

STORAGE NAME: h2023p1.jud

DATE: March 27, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIARY
ANALYSIS**

BILL #: PCS/HB 2023

RELATING TO: Administrative Procedure

SPONSOR(S): Committee on Judiciary and Rep. Bense

TIED BILL(S): None

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

- (1) JUDICIARY
 - (2) GOVERNMENTAL RULES & REGULATIONS
 - (3) GENERAL GOVERNMENT APPROPRIATIONS
 - (4)
 - (5)
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I. SUMMARY:

PCS/HB 2023 modifies various provisions of the Administrative Procedure Act relating to mediation, expedited hearings, and attorney's fees. It also clarifies the expedited hearing processes for certain environmental permit applications under Chapters 373 and 403, F.S. Among other modifications, the bill:

- Modifies the Equal Access to Justice Act to increase the net worth amounts for small business parties and increases the amount of attorney's fees that may be awarded under the Act from \$15,000 to \$75,000.
- Allows only the party affected by the agency and the agency to decide whether to mediate a case pursuant to s. 120.573, F.S. and provides for an award of attorney's fees and costs to the party affected by the agency if that party prevails in a formal hearing in a manner equal to or more favorable than its last offer at mediation on the same matter.
- Gives an administrative law judge recommended order authority instead of final authority for all expedited hearings under s. 120.574, F.S.
- Allows for expedited hearings under the expedited comprehensive plan permit process of s. 403.973, F.S., without consent of the affected agency or a determination of the appropriateness of an expedited hearing by an administrative law judge.
- Allows an award of attorney's fees and costs under 120.595, F.S., to the petitioner regarding agency statements if the agency has proceeded to rulemaking.
- Creates a notice and waiver of administrative rights mechanism for permits under s. 373.4141, F.S., and provides for a hearing within 90 days of a petition for hearing under that section.
- Removes the authority of the Land and Water Adjudicatory Commission to review orders arising from evidentiary hearings conducted pursuant to ss. 120.569 and 120.57, F.S.
- Eliminates standing for citizens under the Environmental Protection Act of 1971 who are not substantially affected by the activity, conduct, or product to be licensed or permitted.

The bill appears not to have a significant fiscal impact on state or local government.

STORAGE NAME: h2023p1.jud

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PAGE 2

The bill shall be effective on becoming law.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

B. PRESENT SITUATION:

Equal Access to Justice Act

Section 57.111, F.S., provides for the award of attorney's fees and costs to prevailing small business parties in actions initiated by state agencies. A small business party is currently defined in relevant part as:

- A sole proprietor of an unincorporated business, including a professional practice, whose principal offices is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than \$2 million, including both personal and business investments; or
- A partnership or corporation, including a professional practice, which has its principle office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than \$2 million. See s. 57.111(3)(d), F.S.

The Act limits the award of attorney's fees for a prevailing party in an action initiated by a state agency to \$15,000. s. 57.111(4)(d)2., F.S.

Mediation under Chapter 120, F.S.

Section 120.573, F.S., provides for the mediation of administrative disputes. This section allows the agency and all parties to the litigation to agree to mediation, and in such cases tolls the time limits provided by ss. 120.569 and 120.57, F.S., to allow for the mediation. The mediation must be conducted within 60 days of the parties' agreement to mediate. The mediation agreement must include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If the mediation results in settlement of the administrative dispute, the agency enters a final order incorporating the agreement of the parties. If the mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.547, F.S., are resumed.

Summary Hearing under Chapter 120, F.S.

Section 120.574, F.S., provides for a summary hearing process for administrative actions. The Division of Administrative Hearings must provide the original parties with an initial order within 5 days of the filing of the petition for hearing. That order shall contain a statement advising the addressees that a summary hearing is available. Within 15 days after service of the initial order, any party may file with the division a motion for summary hearing in accordance with s. 120.574(2), F.S. If all original parties agree, in writing, to the summary proceeding, it shall be conducted within 30 days of the agreement. Intervenors are subject to the decision of the original parties as to whether the case will proceed under the summary hearing provisions and shall not have standing to challenge the decision. If a motion for summary hearing is not filed within 15 days after service of the initial order, the case shall proceed in accordance with the formal hearing provisions of ss. 120.569 and 120.57, F.S.

The summary hearing limits the types of motions and the scope of the record of the hearing. Within 30 days of the conclusion of the summary hearing, the administrative law judge shall enter a final order in the matter, which is final agency action for purposes of Chapter 120, F.S., and is appealable to a district court of appeal as provided in s. 120.68, F.S.

Expedited Permitting Process

Section 403.973, F.S., provides for an expedited permit process for certain economic development projects. Section 403.973(15), F.S., provides that challenges of state agency action under the expedited permit process are subject to the summary hearing provisions of s. 120.574, F.S., except that the decision of the administrative law judge shall be in the form of a recommended order and not a final order subject to appeal under s. 120.68, F.S., unless the affected agencies agree at the preliminary hearing conference to allow the judge's decision to constitute final agency action. In cases where a single agency is affected, the agency shall render its final order in the matter within 10 working days of the receipt of the recommended order. In those proceedings where the actions of more than one agency are challenged, the Governor shall issue the final order within 10 working days of receipt of the recommended order.

Challenges to Agency Action Pursuant to s. 120.56(4), F.S.

Section 120.56(4), F.S., provides for challenges of agency statements defined as administrative rules. A substantially affected person must show that the statement constitutes a rule that the agency has not adopted as required by the general rulemaking provisions of s. 120.54(1), F.S. In such cases, and upon the entry of a final order that all or part of the agency statement violates s. 120.54(1), F.S., the petitioner is entitled to an award of reasonable attorney's fees and costs unless the agency demonstrates that the statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds. See s. 120.595(4), F.S.

Permit Processing under Chapter 373, F.S.

Section 373.4141, F.S., regulates the permitting process for stormwater management systems, dams, impoundments, or other works under Part IV of Chapter 373, F.S. Under that section, within 30 days after receipt of an application for a permit, the Department of Environmental Protection or the water management district shall review the application and shall request submission of all additional information the department or the water management district is permitted by law to require. If the applicant believes any request for additional information is not authorized by law or rule, the applicant may request a hearing pursuant to s. 120.57, F.S.

Within 30 days after receipt of such additional information, the department or water management district shall review it and may request only that information needed to clarify such additional information or to answer new questions raised by or directly related to such additional information. If the applicant believes the request of the department or water management district for such additional information is not authorized by law or rule, the department or water management district, at the applicant's request, shall proceed to process the permit application. This section also requires that a permit must be approved or denied within 90 days after receipt of the original application, the last item of timely requested additional material, or the applicant's written request to begin processing the permit application.

Land and Water Adjudicatory Commission

Section 373.114(1), F.S., provides that the Governor and Cabinet, sitting as the Land and Water adjudicatory Commission, have the exclusive authority to review any order or rule of a water management district, other than a rule of internal procedure of the district, to ensure consistency with the provisions and purposes of Chapter 373, F.S. The law allows the Commission to review orders of the Department of Environmental Protection and local governments exercising delegated authority, pursuant to ss. 373.403-.443, F.S., with certain exceptions.

Citizen Standing under the Environmental Protection Act of 1971

Section 403.412, F.S., confers standing rights on citizens of this state in administrative, licensing, or other proceedings authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction. A citizen may intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources or the state.

C. EFFECT OF PROPOSED CHANGES:

Equal Access to Justice Act

The bill amends s. 57.111, F.S., to change the net worth definition of a "small business party" that may be titled to an award of attorney's fees from \$2 million to \$5 million and to increase the award of attorney's fees under that section from \$15,000 to \$75,000. This change is designed to update the net worth and attorney's fees provisions in light of inflation and changes in the economy.

Mediation under Chapter 120, F.S.

The bill amends s. 120.573, F.S., to limit the decision on whether to mediate a dispute to the agency and the party subject to the agency, instead of all parties to the administrative action. It also provides that the mediation agreement may address the allocation of attorney's fees and costs. It requires that each party shall have persons necessary, with complete settlement authority, present at the mediation; that each party shall mediate in good faith; and that all aspects of the mediation not specifically provided for under s. 120.573, F.S., shall be conducted according to the Florida Rules for Certified Court-Appointed Mediators adopted by the Florida Supreme Court. It also provides that if the parties fail to reach a settlement of the case, the mediator shall record the last offer of the party subject to the agency, and if that party prevails at a later formal hearing and the result is the same or more favorable than the last offer

made by that party at mediation, that party shall be entitled to recover attorney's fees and costs from the petitioner

Summary Hearings under Chapter 120, F.S.

The bill reclassifies the summary hearing under s. 120.574, F.S., as an "expedited" hearing. It requires the initial order to advise the original parties to the litigation that an expedited hearing is available, provided that the affected agency agrees, and defines the accelerated nature of the expedited procedure. The bill additionally provides that any party may file a motion for expedited hearing. Under the bill, if a nonagency party files such a motion, and the affected agency does not file a written objection within 7 days after service of such a motion, or if the affected agency files such a motion, and the party who is the subject of the agency action does not file a written objection within 7 days after service of the motion, the motion shall be granted and an order entered setting a hearing date, which must be held within 30 days of the date the response period to the motion expires. If an affected agency files such a motion, and the party who is the subject of the agency action files a response within 7 days after service of the motion objecting to the expedited hearing, the administrative law judge shall, within 5 days from the filing of that response, enter an order granting the motion for expedited hearing, unless he or she determines that any of the original parties will be unduly prejudiced thereby, which hearing shall be held within 30 days from the date the order granting the expedited hearing is entered.

The bill also requires that intervenors to the litigation be governed by the decision of the administrative law judge, instead of the original parties, with respect to whether the case will proceed on an expedited basis.

Finally, the bill confers on the administrative law judge recommended order authority instead of final order authority, and allows parties to file exceptions to the final order within 10 days of the issuance of the recommended order. The agency shall issue a final order in the case within 30 days of the issuance of the recommended order.

Expedited Hearing Process for Water Pollution Operation Permit

The bill provides that the expedited hearing process under s. 120.574, F.S., shall apply to challenges of state agency action in the expedited permitting process for projects processed under s. 403.088, F.S. It also provides that, notwithstanding the provisions of s. 120.574, F.S., the use of the expedited hearing does *not* require consent of the affected agency or a determination by the administrative law judge as to its propriety.

Challenges to Agency Action Pursuant to s. 120.56(4), F.S.

The bill requires an administrative law judge to award the petitioner reasonable attorney's fees and costs under s. 120.595(4), F.S., if a final hearing regarding an agency's statement has been scheduled, and a final order has not been entered because the agency has proceeded to rulemaking or a final order has been entered in favor of the agency because the agency has proceeded to rulemaking and has effectively relied upon s. 120.56(4)(e), F.S.

Permit Processing under Chapter 373, F.S.

The bill allows an applicant for permit under Chapter 373, Part IV, F.S., to publish notice of his or her application for permit in a newspaper of general circulation in the county or counties where the activity for which the permit is requested may take place, within 30 days after filing

an application for permit. The newspaper notice must comply with the provisions of Chapter 50, F.S. The bill provides for minimum contents of the notice, including notice that, within 21 days after the publication of the notice, any substantially affected person, pursuant to ss. 120.569 and 120.57, F.S., and any citizen, pursuant to s. 403.412(5), F.S., must notify the permitting agency, in writing, of any objections or concerns with regard to the permit application in order to preserve his or her right to initiate an administrative proceeding pursuant to ss. 120.569, 120.57, or 403.412(5), F.S. The bill provides that a substantially affected person, or citizen, as applicable, who, prior to the publication of the notice, notified the permitting agency in writing of his or her objections or concerns regarding the permit application is not affected by this subsection.

Under the bill, the failure to timely notify the permitting agency as required by this section constitutes waiver of administrative rights under ss. 120.569, 120.57 and 403.412(5), F.S., as applicable.

The bill also provides that when an application reviewed by a water management district under s. 373.4141, F.S., is the subject of a notice of intent to issue or deny and is approved or denied by a two-thirds vote of the district's governing board, such approval or denial by the governing board shall carry a presumption of correctness in any administrative proceeding pursuant to ss. 120.569 and 120.57, F.S. In that regard, a party opposed to the governing board's action must overcome this presumption by a preponderance of the evidence.

The bill requires the Division of Administrative Hearing to conduct a final hearing on a permit application under s. 373.4141, F.S., that is challenged pursuant to ss. 120.569 or 120.57, F.S., within 90 days after receipt by the division of the petition or request for hearing. During the pendency of the administrative proceeding, the department or the water management district, as applicable, may authorize construction activities which are not subject to the allegations contained in the petition or request for hearing initiating the administrative challenge.

Review by Land and Water Adjudicatory Commission

The bill exempts from review by the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission, any order resulting from a s. 120.569, F.S., or s. 129.57, F.S., evidentiary hearing.

Standing to Initiate Administrative Litigation

The bill amends the Environmental Protection Act of 1971, s. 403.412, F.S., to prohibit a citizen of the state who is not substantially affected by the activity, conduct, or product that is to be licensed or permitted from instituting, initiating, petitioning, or requesting a administrative proceeding pursuant to s. 120.569 or s. 120.57, F.S.

Conforming Amendments

The bill amends ss. 373.1501, 403.088, 403.973, and 408.7056, F.S., to conform the use of the term "expedited" with respect to hearings under s. 120.574, F.S.

D. SECTION-BY-SECTION ANALYSIS:

Section 1 amends s. 57.111, F.S., to change the net worth definition of a "small business party" that may be entitled to seek attorney's fees from \$2 million to \$5 million and to increase the award of attorney's fees under that section from \$15,000 to \$75,000.

Section 2 amends s. 120.573, F.S., to limit the decision on whether to mediate a dispute to the agency and the party subject to the agency, instead of all parties to the administrative action. Provides that the mediation agreement may address the allocation of attorney's fees and costs. Provides that each party shall have persons necessary, with complete settlement authority, present at the mediation; that each party shall mediate in good faith; that all aspects of the mediation not specifically provided for under s. 120.573, F.S., shall be conducted according to the Florida Rules for Certified Court-Appointed Mediators adopted by the Florida Supreme Court; provides that if the parties fail to reach a settlement of the case, the mediator shall record the last offer of the party subject to the agency, and if that party prevails at a later formal hearing and the result is the same or more favorable than the last offer made by the party at mediation, that party shall be entitled to recover attorney's fees and costs from the petitioner.

Section 3 amends s. 120.574, F.S., to reclassify the summary hearing as an "expedited" hearing. Requires the initial order to advise the original parties to the litigation that an expedited hearing is available, provided that the affected agency agrees, and defining the accelerated nature of the expedited procedure. Provides that any party may file a motion for expedited hearing; provides that if a nonagency party files such a motion, and the affected agency does not file a written objection within 7 days after service of such a motion, or if the affected agency files such a motion, and the party who is the subject of the agency actions does not file a written objection within 7 days after the service of the motion, the motion shall be granted and an order entered setting a hearing date, which must be held within 30 days of the date the response period to the motion expires. Provides that if an affected agency files such a motion, and the party who is the subject of the agency action files a response within 7 days after service of the motion objecting to the expedited hearing, the administrative law judge shall, within 5 days from the filing of that response, enter an order granting the motion for expedited hearing, unless he or she determines that any of the original parties will be unduly prejudiced thereby, which hearing shall be held within 30 days from the date the order granting the expedited hearing is entered. Provides that intervenors to the litigation shall be governed by the decision of the administrative law judge with respect to whether the case will proceed on an expedited basis. Provides conforming amendments adopting the term "expedited" in lieu of "summary." Confers on the administrative law judge recommended order authority instead of final order authority; provides that the parties may file exceptions to the final order within 10 days of the issuance of the recommended order, and requires the agency to issue a final order in the case within 30 days of the issuance of the recommended order.

Section 4 amends s. 373.1501, F.S., to conform the use of the term "expedited" with respect to hearings under s. 120.574, F.S.

Section 5 amends s. 403.088, F.S., to conform the use of the term "expedited" with respect to hearings under s. 120.574, F.S.

Section 6 amends s. 403.973, F.S., to conform the use of the term "expedited" with respect to s. 120.574, F.S., hearings. Provides that the expedited hearing process under s. 120.574, F.S., shall apply to challenges of state agency action in the expedited permitting process for projects processed under s. 403.088, F.S. Provides that, notwithstanding the provisions of s. 120.574, F.S., the use of the expedited hearing does not require consent of the affected agency or a determination by the administrative law judge as to its propriety.

Section 7 amends s. 408.7056, F.S., to conform the use of the term "expedited" with respect to hearings under s. 120.574, F.S.

Section 8 amends s. 120.595, F.S., to provide that an administrative law judge shall award the petitioner reasonable attorney's fees and costs if a final hearing regarding an agency's

statement has been scheduled, and a final order has not been entered because the agency has proceeded to rulemaking or a final order has been entered in favor of the agency because the agency has proceeded to rulemaking and has effectively relied upon s. 120.56(4)(e), F.S.

Section 9 amends s. 373.4141, F.S., to allow an applicant for permit to publish notice of his or her application for permit in a newspaper of general circulation in the county or counties where the activity for which the permit is requested may take place, within 30 days after filing an application for permit. Requires that the newspaper notice shall comply with the provisions of chapter 50, F.S. Provides for minimum contents of the notice, including notice that, within 21 days after the publication of the notice, any substantially affected person, pursuant to ss. 120.569 and 120.57, F.S., and any citizen, pursuant to s. 403.412(5), F.S., must notify the permitting agency, in writing, of any objections or concerns with regard to the permit application in order to preserve his or her right to initiate an administrative proceeding pursuant to ss. 120.569, 120.57 or 403.412(5), F.S. Provides that a substantially affected person, or citizen, as applicable, who, prior to the publication of the notice, notified the permitting agency in writing of his or her objections or concerns regarding the permit application is not affected by this subsection. Provides that failure to timely notify the permitting agency as required by this subsection shall constitute waiver of administrative rights under ss. 120.569, 120.57 and 403.412(5), F.S., as applicable. Provides that when an application reviewed by a water management district under s. 373.4141, F.S., is the subject of a notice of intent to issue or deny and is approved or denied by a two-thirds vote of the district's governing board, such approval or denial by the governing board shall carry a presumption of correctness in any administrative proceeding pursuant to ss. 120.569 and 120.57, F.S. Provides that a party opposed to the governing board's action must overcome this presumption by a preponderance of the evidence. Provides that the Division of Administrative Hearings shall conduct a final hearing on a permit application under s. 373.4141, F.S., challenged pursuant to ss. 120.569 or 120.57, F.S., within 90 days after receipt by the division of the petition or request for hearing. Provides that during the pendency of the administrative proceeding, the department or the water management district, as applicable, may authorize construction activities which are not subject to the allegations contained in the petition or request for hearing initiating the administrative challenge.

Section 10 amends s. 373.114, F.S., to exempt from review by the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission, any order resulting from a s. 120.56, F.S., or a s. 129.57, F.S., evidentiary hearing.

Section 11 amends s. 403.412, F.S., to prohibit a citizen of the state who is not substantially affected by the activity, conduct, or product to be licensed or permitted may not institute, initiate, petition, or request a proceeding pursuant to s. 120.569, F.S., or s. 120.57, F.S.

Section 12 provides that the bill shall become effective on becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

N/A

2. Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

N/A

2. Expenditures:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

N/A

D. FISCAL COMMENTS:

N/A

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require a city or county to spend funds or to take any action requiring the expenditure of any funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the revenue raising authority of any city or county.

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

The bill does not reduce the amount of state tax shared with any city or county.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

N/A

B. RULE-MAKING AUTHORITY:

N/A

C. OTHER COMMENTS:

The bill will speed up the administrative hearing process in expedited permitting cases under Chapter 403, F.S., without the consent of the affected agency. This may place an administrative burden on the agencies in question, who may not be prepared to litigate a case on an expedited basis.

The bill also requires the Division of Administrative Hearings to accelerate certain hearings under s. 120.574, F.S., and Chapter 373, F.S. By requiring a hearing within 30 or 90 days of the request for hearing, the bill may have an effect on the docket schedule at DOAH. As of this date, the Division has not indicated whether this requirement will have an adverse effect however.

The bill will eliminate a citizen's right to participate in an administrative hearing on a permit or license under the Environmental Protection Act. It is not clear whether the elimination of this broad right will lessen the ability of citizen "watchdog" groups to participate in these matters, either independently or on behalf of a substantially affected person who cannot otherwise raise relevant claims.

The bill may also have a chilling effect on the number of administrative mediations that are initiated because of the quasi "offer of judgment" provisions contained in section 2. By making a record of the last offer of the party subject to the agency and allowing that record to be admitted into evidence at a formal administrative hearing, the bill may dissuade agencies from offering or consenting to mediation. Ordinarily, in civil mediations, the entire record of the proceedings, including all settlement offers, are confidential and not subject to admission at trial. In addition, the "offer of judgment" language may make determining who "prevails" difficult, in that the determination will not always relate to money damages. An offer at mediation regarding an emissions permit and a subsequent final determination at hearing may be hard to reconcile for purposes of determining who has "prevailed," and the difference between a final offer and the outcome of the hearing may be a matter of degree, begging the question whether the bill will incentivize parties to enter into mediation.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIARY:

Prepared by:

Staff Director:

Michael W. Carlson, J.D.

P.K. Jameson, J.D.