

STORAGE NAME: h2317.grr

DATE: April 17, 2000

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL RULES & REGULATIONS
ANALYSIS**

BILL #: HB 2317 (PCB TU 00-05)

RELATING TO: Department of State

SPONSOR(S): Committee on Tourism, Representative Starks, and others

TIED BILL(S):

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

- (1) TOURISM YEAS 6 NAYS 0
 - (2) GOVERNMENTAL RULES & REGULATIONS
 - (3) TRANSPORTATION & ECONOMIC DEVELOPMENT APPROPRIATIONS
-

I. SUMMARY:

HB 2317 addresses issues relating to both general rulemaking of the Department of State and rulemaking related to certain responsibilities of the Division of Historical Resources. The bill also addresses some specific provisions relating to historic preservation.

Pursuant to s. 120.536(2)(b), the Department of State (DOS) reported 33 rules to Joint Administrative Procedures Committee (JAPC) as exceeding DOS's statutory rulemaking authority. This section required the Legislature to determine whether specific legislation should be enacted to authorize the rules, or portions thereof, identified by the agency. By amending ss. 267.061 and 872.05, F.S., this bill provides specific authority for the following 10 rules:

- Rules 1A-31.0015, 1A-31.0035, 1A-31.0055, 1A-31.0065, 1A-31.010, and 1A-31.011, F.A.C., relating to historic shipwreck exploration and salvage; and
- Rules 1A-44.003 through 1A-44.006, F.A.C., relating to unmarked human burials.

Unlike other state agencies, DOS is not statutorily provided with broad grants of general rulemaking authority which permit the promulgation of rules to implement the provisions of law conferring duties upon the department. The bill amends s. 20.10, F.S., to authorize DOS to adopt rules to administer laws conferring duties upon it.

The bill also amends s. 266.0016, F.S., to authorize the Historic Pensacola Preservation Board of Trustees to enter into agreements to accept credit card payments as compensation, establish accounts in credit card banks for the deposit of credit card sales invoices, and permit the acceptance of tour vouchers issued by tour organizations or travel agents for payment of admissions.

Finally, the bill requires the Division of Historical Resources of DOS and the Historic Pensacola Preservation Board of Trustees, in conjunction with representatives from West Florida counties, municipalities, and postsecondary educational institutions, to develop a regionally based plan for the protection, preservation, restoration and promotion of historically significant sites, objects and landmarks to West Florida and to the state. Some requirements of the plan are outlined. A copy of the plan is required to be submitted to the President of the Senate and Speaker of the House of Representatives by no later than January 1, 2001.

The bill may have a small fiscal impact on DOS and the Historic Pensacola Preservation Board of Trustees as it relates to the plan preparation. The act becomes effective upon becoming a 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"/> |

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Administrative Procedure Act

The Administrative Procedure Act (APA), contained in Chapter 120, F.S., provides the general standards and procedures that all agencies must follow when adopting administrative rules. Agencies do not have inherent rulemaking authority. Shaping public policy through lawmaking is the exclusive power of the Legislature. The Legislature, however, may delegate to agencies the authority to adopt rules that implement, enforce, and interpret a statute. An enabling statute that delegates rulemaking authority to an agency cannot provide unbridled authority to an agency to decide what the law is, but must be complete, must declare the legislative policy or standard, and must operate to limit the delegated power.

Agencies are not authorized to determine whether or not they want to adopt rules. They are required by law to adopt as a rule each agency statement that meets the definition of a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless the agency proves certain statutory standards. Whenever an act of the Legislature requires implementation by rule, an agency has 180 days after the effective date of the act to do so, unless the act provides otherwise.

While agencies are required to adopt as a rule each agency statement that implements, interprets, or prescribes law or policy, there are limitations on the content and scope of these rules. When the Legislature adopted changes to the APA in 1996, it overturned case law that had permitted broader bases for rulemaking, and significantly narrowed the standard for rulemaking. In 1996, ss. 120.52(8) and 120.536, F.S., provided that a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule, and that a specific law to be implemented is also required. The sections also provided that an agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.

When this new provision was challenged, the courts had difficulty construing the "particular powers and duties" language. In an administrative proceeding, a judge ruled that the phrase meant an enabling statute must detail the powers and duties that would be the subject of the rule. On appeal, however, the First District Court of Appeals held that a broader interpretation was proper, and stated that the test to determine whether a rule is a

valid exercise of delegated authority is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. The First District Court of Appeals further stated that a rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented. This approach, according to the Court, meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature.

In 1999, the Legislature rejected the First District Court of Appeals' broad "class of powers and duties" test when it enacted ch. 99-379, L.O.F. The APA now provides:

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 or interpret the specific 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 or is within the agency's class of powers and duties, 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 implementing or interpreting the specific powers and duties conferred by the same statute. [ss. 120.52(8) and 120.536(1), F.S.]

The Legislature recognized that as a result of this amendment some existing rules might no longer be authorized, and consequently, also provided that agencies could temporarily shield unauthorized rules from rule challenges based on the amendment until July 1, 2001. [s. 120.536(2)(b), F.S.] In order to have a rule shielded, agencies were required to have submitted to JAPC by October 1, 1999, a list of rules, or portions thereof, adopted prior to June 18, 1999, which exceeded the newly amended rulemaking authority standard.

The law further provided that the Legislature is required to consider at the 2000 Regular Session whether specific legislation authorizing the shielded rules, or portions thereof, should be enacted. After that, agencies must begin repeal proceedings by January 1, 2001, for shielded rules for which authorizing legislation does not exist. On or after July 1, 2001, JAPC or any substantially affected person may petition an agency to repeal any rule because it exceeds the rulemaking authority permitted by the new standard.

Department of State - Rulemaking

The Department of State (DOS) shielded 33 rules. The bill addresses 10 of those shielded rules as well as the general provision for adoption of rules authority not provided to DOS. The rules and provisions of law are provided below.

- Throughout the statutes, departments are provided with broad grants of general rulemaking authority, which permit the promulgation of rules to implement the provisions of law conferring duties upon the departments. The statutes concerning DOS do not contain this broad grant of authority.
- Rule Chapter 1A-31, F.A.C., provides the procedures for the Division of Historical Services of DOS to implement a program of historic shipwreck exploration and salvage. The following rules from this chapter are without specific statutory authority:

- 1A-31.0015, F.A.C., provides definitions for the rules relating to the exploration for and salvage of artifacts from state-owned sovereignty submerged lands.
- 1A-31.0035, F.A.C., requires persons desiring to explore for, excavate, or salvage archaeological materials from sovereignty submerged lands to first enter into an exploration or salvage agreement with the division.
- 1A-31.0055, F.A.C., delineates the criteria necessary for determining that an applicant for an exploration agreement is professionally qualified and also requires coordination with the division prior to removing archaeological materials.
- 1A-31.0065, F.A.C., delineates the criteria for determining that an applicant for a salvage agreement is professionally qualified and requires that all salvaged materials be given to the division as owner of the state's archaeological materials.
- 1A-31.0010, F.A.C., requires the division to limit the number of exploration and salvage agreements to those which the division can properly supervise and administer; requires one person on board during exploration and salvage operations to be responsible for compliance with the rules of the agreement; and, requires a crew list to be submitted to the division prior to beginning operations.
- 1A-31.0011, F.A.C., requires all exploration and salvage contractors to provide the division with a list of vessels to be used in the operation and requires that all vessels must be marked with identifying information which is visible from air and sea and must have written identification provided by the division on board at all times.

Section 267.031, F.S., provided the division with the authority to adopt rules and to execute contracts to implement the provisions of law conferring duties and powers upon it. Section 267.061(3), F.S., delineates the duties of the division which include: maintaining a statewide inventory of historic resources and protecting and preserving those resources; developing a comprehensive statewide historic preservation plan; working with federal, state, and local governments to ensure that historic resources are considered at all levels of planning and development, and in carrying out their historic preservation responsibilities and programs; and, acquiring, preserving, and making available state archaeological objects. The section, however, does not prescribe duties concerning exploration, excavation, and salvage. The rules mentioned above, therefore, are without statutory authority.

- Rules 1A-44.003 through 1A-44.006, F.A.C., delineate the procedures to be followed when unmarked burials are discovered during an archaeological excavation and otherwise. The procedures include notifying the District Medical Examiner and the State Archaeologist. The rules also state when the division has jurisdiction, rather than others, over the remains.

Section 872.05, F.S., requires that unmarked human burials be immediately reported to local law enforcement, prescribes the procedures to be followed when such is discovered during an archaeological excavation or otherwise, and states when the division has jurisdiction of the remains. The rules parallel this statutory section; however, the section does not provide DOS with rulemaking authority in this area.

Department of State - Historic Preservation

Prior to 1997, Chapter 266, F.S., authorized Historic Preservation Boards in St. Augustine, Tallahassee, Palm Beach County, Tampa-Hillsborough, the Florida Keys, Broward County, and Pensacola, along with their respective direct-support organizations. In 1997, all but the Pensacola board was repealed. The state properties in the Florida Keys and Tallahassee were to be managed under contract between DOS and private not-for-profit organizations. DOS entered into a contract with the City of St. Augustine to manage the properties in that area. The Broward County board had been nonexistent for several years. The Department of State was directed to establish regional offices with expanded jurisdictions in which to provide historic preservation services in the areas of Palm Beach County, Tampa-Hillsborough County, and St. Augustine. Authority was given for the establishment of other regional offices, if needed.

Part II of Chapter 266, F.S., creates the Historic Pensacola Preservation Board of Trustees (board) within the Department of State. The Department of State monitors the effectiveness of all programs of the board and oversees the board to ensure that it complies with state laws and rules. The board is the governing body in the Pensacola and Escambia County area for historic properties and is delegated powers by the department. The purposes and functions of the 7-member board include the following:

- restoring, preserving, maintaining, reconstructing, reproducing, and operating for the use, benefit, education, recreation, enjoyment, and general welfare of the people of this state and nation certain ancient or historic landmarks, sites, buildings, etc., and other objects of historical or antiquarian interest of the City of Pensacola and Escambia County; and
- researching, preparing, publishing, and procuring for the use and benefit of the general public books, reports, articles, pamphlets, brochures, documents, maps, photographs, films, sound recordings, etc., in furtherance of the protection and preservation of and the dissemination of information about historic sites and properties, persons, places, events, objects, etc., pertaining to Florida history to be used by the board or made available by the board for others.

The board manages 25 state-owned properties in Pensacola and Escambia County.

Section 266.0018, F.S., provides that the board may authorize a direct-support organization (DSO) to assist the board in carrying out its purposes by raising money; submitting requests for and receiving grants from the Federal Government, the state or its political subdivisions, private foundations, and individuals; receiving, holding, investing, and administering property; and making expenditures to or for the benefit of the board. The sole purpose of the DSO is to support the board. Moneys may be held in a separate depository account in the name of the DSO and subject to the provisions of the contract with the board. These moneys include such things as membership fees, private donations, income derived from fundraising activities, and grants applied for and received by the DSO. Moneys received from admissions to and rentals of facilities and properties managed by the board are deposited by the DSO into an account. The DSO is required by s. 266.0018(7), F.S., to provide for board review and approval an annual financial and compliance audit of its financial accounts and records prepared by an independent certified public accountant

in accordance with board rules. Upon approval, the board is to certify the audit to the Auditor General for review.

Section 266.0016, F.S., delineates some of the powers delegated to the board by DOS. These include hiring a manager and staff; adopting a seal; contracting authority, including making and entering into all contracts necessary to perform its duties; establish a process for suing and being sued; establishing an office in or near Pensacola; acquiring, holding, leasing, and disposing of personal property; planning buildings and improvements, demolishing existing structures, and constructing, reconstructing, altering, repairing, and improving its facilities; contracting with consultants; drafting a historical plan of development for the City of Pensacola and Escambia County; cooperating and coordinating all its activities with any statewide commission and participating in any overall statewide plan of historic development; cooperating with national projects of historical development; and, researching, preparing publishing and procuring materials to meet its second purpose stated above. Two other delegated powers described relate to:

- engaging in any lawful business or activity to establish, maintain, and operate the facilities under the board, such as selling craft products and merchandise relating to historical and antiquarian Pensacola and surrounding territory, and rental or leasing of property; and,
- fixing and collecting charges for admission to facilities owned and maintained by the board.

The board does not have the authority to enter into agreements to accept credit card payments as compensation nor establish accounts in credit card banks for the deposit of credit card sales invoices. The board is not authorized to accept tour vouchers issued by tour organizations or travel agents for payment of admissions.

C. EFFECT OF PROPOSED CHANGES:

The bill addresses issues relating to both general rulemaking of the Department of State and rulemaking related to certain responsibilities of the Division of Historical Resources. The bill also addresses some specific provisions relating to historic preservation.

Pursuant to s. 120.536(2)(b), F.S., the Department of State (DOS) reported 33 rules to Joint Administrative Procedures Committee (JAPC) that exceed DOS's statutory rulemaking authority. This section requires the Legislature to determine whether specific legislation should be enacted to authorize the rules, or portions thereof, which have been identified by the agency. By amending ss. 267.061 and 872.05, F.S., this bill provides specific authority for 10 of the rules reported by DOS:

- Rules 1A-31.0015, 1A-31.0035, 1A-31.0055, 1A-31.0065, 1A-31.010, and 1A.31.011, F.A.C., relating to historic shipwreck exploration and salvage; and
- Rules 1A-44.003 through 1A-44.006, F.A.C., relating to unmarked human burials.

Specifically, this authorization is provided for the rules relating to historic shipwreck exploration and salvage by amending s. 267.071, F.S., to do the following:

- protect and administer historical resources abandoned on state-owned lands and state-owned sovereignty submerged lands;

- issue permits for survey and exploration activities to identify historical resources, for excavation and salvage activities to recover historical resources, for archaeological excavation for scientific or educational purposes, and for exploration and salvage of historic shipwreck sites; and,
- adopt rules to administer the issuance of permits for and the transfer of objects recovered by commercial salvors under permit in exchange for recovery services provided by the state.

The authorization for rules relating to unmarked human burials is provided by amending s. 872.05, F.S., to provide that DOS may prescribe rules for reporting an unmarked human burial and for determining jurisdiction over the burial.

Unlike other state agencies, DOS is not statutorily provided with broad grants of general rulemaking authority which permit the promulgation of rules to implement the provisions of law conferring duties upon the department. The bill amends s. 20.10, F.S., to authorize DOS to adopt rules to administer laws conferring duties upon it.

The bill also amends s. 266.0016, F.S., to authorize the Historic Pensacola Preservation Board of Trustees to enter into agreements to accept credit card payments as compensation, establish accounts in credit card banks for the deposit of credit card sales invoices, and permit the acceptance of tour vouchers issued by tour organizations or travel agents for payment of admissions.

Finally, the bill requires the Division of Historical Resources of DOS and the Historic Pensacola Preservation Board of Trustees, in conjunction with representatives from West Florida counties, municipalities, and postsecondary educational institutions, to develop a regionally based plan for the protection, preservation, restoration and promotion of historically significant sites, objects and landmarks to West Florida and to the state. Some, but not all, elements of the plan are delineated. Elements include identification of regional needs; consideration and evaluation of and recommendations concerning the long-term management of historic properties under the board; consideration and evaluation of and recommendations concerning establishment of a West Florida Museum of History to serve as the regional center for historic preservation and promotion efforts; recommendations for local initiatives; and recommendations to the Legislature for both statutory and fiscal concerns. The plan must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than January 1, 2001.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 20.10, F.S., which creates DOS and establishes its seven divisions, to provide that DOS may adopt rules pursuant to Chapter 120, F.S., to administer the provisions of law conferring duties on the department.

Section 2. Authorizes Rules 1A-31.0015, 1A-31.0035, 1A-31.0055, 1A-31.0065, 1A-31.010, and 1A-31.011, F.A.C., by amending s. 267.071, F.S., to do the following:

- protect and administer historical resources abandoned on state-owned lands and state-owned sovereignty submerged lands;
- issue permits for survey and exploration activities to identify historical resources, for excavation and salvage activities to recover historical resources, for

archaeological excavation for scientific or educational purposes, and for exploration and salvage of historic shipwreck sites; and,

- adopt rules to administer the issuance of permits for and the transfer of objects recovered by commercial salvors under permit in exchange for recovery services provided by the state.

Section 3. Authorizes Rules 1A-44.003 through 1A-44.006, F.A.C., by amending s. 872.05, F.S., to provide that DOS may prescribe rules for reporting an unmarked human burial and for determining jurisdiction over the burial.

Section 4. Amends s. 266.0016, F.S., to authorize the Historic Pensacola Preservation Board of Trustees to enter into agreements to accept credit card payments as compensation, establish accounts in credit card banks for the deposit of credit card sales invoices, and permit the acceptance of tour vouchers issued by tour organizations or travel agents for payment of admissions.

Section 5. Requires the Division of Historical Resources in DOS and the Historic Pensacola Preservation Board of Trustees (board), in conjunction with representatives of West Florida counties, municipalities, and postsecondary educational institutions, to develop a regionally based plan for the preservation, protection, restoration, and promotion of historically significant sites, objects and landmarks to West Florida and the state. Some, but not all, elements of the plan are delineated. Elements include identification of regional needs; consideration and evaluation of and recommendations concerning the long-term management of historic properties under the board; consideration and evaluation of and recommendations concerning establishment of a West Florida Museum of History to serve as the regional center for historic preservation and promotion efforts; recommendations for local initiatives; and recommendations to the Legislature for both statutory and fiscal concerns. The plan must be submitted to the President of the Senate and the Speaker of the House of Representatives no later than January 1, 2001.

Section 6. Provides that the bill takes effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The fiscal impact will be minimal. The Division of Historical Resources of the Department of State and the Historic Pensacola Preservation Board of Trustees will experience some impact related to the plan preparation required in section 5 of the bill.

STORAGE NAME: h2317.grr

DATE: April 17, 2000

PAGE 9

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The fiscal impact will be minimal. The Division of Historical Resources of the Department of State and the Historic Pensacola Preservation Board of Trustees will experience some impact related to the plan preparation required in section 5 of the bill.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to expend funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority of counties or municipalities to raise revenue.

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

The bill does not reduce the percentage of a state tax shared with counties and municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

The bill corrects identified current rulemaking problems.

C. OTHER COMMENTS:

None.

STORAGE NAME: h2317.grr

DATE: April 17, 2000

PAGE 10

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None

VII. SIGNATURES:

COMMITTEE ON TOURISM:

Prepared by:

Staff Director:

Judy C. McDonald

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AS REVISED BY THE COMMITTEE ON GOVERNMENTAL RULES & REGULATIONS:

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