

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 12, 1998 Revised: _____

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

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Schmith</u>	<u>Yeatman</u>	<u>CA</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The CS for SB 1702 provides rulemaking authority to the Department of Community Affairs in the following subject areas:

- ▶ Contents of the capital improvements element of local government 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 thereto;
- ▶ Scheduling of receipt of comments from reviewing agencies on local government comprehensive plans and amendments thereto;
- ▶ Procedures by which a local government may request substantive comments regarding its Evaluation and Appraisal Report (EAR) during the department’s sufficiency review;
- ▶ Exceptions for delegation of EAR review to the appropriate regional planning council;
- ▶ Schedules for adoption of local government land development regulations and procedures for the department’s review thereof;
- ▶ Clearance letters relating to developments of regional impact;

- ▶ 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 CS 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.

This CS amends the following sections of the Florida Statutes: 20.255, 163.3177, 163.3184, 163.3191, 163.3202, 190.005, 373.114, 380.06, 380.061, 380.07, and 380.22.

II. Present Situation:

During the 1996 legislative session, a comprehensive rewrite of the Florida Administrative Procedures Act was adopted as CS/SBs 2290 and 2288. Among many other changes, the revised APA modified the standards which authorize rulemaking and included provision for periodic review of rules by agencies with rulemaking authority.

In particular, s. 120.536, F.S., a new section of the APA, narrowed legislative authorization for rulemaking:

120.536 Rulemaking authority; listing of rules exceeding authority; repeal; challenge.--

(1) 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 decisions 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. Additionally, 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, F.S., 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 in good faith before the new standard took effect, but which no longer would be valid. Rather than immediately subject all of these rules to challenges under s. 120.56, F.S., 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), F.S., which reads, in part:

(2) 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 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 agency's rulemaking authority under s. 120.536(1), F.S. Of these, 3,610 rules were identified by various local school boards, whose rules are not contained in the FAC. However, 2,240 rules contained in the FAC were reported by various agencies as exceeding statutory authority for rulemaking under s. 120.536, F.S.

Subsection (2) of s. 120.536 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 proceedings pursuant to s. 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.

Thus, during the 1998 legislative session, each agency has the responsibility to bring forward legislative proposals, as appropriate, which will provide statutory authorization for existing 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 (3) of s. 120.536, F.S., 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:

(3) 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 the JAPC, there are 3500-3600 grants of rulemaking authority contained in the Florida Statutes falling roughly into two categories: specific grants and general grants. Most of them are specific grants of authority, that is, the grant of authority is found coupled in a sentence with a specific power or duty of the agency. General grants of rulemaking authority 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, not a legislative grant of rulemaking authority.

Rules Identified by DCA

On September 30, 1997, the department complied with the legislative requirement by notifying JAPC that it had identified 21 rules, or portions thereof, for which the department needed specific legislative authority under the new APA standard. Those rules relate to the department's programs in Local Government Comprehensive Plan Review, Evaluation and Appraisal Reports, Developments of Regional Impact, Florida Quality Developments and Coastal Management.

Rules Identified by FLWAC

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.

III. Effect of Proposed Changes:

Section 1 amends s. 20.255, F.S., to authorize 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 s. 163.3177, F.S., to require that 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, respectively.

Section 3 amends s. 163.3184, F.S., relating to local government transmittal of proposed plans or amendments thereto. 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 changes provide specific authority for Rules 9J-11.006(1), F.A.C., and 9J-11.009(8)(c), F.A.C., respectively.

Subsection (3) is further amended to codify agency practice when reviewing multiple individual local government comprehensive plan amendments. The language clarifies that if the department 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 change 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 thereto, that review will be limited to the relationship and effect on the reviewing municipality's plan. This change provides specific authority for Rule 9J-11.010(6)(d), F.A.C.

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

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

Section 4 amends s. 163.3191, F.S., governing the Evaluation and Appraisal Reports (EAR) required to be submitted by local governments to the department 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 department along with the plan amendments to implement the EAR. This change 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 department during the sufficiency review of the EAR, and to authorize the department to provide such comments when requested by a local government. These changes 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

department to adopt rules for delegation of EAR review. These changes provide specific authority for Rules 9J-34.005 and 34.004, F.A.C., respectively.

Section 5 amends s. 163.3202, F.S., relating to the adoption and review of local government land development regulations. Subsection (1) is amended to clarify that all municipalities are required to adopt land development regulations, deleting obsolete language which distinguished coastal municipalities from other municipalities. This change does not grant specific authority to adopt any rules.

Subsection (4) is amended to provide a timeframe of 30 days from receipt of the land development regulations for the department to notify a local government whether the land development regulations comply with the statute. This change provides specific authority for Rule 9J-11.021, F.A.C.

Subsection (5) is amended to authorize the department to adopt by rule schedules for the adoption of land development regulations by local governments. This change provides specific authority for Rule 9J-11.019, F.A.C.

Section 6 amends s. 190.005, F.S., 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 change provides specific authority for Rules 42-1.009, 42-1.010, and 42-1.102, F.A.C.

Section 7 amends s. 373.114, F.S., to authorize FLWAC to adopt rules setting forth procedures for reviewing orders or rules of water management districts. This change provides specific authority for Rules 42-2.0121, 42-2.013, 42-2.0132, 42-2.014, 42-2.015, 42-2.016, and 42-2.018, F.A.C.

Section 8 amends s. 380.06, F.S., relating to developments of regional impact (DRIs).

Paragraph (i) is created in subsection (4) to authorize the department to issue clearance letters, at the request of a 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 department is not required to investigate that information. If the information supplied by the developer is inaccurate, the clearance letter is not binding on the department. Clearance letters do not constitute final agency action; therefore, they cannot be challenged in an administrative hearing. This change 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 change provides specific authority for Rule 9J-2.021(1)(h), F.A.C.

Subsection (7) is further amended by creating a new paragraph (c) which provides that if the application for 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 change provides specific authority for Rule 9J-2.021(3), F.A.C.

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

Section 9 amends s. 380.061, F.S., to expand the department's rule authority for the Florida Quality Developments (FQD) program to include provisions governing annual reports and criteria for determining whether a proposed change to an approved FQD constitutes a substantial change. This section provides specific authority for Rules 9J-28.024, F.A.C., and 9J-28.023(6), F.A.C.

Section 10 amends s. 380.07, F.S., relating to FLWAC and the Area of Critical State Concern and DRI programs administered by the department. This section is amended to authorize FLWAC to adopt rules to ensure compliance with the programs. This change 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 department to adopt rules describing when a development order has been rendered to the department, for purposes of determining when the appeal period begins, and describing the effectiveness of development orders in areas of critical state concern. These changes provide specific authority for Rule 9J-1.003, F.A.C.

Section 11 amends s. 380.22, F.S., to authorize the department to adopt procedures and criteria for evaluating subgrant applications to receive funds from the Coastal Zone Management Act. This change provides specific authority for Rules 9M-1.004, 9M-1.005 and 9M-1.007, F.A.C.

Section 12 provides an effective date upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.