

STORAGE NAME: s1702.ca

DATE: April 9, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMUNITY AFFAIRS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: CS/SB 1702

RELATING TO: Rulemaking Authority of the Department of Community Affairs and the Florida Land and Water Adjudicatory Commission

SPONSOR(S): Senate Committee on Community Affairs and Senator Dyer

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) COMMUNITY AFFAIRS

(2)

(3)

(4)

(5)

I. SUMMARY:

This Senate Committee on Community Affairs committee substitute authorizes the Department of Community Affairs to adopt rules and to administer specific laws in accordance with the Florida Administrative Procedures Act.

This bill authorizes the Florida land and Water Adjudicatory Commission to adopt rules.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

During the 1996 legislative session, the Florida Administrative Procedures Act (APA) was substantially re-written and was adopted as CS/SBs 2290 and 2288. The revised APA, among many other changes, modified the standards which authorized rulemaking and included provision for periodic review of rules by agencies with rulemaking authority.

In particular, newly created sub section 120.536(1), Florida Statutes, narrowed legislative authorization for rulemaking:

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

In the past, a number of court decision held that a rule did not exceed the legislative grant of rulemaking authority if it was reasonably related to the stated purpose of the enabling legislation. In addition, it was accepted that a rule was valid when it implemented general legislative intent or policy. Agencies had wide discretion to adopt rules whether the statutory basis for a rule was clearly conferred or implied from the enabling statute.

Section 120.536, Florida Statutes, effectively overturned this line of cases and imposed a much stricter standard for rulemaking authority. Under the new APA, existing rules and proposed rules must **implement, interpret, or make specific** the particular powers and duties granted by the enabling statute. It is important to note that the revised APA is not intended to eliminate administrative rules or even to discourage rulemaking, but to ensure that administrative rules are no broader than the enabling statute. A grant of rulemaking authority by the Legislature is necessary but not enough by itself for an agency to adopt a rule. Likewise, agencies need more than a statement of general legislative intent for implementing a rule. Rules must be based on specific grants of powers and not address subjects on which the Legislature was silent.

In creating this new rulemaking standard, the Legislature recognized that there might be existing rules which had been adopted before the new standard took effect, but which no longer would be valid. Rather than immediately subject all of these rules to challenges under section 120.56, Florida Statutes, for failure to meet the new test, the reform bill created a temporary "shield" for these existing rules. The purpose of this shield was to allow agencies time to identify these rules and to seek legislative authorization for them.

In order to temporarily shield a rule or portion of a rule from challenge under the new provisions, agencies were to report rules which they believed did not meet the new criteria by October 1, 1997. This provision is contained in subsection 120.536(2), Florida Statutes, which reads, in part:

By October 1, 1997, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The [Joint] Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives.

The Joint Administrative Procedures Committee (JAPC) reports that some 5,850 rules or portions of rules were reported as exceeding the agencies' rulemaking authority under subsection 120.536(1), Florida Statutes. Of these, 3,610 rules were identified by various local school boards, whose rules are not contained in the Florida Administrative Code. However, 2,240 rules contained in the F.A.C. were reported by various agencies as exceeding statutory authority for rulemaking under section 120.536, Florida Statutes.

Subsection 120.536(2), Florida Statutes, also lays out the second step in the process, that of legislative review. The subsection goes on to state:

The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceeding pursuant to section 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist.

During the 1998 legislative session, each agency has the responsibility to bring forward legislative proposal, as appropriate, which will provide statutory authorization for assisting rules or portions thereof which the agency deems necessary but which currently exceed the agencies' rulemaking authority. The Legislature is directed to consider whether such legislation authorizing the identified rules should be enacted.

Subsection 120.536(3), Florida Statutes, details when rules, both those identified by agencies as exceeding their new authority and those not so identified, may be challenged as exceeding rulemaking authority under the new act:

All proposed rules or amendments to existing rules filed with the Department of State on or after October 1, 1996, shall be based on rulemaking authority no broader than permitted by this section. A rule adopted before October 1, 1996, and not included on a list submitted by an agency in accordance with subsection (2) may not be challenged before November 1, 1997, on the grounds that it

exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before October 1, 1996, and included on a list submitted by an agency in accordance with subsection (2) may not be challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

Rules not included on the list submitted by the agency, along with rules adopted after October 1, 1996, could be challenged on grounds of exceeding the agencies' rulemaking authority after November 1, 1997. Rules included on the submitted list may not be challenged on such grounds until July 1, 1999. Thus, while the statutes direct the 1998 Legislature to consider whether legislation authorizing identified rules should be enacted and while agencies must begin the rule repeal process for identified rules before January 1, 1999, rules identified as exceeding the new rulemaking authority are not subject to challenge on such grounds until July 1, 1999, after the 1999 legislative session.

According to JAPC, there are 3,500-3,600 grants of rulemaking authority contained the Florida Statutes falling roughly into two categories: specific grants and general grants. Most of the rulemaking authority are specific grants of rulemaking authority coupled in a sentence with a specific power or duty of the agency. General grants of rulemaking authorize rulemaking in the context of the agency's mission or as it pertains to the stated purpose of the enabling legislation. Most agencies have a general grant of rulemaking authority and numerous specific grants of rulemaking authority. In most cases, it appears that existing rules exceed statutory authority because a "specific law to be implemented" is missing from the statute.

Rules Identified by the Department of Community Affairs:

On September 30, 1997, the Department of Community Affairs (DCA), complied with the legislative requirement by notifying JAPC that it had identified 21 rules, or portions thereof, for which DCA needed specific legislative authority under the new APA standards. Those rules are related to the following programs:

- Local Government Comprehensive Plan Review;
- Evaluation and Appraisal Reports;
- Developments of Regional Impact;
- Florida Quality Developments; and
- Coastal Management.

Rules Identified by the Florida Land and Water Adjudicatory Commission:

On October 1, 1997, the Florida Land and Water Adjudicatory Commission (FLWAC) complied with the legislative requirement by notifying JAPC that it had identified 19 rules for which FLWAC had no specific authority or needed clarification of that authority under the new APA standard. These rules relate to the following program areas:

- Community Development Districts;
- Developments of Regional Impact;
- Areas of Critical State Concern; and
- FLWAC's appellate responsibility to review actions of water management districts and the Department of Environmental Protection.
- FLWAC's appellate responsibility to re

B. EFFECT OF PROPOSED CHANGES:

The Senate Committee on Community Affairs' committee substitute provides rulemaking authority to DCA in the following areas:

- Contents of the capital improvements element of local comprehensive plans;
- Required planning periods of local government comprehensive plans;
- Department review of multiple individual amendments to local government comprehensive plans;
- The scope of municipal review of local government comprehensive plans and amendments;
- Procedures by which a local government may request substantive comments regarding its Evaluation and Appraisal Report (EAR) during the sufficiency review;
- Exceptions for delegation of EAR review to the appropriate regional planning council;
- Schedules for adoption of local government development regulations and procedures for DCA's review;
- Procedures relating to the review of applications for development approval and preapplication conferences:
- Abandonment of developments of regional impact development orders;
- Substantial changes to Florida Quality Developments;
- Rendering and effectiveness of development orders within an Area of Critical State Concern; and
- Applications to receive funding under the federal Coastal Zone Management Act.

The bill also provides rulemaking authority for the Florida Land and Water Adjudicatory Commission in the following subject areas:

- Reviewing rules and orders of the Department of Environmental Protection and water management districts;
- Consideration of petitions to establish, alter, or delete community development districts, or portions thereof; and
- Areas of Critical State Concern and Developments of Regional Impact.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

Yes. The bill requires the Department of Community Affairs to adopt rules, in accordance with chapter 120, Florida Statutes.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 20.255, Florida Statutes;
Section 163.3177, Florida Statutes;
Section 163.3184, Florida Statutes;
Section 163.3191, Florida Statutes;
Section 163.3202, Florida Statutes;
Section 190.005, Florida Statutes;
Section 373.114, Florida Statutes;
Section 380.06, Florida Statutes;
Section 380.061, Florida Statutes;
Section 380.07, Florida Statutes; and
Section 380.22, Florida Statutes.

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends section 20.255, Florida Statutes, authorizes FLWAC to adopt rules setting forth procedures for reviewing orders and rules of the Department of Environmental Protection. ***This change provides specific authority for Rules 42-2.0131, 42-2.0132, 42-2.014, 42-2.016, and 42-2.018, F.A.C.***

Section 2: Amends section 163.3177, Florida Statutes, to require the capital improvements element of a local government comprehensive plan contain standards for the management of debt. This section is further amended to provide that the plan contain two planning periods, one covering at least the first five years after adoption, and another covering at least 10 years. ***These amendments provide specific statutory authority for Rules 9J-5.016(3)(c)2., F.A.C., and 9J-5.005(1), F.A.C.***

Section 3: Amends section 163.3184, Florida Statutes, relating to local government transmittal of proposed plans or amendments. Subsections (3) and (4) are amended to clarify that the "Department" refers to the Department of Environmental Protection, as distinguished from the state land planning agency which is used for reference to the Department of Community Affairs. ***These amendments provide specific authority for Rules 9J-11.006(1), F.A.C., and 9J-11.009(8)(c), F.A.C.b***

Subsection (3) is further amended to codify agency practice when reviewing multiple individual local government comprehensive plan amendments. The language clarifies that if the state land planning agency chooses to review only a portion of proposed amendments submitted together as a package, and the local government chooses to adopt those amendments not reviewed, subsequent adoption of the reviewed amendments will not be counted as a separate amendment cycle for purposes of the statutory limitation on two amendment cycles per year. ***This amendment provides specific authority for Rule 9J-11.009(9), F.A.C.***

Subsection (5) is amended to clarify that when a municipality reviews another local government's comprehensive plan, or amendment, that review will be limited to the relationship and effect on the reviewing municipality's plan. ***This amendment provides specific authority for Rule 9J-010(6)(d), F.A.C.***

Subsection (6) is amended to authorize the state land planning agency to establish a schedule for receipt of comments from reviewing agencies regarding a local government plan or amendment. This change does not affect the 30-day timeframe in which the state land planning agency must review those comments and submit its ORC report to the local government. ***This amendment provides specific authority for Rule 9J-11.010(8), F.A.C.***

Subsection (9) is amended to delete timeframes for the filing of exceptions and issuance of a final or recommended order by the state land planning agency. These timeframes conflict with the new uniform rules of procedure adopted pursuant to the new APA; therefore, by their deletion, the state land planning agency defaults to the timeframes established in the uniform rules.

Section 4: Amends section 163.3191, Florida Statutes, governing the Evaluation and Appraisal Reports (EAR) required to be submitted by local governments to the state land planning agency or applicable Regional Planning Council, where delegation has been achieved.

Subsection (4) is amended to specify that three copies of the EAR must be transmitted to the state land planning agency along with the plan amendments to implement the EAR. ***This amendment provides specific authority for Rule 9J-5.0053(3)(a), F.A.C.***

Subsection (9) is amended to provide guidelines to local governments which choose to request comments from the state land planning agency during the sufficiency review of the EAR, and to authorize the state land planning agency to provide such comments when requested by a local government. ***These amendments provide specific authority for Rule 9J-11.018(4)(b), F.A.C.***

Subsection (10) is amended to clarify that delegation of EAR sufficiency review is not available to local governments located within an Area of Critical State Concern, and to authorize the state land planning agency to adopt rules for delegation of EAR review. ***These amendments provide specific authority for Rules 9J-34.005 and 34.004, F.A.C.***

Section 5: Amends section 163.3202, Florida Statutes, relating to the adoption and review of local government land development regulations (LDR).

Subsection (1) is amended to clarify that all municipalities are required to adopt land development regulation, deleting obsolete language which distinguished coastal municipalities from other municipalities. ***This amendment does not grant specific authority to adopt any rules.***

Subsection (4) is amended to provide a timeframe of 30 days from receipt of the LDR for the state land planning agency to notify a local government whether the LDR comply with the statute. ***This amendment provides specific authority for Rule 9J-11.021, F.A.C.***

Subsection (5) is amended to authorize the state land planning agency to adopt, by rule, schedules for the adoption of LDR by local governments. ***This amendment provides specific authority for Rule 9J-11.019, F.A.C.***

Section 6: Amends section 190.005, Florida Statutes, to authorize FLWAC to adopt rules setting forth procedures for considering petitions to establish, expand, modify, or delete uniform community development districts, or portions thereof. ***This amendment provides specific authority for Rules 42-1.009, 42-1.010, and 42-1.102, F.A.C.***

Section 7: amends section 373.114, Florida Statutes, to authorize FLWAC to adopt rules setting forth procedures for reviewing orders or rules of water management districts. ***This amendment provides specific authority for Rules 42-2.0121, 42-2.013, 42-2.0132, 42-014, 42-2.015, 42-2.016, and 42-2.018, F.A.C.***

Section 8: Amends section 380.06, Florida Statutes, relating to developments of regional impact (DRIs).

Paragraph (l) is created in subsection (4) to authorize the state land planning agency to issue clearance letters, at the request of the developer, on whether a development is required to undergo DRI review. The clearance letter may be based solely on information supplied by the developer, and the state land planning agency is not required to investigate the information. If the information supplied by the developer is inaccurate, the clearance letter is not binding on the state land planning agency. Clearance letters do not constitute final agency action; therefore, they cannot be challenged in an administrative hearing. ***This amendment provides specific authority for Rule 9J-2.015, F.A.C.***

Subsection (7) is amended to provide that if the parties to a preapplication conference agree on the assumptions and methodology to be used in an application for development approval for a DRI, the reviewing agencies may not subsequently object to those assumptions or methodologies unless the project has subsequently been modified or unless information obtained during the review makes those assumptions or methodologies inappropriate. ***This amendment provides specific authority for Rule 9J-2.021, F.A.C.***

Subsection (7) is further amended by creating a new paragraph (c) which provides that if the application for the development order is not submitted within a year after the preapplication conference is held, either the developer or the local government may request another preapplication conference. ***This amendment provides specific authority for Rule 9J-2.025, F.A.C.***

Subsection (26) is amended to authorize the state land planning agency to adopt criteria for determining whether to grant or deny a proposal for abandonment of a DRI. ***This amendment provides specific authority for Rule 9J-2.0251, F.A.C.***

Section 9: amends section 380.061, Florida Statutes, to expand the state land planning agency's rule authority for the Florida Quality Developments (FQD) program to include the provisions governing annual reports and criteria for determining whether a proposed change to an approved FQD constitutes a substantial change. ***This amendment provides specific authority for Rules 9J-28.024, F.A.C.***

Section 10: Amends section 380.07, Florida Statutes, relating to FLWAC and the Area of Critical State Concern and DRI programs administered by the state land planning agency. This section is amended to authorize FLWAC to adopt rules to ensure

compliance with the programs. ***This amendment provides specific authority for Rules 42-2.002, 42-2.004, 42-2.005, 42-2.006, 42-2.008, 42-2.009, 42-2.010, and 42-2.011, F.A.C.***

This section is further amended to authorize the state land planning agency to adopt describing when a development order has been rendered to the state land planning agency, for purposes of determining when the appeal period begins, and describing the effectiveness of development orders in areas of critical state concern. ***This amendment provides specific authority for Rule 9J-1.003, F.A.C.***

Section 11: Amends section 380.22, Florida Statutes, to adopt procedures and criteria for evaluating subgrant applications to receive funds from the Coastal Zone Management Act. ***This amendment provides specific authority for Rules 9M-1.004, 9M-1.005, and 9M-1.007, F.A.C.***

Section 12: Provides and effective date upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not required counties or municipalities to spend funds or take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that local governments have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of state tax shared with local governments.

V. COMMENTS:

N/A

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VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

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