentorship over the years.

> "Ernie has been a helping hand and an incredible source of information for years, leading me as a young rules attorney through the rulemaking process and helping me understand the complexities of administrative rulemaking. He will be greatly missed." – Kathleen Brown-Blake, former Interim Deputy General Counsel for the Agency for Persons with Disabilities

Ernie also fostered positive relationships with his colleagues at the Florida Legislature and other administrative law practitioners.

> "It has been a pleasure to work with Ernie over the years. Ernie's patience and attention to detail are responsible for the high quality of the Florida Administrative Register and Florida Administrative Code. I will miss his pleasant personality, calm demeanor, and expertise at the Department of State. Ernie, I hope that you enjoy retirement and please come back and visit us at an Administrative Law Section function." – Jowanna N. Oates, Chief Attorney, Joint Administrative Procedures Committee

Despite our sadness to see him go, Ernie is ready to pursue his passions on a full-time basis. He will be venturing to Colorado in September to see some of his favorite bands, Greensky Bluegrass and Railroad Earth, play at Red Rocks. He is also looking forward to spending more time with his family, including his granddaughter Charlotte and his wife, who is joining him in retirement later this year.

When asked about the future of the Florida Administrative Code and Register, Ernie expressed his excitement to pass the baton to his highly capable successor, Anya Grosenbaugh. For Anya, her rise is understandably bittersweet. "Ernie has been an amazing mentor for the past four years and has given me the guidance and encouragement to continue in his place. We've had a lot of laughs along the way and, in spite of the pressure of our operations, I have always admired Ernie's easygoing approach which I hope to reflect myself. I know that I speak for our entire office when I say that we will miss seeing him every day and wish him well in this next chapter of his life."

Ernie, thank you for your 35 years of service to the State of Florida. You undoubtedly made a positive impact on so many of us, and we are grateful for your tireless efforts, support, and friendship. Please keep in touch, visit often, and enjoy every minute! For now, we will be at work guarding our "good chairs."

Brittany Griffith is an Executive Senior Attorney for the Florida Department of Financial Services where she manages the Office of the General Counsel's Contracts and Rulemaking Section. She began her journey with Florida rulemaking in 2013 and met Ernie Reddick the same year. She earned her J.D. from the Florida State University College of Law.

The views expressed herein are those of the author and are not intended to reflect the views of the Florida Department of Financial Services or Florida's Chief Financial Officer.

Appellate Case Notes

By Tara Price, Larry Sellers, Gigi Rollini, Melanie Leitman, and Robert Walters

Constitutionality—Florida's Medical Marijuana Regulatory Scheme

Dep't of Health v. Florigrown, LLC, 317 So. 3d 1101 (Fla. 2021)

In 2018, Florigrown, an entity which applied to become a licensed Medical Marijuana Treatment Center ("MMTC"), challenged two provisions of section 381.986(8), Florida Statutes, as inconsistent with the recent medical marijuana amendment to the Article X, Section 29 of the Florida Constitution, and sought a temporary injunction. The Leon County Circuit Court issued a temporary injunction to stop the Department of Health ("Department") from issuing licenses under section 381.986, finding that Florigrown had a substantial likelihood of success on the merits in its constitutional challenge. On appeal, the First District Court of Appeal upheld the injunction.

The Florida Supreme Court, however, quashed the ruling, struck down the temporary injunction, and upheld the constitutionality of the medical marijuana regulatory scheme.

Florigrown asserted that the vertical-integration requirement of section 381.986(8)(e) conflicted with the definition of MMTCs provided in the amendment. However, the Court held that there was no conflict between the definition of MMTCs in the Constitution and the statute's vertical-integration requirement because the statute did not define MMTCs at all; rather, the statute simply set forth requirements that were necessary for an MMTC to be licensed.

Florigrown additionally argued that the Florida Constitution only gave the Department the power to register the MMTCs, not to provide them with licenses. However, the Court concluded that the constitution's definition of MMTC does not provide for unilateral registration "with" the Department, but registration "by" the Department. The constitution also allows the Legislature to enact laws that are consistent with that provision in the constitution. Since the Florida Constitution does not entitle an entity to registration or licensure simply because it intends to perform one of the listed functions, and the constitution contemplates licensure according to substantive standards, the Legislature's enactment of a standard that includes vertical integration is not inconsistent with the constitution.

Licensure—Entitlement to Formal Administrative Hearing

R.C. v. Dep't of Agric. & Consumer Servs., 46 Fla. L. Weekly D1421b (Fla. 1st DCA June 16, 2021)

An applicant for a concealed weapons license appealed after the Florida Department of Agriculture and Consumer Services, Division of Licensing ("FDACS"), denied him the license. FDACS's denial was based upon the results of a search of the National Instant Criminal Background check system ("NICS"), which indicated that the applicant had a disqualifying conviction. The NICS did not provide any additional information as to the jurisdiction of the conviction, the nature of the crime, or the date of conviction. Because FDACS is not a law enforcement agency, it does not have access to any additional information regarding NICS results.

The applicant challenged the results of the NICS search and contended that although he had a felony conviction in Illinois in 1969, he had secured a rights restoration. He argued that he should not have been denied his concealed weapons permit on those facts.

FDACS, taking the position that the NICS result was binding as a matter of law according to statute and that, as such, disagreeing with the results of the search did not create a disputed issue of material fact, denied the applicant's petition for formal administrative hearing and instead conducted an informal hearing. Offering no evidence but the NICS result, FDACS issued a final order affirming the license denial and finding that the NICS search result required the applicant to be disqualified, notwithstanding the applicant's submission of his rights restoration paperwork.

The majority en banc opinion held that FDACS was not required to rely solely upon the NICS search result to deny the application. The court concluded that the NICS result is not dispositive in determining license eligibility and, consequently, FDACS's failure to present any additional evidence at the hearing to support its denial left the final order lacking competent, substantial evidence. The court therefore held that FDACS's denial of a formal administrative hearing was improper, as evidence was required to resolve the challenged facts stemming from the NICS search.

Judge Makar dissented, arguing that based on a plain reading of the statute, FDACS has no discretionary authority due to the clear preemption to the Legislature imposed in the statute, and lacks any rulemaking authority to create independent procedures, so that the court's holding forces FDACS to follow a course entirely outside of its existing legislative authority. Judge Kelsey also dissented on the basis that the majority's opinion improperly requires FDACS to exceed, and therefore violate, the statutory mandates issued to FDACS in granting or denying concealed weapons licenses. Because FDACS has no statutory authority to ignore or even modify criminal justice information it receives during the background check process, nor does FDACS have rulemaking authority, FDACS could not have conducted an independent analysis to verify the NICS results. As a result, FDACS properly denied the applicant's request for a formal adminis-

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trative hearing because there were no disputed issues of material fact. Judge Kelsey also found the applicant failed to preserve any of the issues discussed in the majority's opinion, and there being no preserved issues on which appellate relief could be awarded, the final order should have been affirmed.

Licensure—Revocation
Stern v. Dep't of Bus. & Prof'l Regulation, 319 So. 3d 659 (Fla. 4th DCA 2021)

The petitioner is a licensed real estate sales associate who was convicted of violating section 1 of the Sherman Antitrust Act ("Act") after improperly being involved in bidding on foreclosed property. The Department of Business and Professional Regulation ("DBPR") issued an order imposing a fine and revoked the petitioner's license, relying on section 475.25(1)(f), Florida Statutes, which provides authority to discipline a licensee convicted of a crime in any jurisdiction which "involves moral turpitude or fraudulent or dishonest dealing." The petitioner appealed the sanction imposed by DBPR, arguing that his conviction under the Act is not necessarily a crime involving "moral turpitude or fraudulent or dishonest dealing" such that it would qualify for discipline based on the conviction alone.

The Fourth District Court of Appeal agreed with the petitioner and reversed the fine and revocation. The court determined that although a violation of the Act may involve "fraudulent or dishonest dealing" based on the elements of the crime, neither was present in the facts giving rise to petitioner's conviction.

That left the court to determine whether a violation of the Act necessarily involves "moral turpitude" to support DBPR's discipline. The court addressed the differences between *malum prohibitum* and *malum in se* crimes. The former involves crimes that are acts which are wrong because they are so decreed, or which are ethically neutral and forbidden only by positive enactment. The latter involves crimes that are acts which are wrong in themselves, or which are seen as ethically wrong without any need for legal prohibition.

The court determined violations of the Act are not *malum in se* crimes. Instead, the crimes involved in the Act are *malum prohibitum* crimes, which Congress prohibited as hampering commerce and free enterprise. Concluding that because a violation of the Act is not necessarily one of "moral turpitude," and because there were no findings of "fraudulent or dishonest dealing" in the the petitioner's specific crimes, the court held that DBPR could not sanction the petitioner based on the conviction standing alone. The final order imposing the discipline solely based on the conviction was therefore reversed.

Rule Challenges—Validity

On May 19, 2021, the First District Court of Appeal issued four opinions involving challenges to the rule that defines items "customarily sold in a restaurant" as that term is used in section 565.045, Florida Statutes, for the purpose of issuing Consumption on Premises ("COP") liquor licenses. Two of these opinions address appeals from a final order declaring the existing rule invalid; the other two opinions involve appeals from a final order declaring the subsequently-published proposed rule to be invalid.

I. Existing Rule Challenges

Rule Challenge—Validity—Standing to Challenge
Dep't of Bus. & Prof'l Regulation v. Target Corp., 321 So. 3d 320 (Fla. 1st DCA 2021).

This is one of two appeals from a final order declaring existing rule 61A-3.055, F.A.C., invalid.

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Under section 565.045, Florida Statutes, a COP licensee may not sell "anything other than the beverages permitted, home bar and party supplies and equipment (including but not limited to glassware and party-type foods), cigarettes, and what is *customarily sold in a restaurant*." The challenged existing rule defines what is "customarily sold in a restaurant." Subsection (1) of the existing rule lists seven specified items, and subsection (2) of the existing rule provides that a licensee may petition the Division of Alcoholic Beverages & Tobacco ("Division") for permission to sell a product other than those listed, providing the licensee can show that the item is customarily sold in a restaurant.

Appellees (who were "Petitioners" below) challenged the existing rule as an invalid exercise of delegated legislative authority on various grounds. Petitioners claimed they are substantially affected by the challenged rule because each has locations that are licensed as restaurants, and they seek to obtain a license allowing for consumption of alcoholic beverages on the premises. The existing rule restricts the items that may be sold by a holder of a COP license and therefore prevents them from obtaining a COP license. As such, they claim that the rule is invalid to the extent that it places limitations beyond those established in the statute.

The ALJ found that Petitioners have standing to challenge the existing rule. The ALJ determined the existing rule is invalid because the rule is arbitrary and capricious, as restaurants customarily sell at least t-shirts and branded souvenirs—items not listed in the existing rule—and excluding an item customarily sold in restaurants from a list of items customarily sold in restaurants is illogical. The ALJ also found that the existing rule is invalid because subsection (2) is vague and vests unbridled discretion in the Division because it provides no standard for what, if any, other items may be permitted to be sold in addition to those listed in subsection (1) of the rule.

On appeal, the Division argued that the ALJ erred when he found subsection (1) of the existing rule to be arbitrary and capricious, and therefore an invalid exercise of delegated legislative authority, because it does not include t-shirts and branded souvenirs. The court observed that "[a] rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." The court found that a plain reading of the existing rule reveals that subsection (1) provides an exclusive list of items customarily sold in a restaurant, so if there is an item that is proven to be customarily sold in a restaurant that is absent from this exclusive list, then the list itself is not supported by the necessary facts and does not operate according to reason. As such, the court concluded that subsection (1) of the existing rule is arbitrary and capricious.

The Division also claimed that the ALJ erred when he held subsection (2) of the existing rule to be invalid because it is vague and vests unbridled discretion in the Division. Subsection (2) allows for a business seeking a COP license to petition the Division to ask for items they sell that are not included in subsection (1) to be deemed as items customarily sold in a restaurant. The court noted that an administrative rule is invalid under section 120.52(8)(d), Florida Statutes, if it forbids or requires the performance of an act in terms that are so vague that persons of common intelligence must guess at its meaning and differ as to its application. The court agreed with the ALJ's determination that the existing rule provides no standard for determining what, if any, items may be permitted to be sold other than those listed in in subsection (1). The court therefore agreed that the existing rule vests unbridled discretion in the Division, and the court affirmed the ALJ's determination that subsection (2) is invalid for this reason.

The Division also challenged Petitioners' standing to challenge the existing rule. The ALJ determined that, as prospective applicants, Petitioners had standing to challenge the rule because it will affect the disposition of their applications. The court rejected the Division's arguments that Petitioners failed to satisfy the immediate injury prong of the substantially affected test, noting that Petitioners are not required to have a pending application for the purpose of showing an immediate injury; rather, it is sufficient that a party is a potential applicant for the purposes of standing.

The Division also argued that Petitioners cannot demonstrate they have standing because the ALJ's ruling is much narrower than requested by Petitioners and would not necessarily result in Petitioners being able to obtain a COP license because they sell many more items than t-shirts and branded souvenirs. The court rejected this argument, holding that it is sufficient that a petitioner proves that its interest "could reasonably be affected" by the rule. The court therefore affirmed the ALJ's determination that Petitioners had standing to challenge the validity of the existing rule.

Rule Challenge—Standing to Intervene
ABC Fine Wine & Spirits v. Target Corp., 321 So. 3d 896 (Fla. 1st DCA 2021)

This is the second of two appeals from a final order declaring existing rule 61A-3.055 invalid. The appellants in this appeal intervened in the rule challenge in support of the existing rule.

The court affirmed the ALJ's determination that the rule is invalid for the reasons set forth in *Dep't of Bus. & Prof'l Regulation v. Target Corp.*, 321 So. 3d 320 (Fla. 1st DCA 2021), described above. The court, however, agreed with the appellants that the ALJ erred in finding that they lacked standing to intervene and, therefore, reversed that portion of the final order.

After Petitioners filed their challenge to the existing rule, the appellants in *ABC Fine Wine* ("Appellants"), as COP license holders, sought to intervene in support of the existing rule. Petitioners opposed the intervention, claiming that although Appellants would have standing to

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challenge the rule, they do not have standing to intervene in support of the rule. The ALJ allowed Petitioners to intervene, subject to proof of standing at the final hearing. After the final hearing, the ALJ concluded that Appellants lacked standing to intervene in support of the existing rule because they did not prove a real or immediate injury. The ALJ found that, if the rule were to be found invalid, the effects upon Appellants would only be to remove restrictions upon what they could sell. The court, however, concluded that the fact that a party is regulated by a rule "is alone sufficient to establish that their substantial interests will be affected," cited various authorities, and noted that the court previously has held that participation in a rule challenge proceeding is not limited to those parties seeking to intervene on behalf of the petitioner.

II. Proposed Rule Challenges

Rule Challenge—Validity
Dep't of Bus. & Prof'l Regulation v. Walmart Inc., 46 Fla. L. Weekly D1167a (Fla. 1st DCA May 19, 2021).

After the existing rule was found to be invalid, the Division published a new proposed rule 61A-3.055 defining items "customarily sold in a restaurant" as that term is used in section 565.045, Florida Statutes, for the purpose of issuing COP liquor licenses. This is the first of two appeals from the final order declaring this proposed rule invalid.

The proposed rule provides that items "customarily sold in a restaurant" include only the following: (a) food cooked or prepared on the licensed premises; or (b) hot or cold beverages; or (c) souvenirs bearing the name, logo, trademark, or location of the licensed vendor operating the licensed premises; or (d) gift cards or certificates pertaining to the licensed premises. The proposed rule also includes services or sales authorized in the Florida Public Lottery Act.

After a final hearing, the ALJ declared the proposed rule invalid because it enlarges, modifies, or contravenes the statute as the proposed rule does not allow for food that is cooked or prepared offsite to be sold. As such, the ALJ determined that the Division improperly restricted the items "customarily sold in a restaurant" to only those foods listed. The ALJ also found the proposed rule to be invalid because it was arbitrary and capricious because it fails to define "restaurant" or "customarily," and because the Division created a list of items to be considered "customarily sold in a restaurant" without first conducting any survey, study, or investigation of restaurants to determine what they customarily sell.

On appeal, the Division argued that the final order should be reversed because the ALJ held the proposed rule invalid based on objec-

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tions not alleged in the petitions. The court noted that a party challenging the validity of a proposed or adopted rule must state in its petition "the particular provisions alleged to be invalid and a statement of the facts or grounds for the alleged invalidity," citing section 120.56(1)(b), Florida Statutes. The agency is then required to prove "that the proposed rule is not an invalid exercise of delegated legislative authority *as to the objections raised*." § 120.56(2)(a), Fla. Stat. (emphasis added). The court rejected the Division's arguments finding that the basis for the ALJ's ruling was sufficiently pleaded and provided sufficient particularity for the Division to prepare its defense.

The Division also argued that the ALJ erred in determining the proposed rule was invalid because it enlarges, modifies, or contravenes the statute it was meant to implement. In particular, the Division urged that there was not sufficient evidence to conclude that food prepared offsite is "customarily sold in a restaurant." The court rejected this argument, concluding that the plain meaning of the term "restaurant" supports that such establishments customarily sell food prepared offsite, and by excluding such items, the proposed rule improperly enlarges, modifies, or contravenes the statute.

The Division next argued that the ALJ erred when he concluded that the Division was required to define the terms "restaurant" and "customarily" before determining what is "customarily sold in a restaurant." The court agreed, holding that where a term is not defined by statute or rule, the plain meaning of that term will be used, and the Division is not required to do more.

The court also agreed that the ALJ erred in determining that the proposed rule was arbitrary and capricious because the list of items customarily sold in a restaurant is not based upon any factual examination or evidence about what a restaurant, whatever the definition, actually sells. The court found that the Division undertook the proper procedures to adopt the proposed rule and that those procedures do not require the Division to conduct an empirical investigation prior to crafting and adopting a rule. Accordingly, the court concluded that the proposed rule is not arbitrary or capricious.

However, the court upheld the ALJ's final order because it agreed with the ALJ that the challenged proposed rule improperly enlarges, modifies, or contravenes the statute.

Judge Winokur dissented. He agreed with the Division's argument that the ALJ's reason for determining the rule to be invalid—because the proposed rule limiting food customarily sold at a restaurant to food "cooked or prepared on a licensed premises" modified or contravened the statute—was not the objection raised for the rule's invalidity. Judge Winokur reasoned that, under the APA, an ALJ may not invalidate a rule for a reason that was not alleged but seems correct to the ALJ.

Rule Challenge—Standing
ABC Fine Wine & Spirits v. Dep't of Bus. & Prof'l Regulation, 46 Fla. L. Weekly D1164c (Fla. 1st DCA May 19, 2021).

This is the second of two appeals from a final order declaring proposed Rule 61A-3.055 invalid. Appellants intervened in the rule challenge in support of the proposed rule.

The court affirmed the ALJ's determination that the rule is invalid for the reasons set forth in *Dep't of Bus. & Prof'l Regulation v. Walmart Inc.*, 46 Fla. L. Weekly D1167a (Fla. 1st DCA May 19, 2021), described immediately above. The court also affirmed the ALJ's determination that Petitioners had standing to challenge the proposed rule. The court, however, agreed with Appellants that the ALJ erred in finding that Florida Independent Spirits Association ("FISA") lacked standing to intervene and, therefore, reversed that portion of the final order.

Petitioners filed a challenge to the proposed rule, and Appellants sought to intervene in support of the proposed rule. Petitioners opposed Appellants' standing to intervene, but the ALJ granted the intervention, subject to proof of standing at the final hearing. Ultimately, the ALJ agreed that Publix and ABC Fine Wine and Spirits had standing to intervene as COP license holders. But he determined that FISA lacked associational standing, finding that a substantial number of its members were not affected by the proposed rule and that the evidence did not prove that participating in the proceeding was within the authority of the President of FISA. The ALJ also found that petitioners Walmart and Target had standing to challenge the proposed rule as applicants for COP licenses. On appeal, Appellants challenged both those conclusions.

The court held that the ALJ erred in determining that FISA did not have standing because the FISA President did not prove he had the authority to participate in the proceedings on behalf of FISA members or what injuries would be suffered as a result of the proposed rule. The court noted that FISA proved that a "substantial number of its members" are affected by the proposed rule. In so determining, the court observed that FISA was not seeking to intervene on behalf of ABC as ABC appeared in its own right and clearly has standing to do so. Rather, FISA was seeking to intervene on behalf of its remaining members. Not including ABC stores, there are 85 members of FISA, and the parties stipulated that 36 (or some 42%) hold COP licenses. The court determined that this qualifies as a "substantial number" of FISA's members.

The court also found that FISA proved that its members that are COP license holders are affected by the proposed rule, since a party regulated by the challenged rule has standing to challenge the proposed rule. In addition, the President of FISA opined that any rule the Division enacted could result in a loss of business and further that FISA members would benefit from having clear guidance from the Division, which the proposed rule would provide. Accordingly, the court concluded that FISA established that its members

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would be affected by the proposed rule.

In addition, the court concluded that FISA proved that the proposed rule is within the association's general scope of interest and activity, since the parties stipulated that FISA exists to represent the interest of its members before the Division. Accordingly, the court held that FISA had standing to intervene.

The court rejected Appellants' argument that Petitioners lost standing when the ALJ entered a narrower ruling than sought in their petitions. Petitioners had argued that because they are restaurants, what they sell is what is "customarily sold in a restaurant," and because not all such items are included in the proposed rule, the proposed rule is invalid. Instead of ruling on this objection, the ALJ held that the proposed rule is invalid in part because it does not include food prepared offsite which Appellants claim has no impact on Petitioners' ability to obtain COP licenses. The court, however, found that standing in an administrative proceeding is a forward-looking concept and cannot disappear based on the ultimate outcome of the proceeding; rather, it is sufficient that a petitioner proves that its interest "*could* reasonably be affected" by the challenged rule. As such, the ALJ properly determined the Petitioners' standing based on the claims in the petition, and not on his decision to enter a narrower ruling than what was requested. Accordingly, the court affirmed the ALJ's holding that Petitioners have standing to challenge the proposed rule.

Judge Winokur dissented from that part of the majority opinion that affirms the ALJ's decision that the proposed rule is an invalid exercise of delegated authority, for the reasons set forth in his dissent in *Walmart* (described above).

Standing—Mootness to Continue Appeal
Towe v. Fish & Wildlife Conservation Comm'n, 317 So. 3d 1249 (Fla. 1st DCA 2021).

Neely Paul Towe, as Trustee of the Towe Neely Paul 2008 Trust, and Rolf Towe (the "Towes)" appealed the Fish and Wildlife Commission's ("Commission") final order dismissing their amended petition for an administrative hearing for lack of standing.

The Towes filed a petition and amended petition seeking an administrative hearing to challenge a Marine Turtle Permit issued to a neighbor who operated land adjacent to the Towes' property. The Towes alleged the neighbor would violate

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The Florida Bar's website (www.FLORIDABAR.org) offers members the ability to update their address and/or other member information.

The online form can be found on the website under "Member Profile."

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the conditions of the permit and harm the Towes' property and environmental-related interests. The Commission dismissed the Towes' amended petition for lack of standing instead of referring it to DOAH. The Towes appealed.

The court dismissed the Towes' appeal, noting that the permit the Towes were challenging expired in December 2020. Where a case changes in circumstances prior to the appellate court rendering a decision, such that the court is unable to grant relief, the case becomes moot. Because the permit had expired, the court was unable to grant any relief, rendering the case moot.

Voluntary Dispute Resolution Process
Premier Behavioral Sols. of Fla., Inc. v. Magellan Complete Care, 321 So. 3d 337 (Fla. 1st DCA 2021).

Numerous health providers ("Appellants") appealed the Agency for Health Care Administration's ("AHCA") entry of final orders, which incorporated the costs of an optional payment dispute process over Appellants' written objections.

Appellants provide in-patient mental health services. They disputed reimbursement amounts that they were receiving from a health plan that processed and paid the claims of its members. Appellants and the health plan agreed to use an optional statutory dispute resolution process under section 408.7057, Florida Statutes. The statutory process requires AHCA to contract with a third-party dispute resolution company to settle these disputes and to assess costs to the losing party or apportion costs if both parties prevailed in part.

Appellants sought a fee estimate for each of their claims, and the dispute resolution company provided a maximum fee for each set of claims. The dispute resolution company gave Appellants a chance to withdraw or accept the amount of the quoted maximum fee. Appellants agreed to accept the maximum amount and proceed.

After Appellants' and the health plan's reimbursement amounts were resolved, the dispute resolution company invoiced the parties. The costs charged equaled the maximum amounts the dispute resolution company had previously estimated. Although Appellants asked for additional information about the dispute resolution company's fees, no explanation or detail was provided.

The dispute resolution company, pursuant to statute, submitted written recommendations regarding the resolution of reimbursement amounts and invoices showing the fees charged to the parties. No findings of fact were included as to the invoice costs or number of claims reviewed. Appellants sought to challenge the invoices by sending written correspondence to AHCA's Deputy Secretary, which were unanswered. Instead, pursuant to statute, AHCA entered final orders adopting the written recommendations and invoices. Appellants moved to vacate AHCA's final orders, which AHCA denied. Appellants appealed AHCA's final orders.

First, Appellants argued that AHCA's final orders were not supported by competent, substantial evidence because no factual findings exist about the costs in the invoices. The court rejected this argument, noting that Appellants volunteered to use the optional statutory process instead of pursuing administrative litigation. As such, Appellants were not entitled to an evidentiary hearing under the APA. The court concluded that it could not provide Appellants with any relief, despite the absence of factual findings, because the statute expressly required AHCA to adopt the written recommendations it received from the dispute resolution company. Because the final orders complied with the statute, the court upheld them.

Second, Appellants argued that they were denied due process when AHCA adopted the written recommendations without allowing Appellants to challenge the costs. The court noted it had previously rejected this argument and explained that when Appellants voluntarily chose this dispute resolution process, they also chose the minimal protections that went along with it. Moreover, the court noted that the dispute resolution company estimated their maximum costs. Appellants had the opportunity to seek additional information or to withdraw at that time, but instead Appellants consented to the maximum costs. The court concluded that Appellants' remedy was to not use the optional dispute resolution process in the future or to pursue statutory changes with the Legislature.

Thus, the court affirmed AHCA's final orders that adopted the dispute resolution company's written recommendations about reimbursement amounts and the costs of the dispute resolution process.

Waiver of Right to Administrative Hearing Based on Statutory Deadlines
Mathers v. Agency for Health Care Admin., 316 So. 3d 811 (Fla. 1st DCA 2021).

Robert Mathers appealed the Agency for Health Care Administration's ("AHCA") dismissal of his amended petition, which sought to challenge the amount AHCA could recover from the settlement of Mr. Mathers' personal injury lawsuit.

Mr. Mathers was seriously injured in an automobile accident in 2013. After he was left disabled due to catastrophic damage to his spinal cord, he received $221,862.52 for medical care from Florida's Medicaid program. Subsequently, Mr. Mathers brought a personal injury lawsuit against his alleged tortfeasors, and the parties settled. AHCA asserted a lien against Mr. Mathers' settlement proceeds. In February 2016, Mr. Mathers deposited the proceeds of his settlement in a trust account for AHCA's benefit.

In May 2019, Mr. Mathers filed a petition at DOAH, contesting the amount that AHCA could recover under its lien. Section 409.910(17)(b), Florida Statutes, requires all petitions challenging the amount of medical expense damages AHCA could recover to be filed within 21 days of depositing the damages into the

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trust account for the benefit of the agency. The ALJ dismissed Mr. Mathers' petition as untimely because he filed it more than 21 days after he placed the settlement proceeds in the trust account. Mr. Mathers appealed.

On appeal, Mr. Mathers argued that he did not receive notice that the statutory 21-day timeframe applied to him. He also argued that AHCA did not apply a statutory formula found in section 409.910(11)(f) to calculate the amount of damages it could recover.

The court rejected Mr. Mathers' arguments. First, the court ruled that the statute unambiguously stated it was the exclusive method for challenging the amount of medical expense damages the agency could recover. The 21-day statutory deadline thus applied the instant Mr. Mathers deposited his settlement proceeds in the trust for AHCA's benefit. Second, Mr. Mathers' petition alleged that AHCA applied the statutory formula to calculate the damages it could collect. Thus, there was no factual support for Mr. Mathers' argument that the 21-day deadline did not apply because the agency did not follow the statutory formula.

Because Mr. Mathers filed his petition more than 21 days after he deposited the settlement proceeds in the trust account, the court affirmed the ALJ's dismissal of the petition as untimely under the statute.

Tara Price and Larry Sellers *practice in the Tallahassee office of Holland & Knight LLP.*

Gigi Rollini, Melanie Leitman, and Robert Walters *practice in the Tallahassee office of Stearns Weaver Miller P.A.*

DOAH Case Notes

By Gar Chisenhall, Matthew Knoll, Dustin Metz, Paul Rendleman, Tiffany Roddenberry, and Katie Sabo

Veritas Legal Plan, Inc. v. Office of Ins. Regulation, Case No. 21-0711 (Interlocutory Order July 1, 2021).

Substantial Interest Proceedings – Licensing

https://www.doah.state.fl.us/DocDoc/2021/000711/21000711OGEN-063021-09232446.pdf

FACTS: Section 120.60(1), Florida Statutes, provides that "[a]n application for a license must be approved or denied within 90 days after receipt of a completed application . . ." That 90-day time period is tolled by the initiation of a proceeding under sections 120.569 and 120.57, Florida Statutes. In general, any licensure application that is not approved or denied within the 90-day time period is considered to be approved. Veritas Legal Plan Inc. ("Veritas") filed an application with the Office of Insurance Regulation to operate as a legal expense insurance corporation on June 22, 2020, and the application was deemed to be complete on July 9, 2020. As a result, section 120.60(1)'s 90-day limitation period was set to expire on October 7, 2020, unless tolled. On October 7, 2020, OIR sent to Veritas, via certified mail, a formal notice of its intent to deny Veritas' application. Via a letter dated November 20, 2020, Veritas notified OIR of its intent to rely on section 120.60(1)'s default licensure provision.

In support thereof, Veritas argued that OIR had failed to approve or deny its application within 90 days after July 7, 2020. OIR rejected that argument by asserting that its notice of intent to deny Veritas' application tolled the 90-day limitation period.

OUTCOME: In recommending that Veritas be authorized to operate as a legal expense corporation pursuant to section 120.60(1), the ALJ concluded that "the plain and unambiguous statutory text" dictates that "preliminary agency action does not satisfy the obligation to approve or deny an application." "To prevent a claim for default licensure from accruing, the agency must approve or deny an application by *final* agency action within the limitation period, which will be tolled if the applicant timely requests a hearing on or before the 90th day after [receiving notice of the agency's decision]. If, however, the applicant timely initiates a proceeding under sections 120.569 and 120.57 *more than* 90 days after the Receipt Date, as here, then the limitations period— having already expired—is not tolled."

Dep't of Health, Bd. of Nursing v. Perez, Case Nos. 20-3057PL, 20-3062PL, 20-3066PL (Recommended Order May 3, 2021).
https://www.doah.state.fl.us/ROS/2020/20003057.pdf

FACTS: Alejandro Perez was a licensed practical nurse and a medical doctor in Cuba prior to moving to Florida. Mr. Perez twice failed to pass the examination for becoming a licensed medical doctor in Florida. However, he successfully obtained licensure as a registered nurse in 2005 and became an advanced registered nurse practitioner in 2015. At all relevant times, Mr. Perez was employed as an independent contractor by U.S. Stem Cell Clinic ("Clinic"). In May 2015, E.K. was an 89-year-old female suffering from macular degeneration, and she paid the Clinic $5,000 for a stem cell procedure in which fat tissue would be removed from her abdomen and injected into both of her eyes. Until her pre-operative exam on May 14, 2015, E.K. thought that a medical doctor specializing in ophthalmology was going to be performing the procedure scheduled for the following day. E.K and her niece met Mr. Perez the next day and were told that he was very experienced with stem cell injections. In addition, Mr. Perez introduced himself as a medical doctor. Mr. Perez learned shortly after the procedure that E.K. had been rendered blind. Nevertheless, Mr. Perez administered the same procedure on June 16, 2015, to two other patients suffering from macular degeneration: E.N., a 72-year-old female, and P.B., a 77-year-old female. E.N. and P.B. were not notified prior to their procedures that Mr. Perez was not a medical doctor.

OUTCOME: The ALJ found that the Department of Health proved by clear and convincing evidence that Mr. Perez violated: (1) section 456.072(1)(m), Florida Statutes, by making deceptive, untrue, or fraudulent representations related to the practice of medicine; and (2) section 456.072(1)(o), by practicing medicine beyond the scope permitted by law. With regard to the recommended penalty, the ALJ noted that Mr. Perez testified numerous times that he performed services beyond the scope of his license because he had been a doctor in Cuba. In recommending that Mr. Perez's advanced practice registered nurse license be revoked, the ALJ concluded that revocation "will send a message to [the Board of Nursing's] licensees that performing procedures that exceed the scope of training of their license, especially the complicated and dangerous procedures that were performed here, will not be tolerated." After issuance of the Recommended Order, Mr. Perez moved for a new trial asserting that ALJ Creasy erred by completing the Recommended Order begun by ALJ Meale. ALJ Creasy denied Mr. Perez's motion because section 120.57(1)(a), Florida Statutes, provides that "[i]f the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary."

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Substantial Interest Proceedings – Certificate of Need

Seasons Hospice & Palliative Care of Pinellas Cty., LLC v. Agency for Health Care Admin., Case Nos. 21-888CON & 21-889CON (Recommended Order June 16, 2021).
https://www.doah.state.fl.us/ROS/2021/21000888.pdf

FACTS: As part of its responsibilities under certificate of need ("CON") law, AHCA calculates the need for hospice programs in 27 hospice service areas ("HSAs") throughout Florida. Those calculations are known as a fixed need pool ("FNP") and establish a rebuttable presumption of need (or lack thereof) in a particular HSA. On February 5, 2021, AHCA announced that there was a need for one new hospice program in HSA 5B, i.e., Pinellas County. Seasons Hospice and Palliative Care of Pinellas County, LLC ("Seasons Hospice") and the Hospice of Florida Suncoast, Inc. ("Suncoast") operate currently licensed hospice programs in Pinellas County and argued that AHCA's FNP calculation for HSA 5B was erroneous because the calculation of future need for hospice services: (1) was partially based on a spike in admissions caused by the COVID-19 pandemic; and (2) did not account for hospice admissions by VA hospitals. According to Seasons Hospice and Suncoast, accounting for the aforementioned errors would lead to a determination that there was no need for a new hospice program in HSA 5B. Because Florida Administrative Code rule 59C-1.008(2)(a)2. sets forth the right to identify an "error" in the FNP calculation but does not define the type of error that can support a challenge to the FNP, AHCA argued during the formal administrative hearing that challengeable errors are limited to: (1) mathematical errors in the FNP calculation; and (2) disputes regarding the amount of self-reported admissions from AHCA-licensed hospice providers.

OUTCOME: The ALJ rejected AHCA's argument by noting that rule 59C-1.008(2)(a)2.-3. clearly provides that "changes in need methodologies, population estimates, bed inventories, or other factors" can be identified as errors in AHCA's FNP calculations "and, thus, can be the subject of a FNP challenge such as this one." As for the arguments by Seasons Hospice and Suncoast, the ALJ concluded that AHCA correctly followed its rules in calculating the FNP for HSA 5B. If AHCA had done otherwise, then "its calculations of the FNP numbers would have been erroneous." The ALJ also determined that AHCA properly applied rule 59C-1.0355 in excluding hospice admissions by VA hospitals from the FNP calculation.

Rule Challenges – Existing Rules

Lerman v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, Case No. 21-1072RX (Summary Final Order May 6, 2021).
https://www.doah.state.fl.us/ROS/2021/21001072.pdf

FACTS: The Florida Legislature amended section 550.2415, Florida Statutes, in 2015 so that the statute required the Department of Business and Professional Regulation's Division of Pari-Mutuel Wagering ("the Division") to adopt rules governing the drug testing of racing animals and "the testing methodologies, including measurement uncertainties, for screening [ ] specimens to confirm the presence of medications, drugs, and naturally occurring substances." Neither rule 61D-6.008 nor any other Division rule, with the exception of an emergency rule adopted March 4, 2021, contained a provision designating the testing methodologies and measurement uncertainties for confirming the presence of medications, drugs, and naturally occurring substances in horses. Michael Allen Lerman is a thoroughbred racehorse trainer who filed a petition alleging that rule 61D-6.008 was an unlawful delegation of legislative authority because it exceeded its grant of rulemaking authority and contravened the specific provisions of law being implemented. Because rule 61D-6.008 did not set forth the information required by section 550.2415, Mr. Lerman asserted that the Division had delegated the determination of testing methodologies and measurement uncertainties to the University of Florida's Racing Laboratory.

OUTCOME: The ALJ dismissed Mr. Lerman's challenge. In doing so, she observed that section 120.56(1)(b), Florida Statutes, requires a rule challenge petition to identify the particular provisions within the rule at issue that are allegedly invalid. "The only viable interpretation of this language is that a petitioner must actually challenge something contained in the rule." "To exceed the Legislature's grant of authority in violation of section 120.52(8), an agency rule must go further than the grant of authority the agency is given. Here, it appears that initially, the [Division] did not go far enough. However, under the circumstances presented in this case, failing to complete the task does not invalidate the rule actually adopted." The ALJ also observed that if an agency fails to adopt rules as directed by the Legislature, a "more appropriate remedy" would be to file a petition under section 120.54(7), Florida Statutes, for the agency in question to initiate rulemaking.

Bid Protests

Guaranteed Fla. Title & Abstract, Inc. v. Dep't of Transp., Case No. 20-5168BID (Recommended Order May 5, 2021).
https://www.doah.state.fl.us/ROS/2020/20005168.pdf

FACTS: The Department of Transportation ("Department") issued a request for proposals on August 7, 2020, for title search and examination services. On October 12, 2020, the Department posted a notice indicating that it intended to award the contract to American Government Services Corporation. The Department's posting of that notice initiated a 72-hour "cone of silence." *See*

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§ 287.057(23), Fla. Stat. (mandating that "[e]ach solicitation for the procurement of commodities or contractual services shall include the following provision: 'Respondents to this solicitation or persons acting on their behalf may not contact, between the release of the solicitation and the end of the 72-hour period following the agency posting the notice of intended award . . . any employee or officer of the executive or legislative branch concerning any aspect of this solicitation . . . Violation of this provision may be grounds for rejecting a response.'"). After the Department posted the aforementioned notice, Guaranteed Florida Title and Abstract, Inc.'s ("Guaranteed"), president and sole owner, sent an e-mail on October 12, 2020 to the Department employee responsible for selecting the members of the committee who reviewed the competing proposals. The e-mail expressed surprise about the score assigned to Guaranteed's proposal and requested an explanation about why the score was not higher. An identical e-mail was sent to another Department employee on October 12, 2020. Guaranteed filed a notice of protest on October 23, 2020, and the Department referred the protest to DOAH for a formal administrative hearing.

OUTCOME: In the course of recommending that Guaranteed's protest be dismissed based on the merits, the ALJ found that Guaranteed committed a cone-of-silence violation because the e-mails to the Department employees concerned "any aspect of this solicitation." Accordingly, the ALJ noted that the Department could, in its discretion, issue a final order dismissing Guaranteed's protest based on a lack of standing because it would have no chance to obtain the contract at issue in a re-bid proceeding.

The Department rendered a final order on June 14, 2021, adopting the ALJ's recommended order without modification.

Congratulations to the following lawyers who recently passed the State and Federal Government and Administrative Practice Board Certification Examination:

D. Ty Jackson, Tallahassee

Mark S. Urban, Tallahassee

Brittany B. Griffith, Tallahassee

Megan S. Silver, Tallahassee

Seann Michael Frazier, Tallahassee

CALL FOR AUTHORS:
Administrative Law Articles

One of the strengths of the Administrative Law Section is access to scholarly articles on legal issues faced by administrative law practitioners. The Section is in need of articles for submission to *The Florida Bar Journal* and the Section's newsletter. If you are interested in submitting an article for *The Florida Bar Journal*, please email Lylli Van Whittle (Lyyli.VanWhittle@perc.myflorida.com) and if you are interested in submitting an article for the Section's newsletter, please email Jowanna N. Oates (oates.jowanna@leg.state.fl.us). Please help us continue our tradition of advancing the practice of administrative law by authoring an article for either *The Florida Bar Journal* or the Section's newsletter.

Law School Liaison

Florida State University College of Law Summer 2021 Update

by Erin Ryan, Associate Dean for Environmental Programs and Director of FSU Center for Environmental, Energy, and Land Use Law

The U.S. News and World Report (2022) has ranked Florida State University as the nation's 18th best Environmental Law Program, tied with Tulane University, and ranked 7th among environmental law programs at all public universities nationwide. Below highlights the activities and events of FSU Environmental Law Certificate Program, and list recent faculty scholarships.

Recent Student Achievements and Activities

- We congratulate the following graduates who completed the Certificate Program during the Spring 2021 term: Holly Parker Curry (Highest Honors), Brooke Boinis (Honors), Abigail Boyd (Honors), Kathryn Fanning (Honors), Tyler Finello (Honors), Amelia Ulmer (Honors), Erin Carroll, Austin Gasiorek, Kelly Ann Kennedy, Jonathan McGowan, and Ryan Rensel.
- Savannah Wentley completed her Environmental LL.M. degree at the end of Fall 2020. The L.L.M. Program enriches the education experience of our L.L.M. students by enabling them to acquire post-graduate expertise in the areas of environmental, energy, and land use law that interest them most.
- Catherine Awathi, a rising 3L will serve as pro bono director for the Student Animal Legal Defense Fund Chapter. Catherine was selected as a recipient of the 2021 Animal Legal Defense Fund's Advancement in Animal Law Scholarship and the 2021 Law Student Achievement Award from the Florida Bar Animal Law Section. She also co-authored an article with FSU Law Alumni Ralph DeMeo published in the Florida Bar Journal, entitled "Marine Canary in the Coal Mine: The Latest Threats to Manatee Survival and Efforts to Save Them." This summer, Catherine is serving as a litigation program law clerk for the Animal Legal Defense Fund.
- Ten students also completed Pro Bono work in the area of environmental law.
  - Florida Fish and Wildlife Commission – Brooke Boines
  - Florida Department of Environmental Protection – Nicolas Cardamone, Erin Carroll, Kelly Ann Kennedy, and Amelia Ulmer
  - Florida Department of Agriculture and Consumer Services – Tyler Finello
  - Judicial Staff Attorneys Office for the 4th Judicial Circuit – Abigail Boyd
  - 19th Circuit Public Defender's Office – Austin Gasiorek
  - Clean Air Council – Abigail Boyd
  - City of Jacksonville – Jonathan McGowan
  - Cyan Planet Foundation – Casey Melnik
- The FSU Environmental Law Society has concluded elections and finalized the new 2021-2022 Executive Board. The officers are as follows: Cameron Polomski as President; Salome Garcia as Vice President; Margarent Zinsel as Bookkeeper; and Olivia Ingram as Mentor Chair. If any readers would like to reach out to the new board, please email fsuenvironmentallawsociety@gmail.com.
- The Journal of Land Use & Environmental Law also has a new Executive Board. The officers are as follows: Natalie Macaire King as Editor-in-Chief; Kendelle Knapp as Administrative Editor; Caroline Dike and Jacqueline Schlick as Executive Editors; Kalie Maniglia as Associate Editor; and Jaelee Edmond as Senior Articles Editor. Lori Wingfield will continue to serve as Journal Manager and Professor Erin Ryan as the Faculty Advisor.

Recent Alumni Accomplishments

- Captain Alan S. Richard delivered a presentation on behalf of the Florida Bar's Admiralty Law Committee entitled "Florida Maritime Legislative and Regulatory Update, 2021." Captain Richard also testified at the Committee Chair's request before the Florida Senate Committee on Transportation on matters pertaining to federal preemption of state and local regulation of seaports.
- Susan L. Stephens is an adjunct professor at FSU College of Law teaching Florida Environmental Permitting. The course will provide an overview of environmental regulatory programs in Florida and will focus on a case study: the permitting requirements associated with greenfield construction.
- Jessica M. Iceman is an associate in the Tampa office of Stearns Weaver Miller. She is a member of the firm's Land Development Zoning and Environment Group, and is Florida Bar board certified in city, county, and local government law. Icerman represents clients before local and state govern-

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ments, and in litigation on land use and land development issues. She has experience representing clients in matters involving rezonings, comprehensive plan amendments, and all aspects of land development permitting and litigation.

Faculty Achievements

- Professor Shi-Ling Hsu has a forthcoming publication, Whither, Rationality, in 120 Mich. L. Rev. __ (2021).
- Associate Dean Erin Ryan published Environmental Rights for the *21st Century: Comparing the Public Trust Doctrine and the Rights of Nature Movement,* in 43 Cardozo L. Rev. (2021) with Holly Curry & Hayes Rules.
- Assistant Professor Sarah Swan published an article entitled *Constitutional Off-loading at the City Limits* in 135 Harv. L. Rev. (2021).
- Dean Emeritus Don Weidner has a forthcoming publication, *The Unfortunate Role of Special Litigation Committees in LLCs* (2021).

Environmental Law Lectures

The FSU Environmental, Energy, and Land Use Law Program will be hosting a full slate of impressive environmental and administrative law events and activities during the coming 2021-2022 school year.

- Distinguished Environmental Lectures: Each year, the College of Law's nationally regarded Distinguished Environmental Lecture program features some of the profession's leading environmental scholar and policy makers. We have invited Alexandra B. Klass, Distinguished McKnight University Professor at the University of Minnesota Law School and Michael P. Vanderbergh, David Daniels Allen Distinguished Chair in Law, Director of Climate Change Research Network, and Co-Director of the Energy, Environment and Land Use Program of Vanderbilt University Law School to provide lectures for the coming academic school year.
- The Environmental Law Program will also be hosting a panel discussion, a number of enrichment seminars, and several field trips. Information on upcoming events will be available at https://law.fsu.edu/academics/academic-programs/juris-doctor-program/environmental-energy-land-use-law/environmental-program-recent-upcoming-events. We hope Section members will join us for one or more of these events.

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F.S., do not apply in proceedings in which the substantial interests of a student are determined by the state university system or a community college district.[1] Rather, each university president is directed to "establish university rules that ensure fairness and due process as to disciplinary proceedings and that guarantee the academic integrity of the university."[2] Some critics have suggested that these procedures should be improved to provide additional protections to students.[3]

HB 233, Florida's new "intellectual diversity" law,[4] requires colleges and universities to adopt new due process protections for students and student organizations. Here are some of the key provisions:

Right to Written Notice: Timely written notice must be provided that includes the alleged violation of the code of conduct and sufficient detail and provide sufficient time to prepare for any disciplinary proceeding. At least 5 business days before the disciplinary proceeding, the institution or university must provide the student or student organization with: a listing of all known witnesses that have provided, or will provide, information against the student or student organization; and all known information relating to the allegation, including inculpatory and exculpatory information.

Burden of Proof: These minimum due process protections also include the right to a presumption that no violation occurred. The institution has the burden to prove, by a preponderance of the evidence, that a violation has taken place.

Right to an Impartial Hearing Officer: The due process protections also include the right to an impartial hearing officer, as well as the right against self-incrimination and the right to remain silent. Such silence may not be used against the student or student organization.

Right to Present Evidence and Question Witnesses: The protections also must include the right to present relevant information and question witnesses.

Right to an Advisor or Advocate: The prescribed protections also include the right to an advisor or advocate who may not serve in any other role, including as an investigator, decider of fact, hearing officer, member of a committee or panel convened to hear or decide the charge, or any appeal. This includes the right to have an advisor, advocate, or legal representative, at the student's or student organization's own expense, present at any proceeding, whether formal or informal. This person may directly participate in all aspects of the proceeding, including the presentation of relevant information and questioning of witnesses.

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Right to Appeal: The minimum requirements also must include the right to appeal the final decision of the hearing officer, or any committee or panel, directly to the vice president of student affairs, or any other senior administrator designated by the code of conduct, who must hear the appeal and render a final decision. The vice president of student affairs or person designated by the code of conduct to hear the appeal may not have directly participated in any other proceeding related to the charged violation.

Record: The minimum protections include the right to an accurate and complete record of every disciplinary proceeding relating to the charged violation of the code, including record of any appeal, to be made, preserved, and available for copying upon request by the charged student or student organization.

Time Limit for Charging: And the due process protections must contain a provision setting a time limit for charging a student or student organization with a violation of the code of conduct, and a description of those circumstances in which that time limit may be extended or waived.

The law became effective on July 1, 2021. Chapter 2021-159, Laws of Florida.

Agency Contracts for Commodities and Contractual Services

CS/CS/HB 1079 makes a number of changes to the laws governing competitively procured contracts for commodities and contractual services. Here are some of the key provisions:

Competitive Solicitation: An agency may not initiate a competitive solicitation for a product or service if the completion of the competitive solicitation would require a change in law or change to the agency's original approved budget (other than a transfer authorized in law) unless the initiation of the competitive solicitation is specifically authorized in law, in the General Appropriations Act, or by the Legislative Budget Commission. This prohibition does not apply to a competitive solicitation when the agency head certifies that a valid emergency exists.

Contracts: A contract may not contain a nondisclosure clause that prohibits a contractor from disclosing information relevant to the performance of the contract to members or staff of the Senate or the House of Representatives. Each agency contract must include authorization for the agency to inspect certain financial and programmatic records of the contractor relevant to the performance of the contract.

Contract Renewals: For those contract renewals or amendments that result in a longer contract term or increased payments, the bill decreases from $10 million to $5 million the total contract threshold for when a report concerning contract performance must be submitted to the Governor, the President of the Senate, and the Speaker of the House at least 90 days before an agency executes the renewal or amendment.

State Term Contracts: If an agency issues a request for qualifications (RFQ) from a state term contract vendor for contractual services, the agency must issue the request to all approved vendors if there are 25 approved vendors or fewer for the service. For any contract with more than 25 approved vendors, the agency must issue the RFQ to a minimum of 25 of the approved vendors. A vendor is disqualified from state term contract eligibility if the vendor has been placed on the suspended or disqualified vendor list.

Single-source Contracts: The number of business days the agency must post the commodity or service sought on the vendor bid system is increased from seven to 15 business days. In addition, agencies must report to the Department of Management Services on a quarterly basis all single-source contracts entered into for that period.

Suspended Vendor List: A vendor who is placed on the suspended vendor list is disqualified from bidding on or renewing a contract with the state.

The law became effective on July 1, 2021. Chapter 2021-225, Laws of Florida.

Non-binding Advisory Opinion Relating to Technical Amendments to the Building Code

The Florida Building Commission adopts and implements the Building Code. The Building Code must be applied, administered, and enforced uniformly and consistently from jurisdiction to jurisdiction. The Commission and local governments may adopt technical amendments to the Building Code. A technical amendment to the Building Code is an alteration to the prescriptive requirements or standards for construction.

Local governments may adopt amendments to the Building Code that are more stringent than the Building Code. Such local amendments are limited to the local government's jurisdiction and expire upon the adoption of the newest edition of the Building Code. Local governments may adopt technical amendments to the Building Code only in accordance with certain detailed adoption requirements. A technical amendment adopted by a local government takes effect 30 days after the Commission receives the amendment and publishes the amendment on its website. The Commission may review local amendments and issue nonbinding recommendations to local governments regarding whether the local government complied with adoption requirements.

CS/CS/HB 401 authorizes a substantially affected person to petition the Florida Building Commission for a non-binding advisory opinion on any local government regulation, law, ordinance, policy, amendment, or land use or zoning provision (regulation) that the person believes is a technical amendment to the Building Code that was not adopted in accordance with the process for adopting local amendments to the Building Code. A "substantially affected person" includes an owner or builder subject to the local government's regulation or an association of owners or builders with members who are subject to the regulation.

The Commission must consider the petition, the local government's

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response, and any comments posted on the Commission's website, and may consider any recommendation provided by its technical advisory committees. The Commission must issue a non-binding advisory opinion stating whether the local government's regulation is a technical amendment to the Building Code within 30 days of receiving the petition. The Commission must also publish the non-binding advisory opinion on its website and in the *Florida Administrative Register*.

The law became effective on July 1, 2021. Chapter 2021-201, Laws of Florida.

Unwritten Policies Concerning Firearms and Ammunition

SB 1884 revises the Legislature's preemption of the regulation of firearms and ammunitions. Current law provides a person or certain organizations with the right to seek declaratory or injunctive relief and actual damages due to a local ordinance, regulation, measure, directive, rule enactment, order, or policy regulating firearms or ammunition. SB 1884 provides that the right to maintain a legal action against the preempted local regulation applies even if the local regulation is "unwritten." Unwritten policies may include oral instructions given within a law enforcement agency.[5]

This legislation appears consistent with case law interpreting the APA; Florida courts have long held that unwritten policies may constitute rules under Florida's APA.[6]

The law became effective on July 1, 2021. Chapter 2021-15, Laws of Florida.

Ratification of DEP Biosolids Rule and CFWI Rule

In 2020, the Legislature enacted a comprehensive measure dealing with water quality protection that, among other things, directs the Department of Environmental Protection (DEP) to adopt rules for biosolids management.[7] The APA generally requires that any proposed rule that is expected to have a million dollar impact may not become effective until ratified by the Legislature.[8] The Legislature apparently did not want to leave any doubt that the required biosolids rules must be ratified, as the 2020 law expressly provides that these rules may not take effect until ratified by the legislature. **HB 1309** ratifies DEP's proposed biosolids rule, chapter 62-640, Florida Administrative Code.[9] The bill also exempts these rules from review and approval by the Environmental Regulation Commission.

HB 1309 also ratifies DEP's proposed rules relating to the Central Florida Water Initiative, rules 62-41.300, 62-41.301, 62.41.302, 62-41.303, 62-41.304, and 62-41.305, Florida Administrative Code. The Statement of Estimated Regulatory Costs (SERC) developed by DEP for these rules determined that the proposed rule would likely increase regulatory costs in excess of $1 million in the aggregate within five years after implementation of the rule, thus triggering the statutory requirement for the rule to be ratified by the Legislature before it can go into effect.

The law became effective on June 23, 2021. Chapter 2021-153, Laws of Florida.

Utility and Communications Poles

And speaking of SERCs and the legislative ratification of rules:

CS/SB 1944 creates a process for handling redundant utility poles and abandoned pole attachments and vests the Florida Public Service Commission with jurisdiction to administer the bill's provisions. The bill authorizes the Commission to adopt rules regarding pole attachments, including provisions for mandatory pole inspections, vegetation management requirements for poles owned by communication providers, and monetary penalties for failure to comply with Commission rules.[10] Significantly, the bill exempts these rules from the requirements in section 120.541, F.S., relating to SERCs. This also has the effect of exempting these rules from the legislative ratification requirement in section 120.541(3), F.S.

The law became effective on June 29, 2021. Chapter 2021-191, Laws of Florida.

COVID-19 Vaccine Documentation

Legislation often authorizes or directs an administrative agency to adopt implementing rules. One example is **CS/CS/SB 2006**, which contains the so-called "vaccine passport" ban.[11]

The bill applies to a business entity, a governmental entity and an educational institution, each of which is defined. A business entity may not require patrons or customers to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from, the business operations in this state. A governmental entity may not require persons to provide any documentation certifying COVID-19 vaccination or post-infection recovery to gain access to, entry upon, or service from the governmental entity's operations in this state. And an educational institution may not require students or residents to provide any documentation certifying COVID-19 vaccination or post-infection recovery for attendance or enrollment, or to gain access to, entry upon, or service from such educational institution in this state. The bill does not otherwise prohibit these entities from instituting screening protocols consistent with authoritative or controlling government-issued guidance to protect public health.

The bill also authorizes the Department of Health to impose a fine not to exceed $5,000 per violation, and authorizes the Department to adopt rules to implement this requirement. These proposed rules were published on July 30.[12]

CS/CS/SB 2006 became effective on May 3, 2021. Chapter 2021-8, Laws of Florida.

Parents' Bill of Rights

HB 241 establishes the "Parents' Bill of Rights." The bill provides that the state, its political subdivisions,

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any other governmental entity, or other institution may not infringe upon the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of a minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by a less restrictive means.

On July 30, 2021, Governor DeSantis issued Executive Order 21-175 directing the Department of Health (DOH) and the Department of Education (DOE), working together, to immediately execute rules to ensure safety protocols for controlling the spread of COVID-19 in schools that: (a) do not violate Floridians' constitutional freedoms; (b) do not violate parents' right under Florida law to make health care decisions for their minor children; and (c) protect children with disabilities or health conditions who would be harmed by certain protocols such as face masking requirements. The executive order expressly requires that these rules be in accordance with the recently-enacted Parents' Bill of Rights, HB 241, and protect parents' right to make decisions regarding masking of their children in relation to COVID-19. The executive order is the subject of two legal challenges.[13]

On August 6, 2021, DOH adopted emergency rule 64DER21-12, Protocols for Controlling COVID-19 in School Settings, one of the stated purposes of which is to safeguard the rights of parents and their children.[14] Among other things, the emergency rule provides that students may wear masks or facial coverings as a mitigation measure; however, the school must allow for a parent or legal guardian of the student to opt-out the student from wearing a face covering or mask. This emergency rule is the subject of two court challenges.[15]

Also on August 6, 2021, DOE adopted emergency rules, including emergency rule 6AER21-02, COVID-19 Hope Scholarship Transfer Procedures, which provides parents with a mechanism to transfer a child to a private school or another school district under a Hope Scholarship when a school district's COVID-19 health protocols, including masking, pose a health or educational danger to their child.[16] Senator Gary Farmer sent a letter (and issued a press release) stating that the emergency rule is "unconstitutional and illegal."[17]

The State Board of Education determined that certain county school boards have failed to comply with the DOH Emergency Rule, and the Board has entered orders requiring the school boards to come into compliance within 48 hours or, if they do not, directing DOE to withhold state funds equivalent to the compensation paid to the members of the school board.[18] The school boards have announced their intention to challenge these orders.[19]

HB 241 became effective on July 1, 2021. Chapter 2021-199, Laws of Florida

Combating Pubic Disorder

CS/HB 1, relating to combating public disorder, is another high profile measure that resulted in the adoption of implementing rules. Section 1 of the bill creates a process by which the state attorney of the judicial circuit in which a municipality is located, or an objecting member of the municipality's governing body, may appeal a funding reduction to the operating budget of the municipal law enforcement agency to the Administration Commission.[20] Chapter 28-42, F.A.C., sets forth the rules of procedure to govern disposition of all appeals from municipal actions regarding law enforcement agency budgets, These proposed rules were published on June 16, 2021,[21] and became effective on August 8, 2021.

The Gainesville City Commission has voted to file a law suit challenging Section 1 of CS/HB 1.[22] The draft complaint alleges that CS/HB 1 violates the Florida Constitution on several grounds, including the nondelegation doctrine—a doctrine that will be familiar to administrative lawyers.[23]

CS/HB 1 became effective on April 19, 2021. Chapter 2021-6, Laws of Florida.

Name, Image and Likeness (NIL)

And speaking of implementing rules: The Board of Governors recently approved regulations regarding compensation for collegiate athletes from their name, image and likeness (NIL).[24] Under the new regulations, athletes will be able to hire agents and will be required to disclose to universities any contracts for compensation. The universities also must provide financial literacy and life skills at the beginning of a student athlete's first and third academic years.

These regulations became effective on July 1, 2021, making Florida one of the first states to allow its athletes to receive compensation. However, for a brief time during the session, it looked like this would not be the case. The Legislature enacted the authorizing legislation in the 2020 Regular Session and provided that it would take effect on July 1, 2021.[25] During the 2021 Regular Session, the Legislature passed a measure delaying the effective date until July 1, 2022. This two-line date change was included in a 71-page amendment to the Charter School bill, CS/CS/SB 1028.

Public outcry from players and coaches within the state prompted an amendment to return the bill to its original date by the next morning. The original effective date of July 1, 2021, was reinstated by amending another bill, **CS/HB 845**.

CS/HB 845 also prohibits state funds from being used to join or maintain membership in any association whose decisions or proposed decisions are a result of, or in response to, actions proposed or adopted by the Legislature, if such decisions or proposed decisions will result in a negative fiscal impact to the state. The bill requires the Board of Governors to notify any association if its actions or proposed actions may require public postsecondary institutions to withdraw from such association as a result of this law.

CS/HB 845 became effective on June 29, 2021. Chapter 2021-217, Laws of Florida.

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Legal Notice

The APA requires agencies to publish specified legal notices in a newspaper.[26] **CS/HB 35** provides an option for governmental agencies required by law to publish certain legal notices to publish those notices on a newspaper's website instead of in a paper-based publication. This option applies to 18 "governmental agency notices" listed in the new law (including educational unit notices pursuant to section 120.81, F.S.) and only after the governmental agency has a hearing and makes certain findings. If a governmental agency exercises the option to publish legal notices on a newspaper website, the agency must provide an additional notice at least once per week in a print edition newspaper of general circulation. This notice must contain a statement that legal notices pertaining to the agency do not all appear in the print edition of the local newspaper and that a full listing may be accessed on the statewide legal notice website managed by the Florida Press Association, www.floridapublicnotices.com.

The bill expands the types of publications that qualify to publish legal notices. Currently, a newspaper must, among other requirements, be "for sale to the general public" and be qualified to be admitted and entered as a periodical matter at the local post office. By removing these two requirements, the bill will allow for legal notices to be published in some smaller publications that are free to the public.

CS/HB 35 will become effective on January 1, 2022. Chapter 2021-17, Laws of Florida.

BILLS THAT DIED

Here is a sample of some of the bills that died. Each of these measures was also filed in 2020.

JAPC Recommendations for Changes to the APA

Before the legislative session, the Joint Administrative Procedures Committee (JAPC) again developed a number of recommendations for changes to the APA to increase transparency in rulemaking, insure timely rulemaking and provide a mechanism to ensure that agencies reduce unnecessary rules.[27] Measures incorporating these recommendations (and some other provisions) were filed in the form of **SB 1626** and **HB 1145**.[28] Here are some of the key provisions in one or both bills:

Review and Repromulgation of Agency Rules: Each agency is required to review its rules for consistency with the powers and duties granted by the agency's enabling statutes. If, after reviewing the rule, the agency determines substantive changes to update a rule are not required, the agency must repromulgate (or readopt) the rule using a process that does not require the full republication of the rule in the *Florida Administrative Register* or subject the rule to an administrative challenge.

Annual Regulatory Plan: The bill requires regulatory plans to identify rules scheduled to be repromulgated for the upcoming year, as well as to include a 5-year plan for the repromulgation of existing rules.

The bill requires the annual regulatory plan to identify and describe each rule, by rule number or proposed rule number, that the agency expects to develop, adopt, or repeal for the 12-month period beginning October 1 and ending September 30. The bill also requires the annual regulatory plan to contain a declaration that the agency head and the general counsel understand that regulatory accountability is necessary to ensure public confidence in the integrity of state government and, to that end, the agency is diligently working toward lowering the total number of rules adopted.

Regulatory Alternatives: The bill requires that a copy of any regulatory alternative be provided to the Committee by the agency, thereby enabling JAPC to keep an accurate record of the rulemaking timeframe.

Transparency/Materials Incorporated by Reference: The bill would require all documents created by an agency that meet the definition of a rule and that are incorporated by reference into a rule to be amended by strike-through and underline. The bill also would require the proposed rule text to include hyperlinks to materials incorporated by reference, to the extent allowed by federal copyright law, to permit the public to review the material without having to request a hard copy of the material from the agency.

Emergency Rules: The bill requires an agency to publish notice of the renewal of an emergency rule in the *Florida Administrative Register* prior to the expiration of the existing emergency rule. The notice of renewal must state the specific facts and reasons for such renewal. The proposed amendment would require the text of emergency rules to be published in the Florida Administrative Code. The bill also would allow for technical changes to be made within the first seven days after the adoption of the emergency rule and clarifies that an agency may make changes to an emergency rule by superseding the previous emergency rule, while maintaining the original 90-day timeframe of the rule.

Rulemaking Procedure: The bill defines what constitutes a "technical change" to a rule, and requires technical changes to be documented in the history of the rule. The bill requires a notice of correction to be published, and distinguishes between a notice of correction and a notice of change. The bill also streamlines the petition to initiate rulemaking procedure. And the bill reestablishes the mandatory seven-day period between the publication of a notice of rule development and the publication of a notice of proposed rule in the *Florida Administrative Register.*

Mandatory Rulemaking: The bill also requires any legislatively-required rulemaking to be completed within 180 days. A similar provision was removed from the APA in 2015.

The House bill, **CS/HB 1145**, included some provisions not found in the JAPC recommendations. Here are a few:

Regulatory Costs: The House bill requires each agency to have a web-

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site where all of its SERCs may be viewed in their entirety. The House bill clarifies the elements that an agency must consider in a SERC when evaluating the economic impacts of the rule. In addition, the bill replaces the term "transactional costs" with "compliance costs," requires agencies to consider all direct and indirect costs of compliance, and provides 18 specific types of compliance costs as examples for agencies to consider in their evaluation. If an agency holds a public hearing on a proposed rule, the bill requires the agency to ensure that the person responsible for preparing the SERC be made available to respond to questions or comments.

Lower Cost Regulatory Alternative: The House bill provides that a Lower Cost Regulatory Alternative (LCRA) may be submitted after a notice of proposed rule or a notice of change is published. An agency receiving a LCRA has the option of modifying the proposed rule to substantially reduce regulatory costs, in addition to either adopting the LCRA or stating its reasons for rejecting it in favor of the proposed rule. If the rule is modified, the agency must revise the SERC, if one has been prepared. If the agency rejects the LCRA or modifies the proposed rule, the agency must state its reasons for rejecting the LCRA in favor of the proposed or modified rule. When a SERC is revised because a change to a proposed rule increases the projected regulatory costs or the agency modified the rule in response to a LCRA, a summary of the revised SERC must be included in subsequent published rulemaking notices. The revised SERC must be provided to the rules ombudsman, the party submitting the LCRA, and JAPC, and must be published in the same manner as the original SERC. The agency also must provide a copy of a LCRA to JAPC at least 21 days prior to filing the rule for adoption.

Adverse Impact on Small Business: The House bill describes what constitutes an adverse impact on small business, including for example if an owner, officer, operator, or manager of a small business must complete any education, training, or testing to comply with the proposed rule, or is likely to expend ten hours or purchase professional advice to understand and comply with the rule in the first year. If the rules ombudsman of the Executive Office of the Governor provides a regulatory alternative to the agency to reduce the impact of the rule on small businesses, the agency must provide the regulatory alternative to JAPC at least 21 days before filing the rule for adoption.

SB 1626 was reported favorably by the first of three committees of reference. The House Bill, CS/HB 1145, was originally filed as an act relating to regulatory restriction reduction. It was amended to include the JAPC recommendations and some other provisions, and was reported favorably by two of the three committee of reference.

Red Tape Reduction Advisory Council

Senator Diaz again filed a measure relating to regulatory reform and red tape reduction.[29] **SB 152** would establish a Red Tape Reduction Advisory Council within the Executive Office of the Governor. The bill would require an agency that is adopting a rule to submit a rule replacement request to JAPC. JAPC would be required to examine the rule replacement request and existing rules. JAPC also would be required to establish a regulatory baseline of agency rules. Thereafter, a proposed rule may not cause the total number of rules to exceed the established regulatory baseline.

Neither the Senate bill nor the House companion, **HB 65**, was ever heard in committee.

Executive Branch/Appointment of Certain Agency Heads

As initially filed, **HB 1537** was a lengthy and comprehensive bill relating to the executive branch, the stated purpose of which was to pursue a state executive structure more in line with the federal system, to wit, a unitary executive. To this end, the bill would transfer many of the functions of the Governor and Cabinet to the Governor or other agencies controlled by the Governor. Of interest to administrative lawyers, the bill would have made changes to the responsibilities of the Administration Commission, which currently is comprised of the Governor and the three members of the Cabinet (i.e., the Attorney General, the Chief Financial Officer and the Commissioner of Agriculture) and which currently appoints the head of the Division of Administrative Hearings (DOAH). The bill would assign the responsibility to appoint the head of DOAH to the Governor, who would select a director from a list of three qualified candidates recommended by the Supreme Court Judicial Nominating Commission. The bill also would transfer various powers from the Administration Commission to DOAH, including the authority to adopt uniform rules.

The bill was substantially amended in its first committee of reference. The trimmed-down bill was limited to revising the appointment procedures for certain agency heads, including the executive directors of the Department of Law Enforcement (FDLE), the Department of Highway Safety and Motor Vehicles, and the Department of Veterans Affairs, and the Secretary of the Department of Environmental Protection. As revised, the bill would remove the current requirement that these appointments have the approval of all three members of the Cabinet, and instead would make the appointment subject to a majority vote of the Governor and Cabinet consisting of at least three affirmative votes, with the Governor on the prevailing side.[30]

HB 1537 passed the House; SB 1674, dealing only with the executive director of FDLE, was never considered.

Similar legislation was filed in 2020 and there have been various efforts to increase the power of the Governor relative to the members of the Cabinet. So, don't be surprised if these and some of the other measures that failed are considered again during the 2022 Regular Session that begins in January.

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Endnotes

1 § 120.81(1)(g), Fla. Stat.; *see also Morfit v. Univ. of S. Fla.,* 794 So. 2d 655, 656 (Fla. 2d DCA 2001).

2 Fla. Admin. Code R. 6C-6.0105(1)

3 *See, e.g.,* R. Timothy Jansen, *Student Conduct Hearings in a University Setting: Just or Unjust?,* 90 Fla. B.J. 92 (June 2016).

4 *See* Divya Kumar, *Five Things to Know About Florida's New "Intellectual Diversity" Law*, Tampa Bay Times (June 26, 2021). HB 233 is the subject of a legal challenge. *United Faculty of Fla. v. Corcoran*, Case No. 4:21-cv-00271-MW-MAF (M.D. Fla., filed Jul. 2, 2021). The plaintiffs do not appear to take issue with the due process protections described in this article.

5 *See Dougan v. Bradshaw*, 198 So. 3d 878 (Fla. 4th DCA 2016) (the sheriff argued that a cause of action under section 790.33, Florida Statutes, cannot be maintained because the "policy" alleged in appellant's complaint—i.e., retaining firearms seized as a result of a safety recall or safety check until ordered by the court to return them—was an oral instruction pursuant to an Administrative Order and not a "policy" within the meaning of s. 790.33, F.S.).

6 *See, e.g., Dep't of Hwy. Safety & Motor Vehicles v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1997).

7 CS/CS/CS/SB 712 (2020); Ch. 2020-150, Laws of Fla.

8 § 120.541(3), Fla. Stat.; *see also* Larry Sellers, *The 2010 Amendments to the APA: Legislature Overrides Veto of Law to Require Legislative Ratification of "Million Dollar Rules,"* 85 Fla. B.J. 37 (May 2011).

9 As is the Legislature's usual practice, the rules are ratified for the sole and exclusive purpose of satisfying any condition on the effectiveness imposed under section 120.541(3), Florida Statutes. The bill expressly states:

> This section serves no other purpose and shall not be codified in the Florida Statutes. After this act becomes a law, its enactment and effective dates shall be noted in the Florida Administrative Code or the Florida Administrative Register, or both, as appropriate. This section does not constitute legislative preemption of or exception to any provision of law governing adoption or enforcement of the rule cited, and is intended to preserve the status of any cited rule as a rule under chapter 120, Florida Statutes. This section does not cure any rulemaking defect or preempt any challenge based on a violation of the legal requirements governing the adoption of any rule cited.

Ch. 2021-153, § 2, Laws of Fla.; *see also* Eric Miller & Donald Rubottom, *Legislative Rule Ratification: Lessons from the First Four Years*, 89 Fla. B.J. 36 (Feb. 2015).

10 The notice of rule development for rule 25-18.010, Pole Attachment Complaints, was published on August 17, 2021. 47 Fla. Admin. Reg. 3777.

11 The "vaccine passport" ban is the subject of a federal law suit. *Norwegian Cruise Line Holdings Ltd. v. Rivkees,* Case No. 1:21-cv-22492-kmw (Fla. S.D., filed July 13, 2021). On August 8, 2021, the court entered an order granting the motion for preliminary injunction and enjoining the defendant from enforcing the ban against the plaintiff, pending resolution of the case.

12 *See* proposed rule 64-8.001, F.A.C. published in 47 Fla. Admin. Reg. at 3525 (July 30, 2021). The rule is scheduled to take effect on September 16, 2021.

13 Rosa Flores and Christina Maxouris, *Florida Gov. Ron DeSantis' Order on Masks in Schools Faces First Legal Challenges Over Constitutionality,* CNN (Aug. 6, 2021). In the challenge filed in state court, Judge Cooper enjoined the Commissioner of Education, the Department of Education and the Board of Education from violating the Florida Parents' Bill of Rights by taking any action to effect a blanket ban on face mask mandates by local school boards. *Scott v. DeSantis*, Case No. 2021 CA 001382 (Fla. 2d Cir. Sept. 2, 2021). The Governor has announced that he will appeal. *See* Scott Travis and Leslie Postal, *Judge Shoots Down Gov. DeSantis on School Masks*, S. Fla. Sun Sentinel (Aug. 27, 2021). The other case is pending in federal court, *Hayes v. DeSantis*, Case No. 1:21-cv-22863-KMM (S.D. Fla., filed Aug. 6, 2021).

14 The Notice of Emergency Rule was published on August 9, 2021. 47 Fla. Admin. Reg. 3650.

15 *Florida State Conference of NAACP v. Dep't of Health*, Case No. 4D21-2463 (petition filed Aug. 20, 2021); *Scott v. DeSantis*, note 13 supra.

16 Danielle J. Brown, *State Board of Ed Okays Private School Transfers for Public Kids Experiencing 'Covid-19 Harassment*, Florida Phoenix (Aug. 6, 2021). The Notice of Emergency Rule was published on August 9, 2021. 47 Fla. Admin. Reg. at 3648. A Notice of Development of Rulemaking to amend Rule 6A-6.0951 to incorporate changes made by Emergency Rule 6AER21-02 to the Hope Scholarship Program was published on August 27, 2021. 47 Fla. Admin. Reg. 3951.

17 The press release and letter are posted at flsenate.gov/Media/PressReleases/Show/4003.

18 *E.g., In re: Broward County School Board, Student Opt-Out Requirements*, Case No. 21-4024 (Aug. 20, 2021). *See also* A. Ceballos & J. Solochek, *Florida to Broward, Alachua School Boards: Reverse Mask Policy of Lose Pay*, Tampa Bay Times (Aug. 20, 2021).

19 Anne Geggis, *Three school districts lawyer up to fight mandatory mask order ban,* Florida Politics (Aug. 31. 2021).

20 CS/HB 1 is the subject of a pending legal challenge, *Dream Defenders v. DeSantis,* Case No. 4:21-cv-00191-MW-MAF (N.D. Fla., filed May 11, 2021).

21 47 Fla. Admin. Reg. 2756 (Jun. 16, 2021).

22 Katie Hyson, *Gainesville To Become First Florida City To Sue Over 'Anti-Riot' Law After 4-3 City Commission Vote,* WUFT (Aug. 6, 2021).

23 *See, e.g., Askew v. Cross Key Waterways,* 372 So. 2d 913 (Fla. 1978) ("Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.").

24 Regulation 6.022, Intercollegiate Athletes.

25 Ch. 2020-28, Laws of Fla.

26 *See, e.g.,* §§ 120.60(5), 120.80(3), 120.81(d)1, & 120.81(5), Fla. Stat.

27 Regular readers will recognize many of these JAPC recommendations from prior years. *See, e.g.,* HB 729 (2020).

28 HB 1145 was originally filed as an act relating to regulatory restriction reduction.

29 Similar legislation was filed in the 2020 Regular Session. *See* SB 1238 (2020).

30 After the Regular Session had ended, the DEP Secretary resigned. When asked about the replacement of the DEP Secretary, Governor DeSantis stated that the Constitution provides that his appointment of a replacement is subject only to the approval of the Senate. Mary Ellen Klas, *Ron Desantis May Try to Bypass Cabinet on Environmental Officer Pick*, Tampa Bay Times (Jun. 15, 2021). Subsequently, Governor DeSantis appointed a new secretary. Zachary T. Sampson, *DeSantis Appoints Florida's Environmental Secretary; Fried challenges Hire*, Tampa Bay Times (Aug. 31, 2021).

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