



ADMINISTRATIVE LAW SECTION NEWSLETTER

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The 2009 Amendments to the APA

by Larry Sellers

During the 2009 Regular Session, the Florida Legislature enacted a few changes to the Administrative Procedure Act (“APA”) and related laws. Here is a brief summary of some of these amendments:

SB 2188, Administrative Procedures

SB 2188 contains recommendations of the Joint Administrative Procedures Committee (“JAPC”), and it was sponsored by the chair of that committee, Senator Arthenia Joyner.¹ This bill amends the APA in several respects.

Clarifies and simplifies definition of “agency.” Section 1 of the bill amends the definition of “agency” in the APA to clarify and simplify the definition. The clarification appears to have been prompted by an inquiry from the Hillsborough County Aviation Authority. Among other things, the revised definition makes clear that it includes those governmental entities having jurisdiction in one county or less only to the extent they are made subject to the APA by general or special law or by existing judicial decisions. Similarly, Section 1 expressly provides that the definition

does not include any municipality or legal entity created solely by a municipality. Section 2 of the bill states that the changes are not intended to effect a substantive change in meaning and are intended to be consistent with existing judicial interpretations of the definition.

Expands required public notice of meetings to agency websites. The bill recognizes that many agencies regularly use their websites to inform the public and that the public has come to rely on this form of notice. Section 3 of the bill amends section 120.525, governing meetings, hearings, and

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From the Chair

by Elizabeth McArthur

When I used to be allowed to edit the newsletter, I would always tell the incumbent chair that this was the EASY column to write – it was the proverbial “swan song,” and all he or she had to do was to wrap up, say good-bye, say how much he or she won’t miss being nagged by the editor to write newsletter columns, and thank everyone (especially Jackie). But I’ve never been very good at saying good-bye – where does the sentiment go? The nostalgia? The pride in working as a team to accomplish good things, the regret for not doing more?

Will someone else please write that part?

*Should auld acquaintance be forgot,
And never brought to mind?
Should auld acquaintance be forgot,
And auld lang syne?*

* * *

*And there’s a hand my trusty friend,
And give us a hand o’ thine;
And we’ll take a right good-will draught,
for auld lang syne.*

By Robert Burns (with a wee bit of loose English translation)

So – to the business at hand. While this year has flown by, and we have not accomplished everything on my to-do list for the section this year, I take some comfort that we have

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tions 163.3184(9) and (10), Florida Statutes.

DCA also is a party to land development regulation ("LDR") challenges brought by substantially affected persons, as provided in section 163.3213, Florida Statutes, on the ground that the LDR is not consistent with the local comprehensive plan. DCA refers these cases to DOAH for formal evidentiary hearings pursuant to section 120.57(1); however, if the ALJ determines the LDR is consistent with the comprehensive plan, the ALJ issues a final order that is appealable under section 120.68, Florida Statutes. If the ALJ determines the LDR is inconsistent with the plan, the Administration Commission issues the final order, which solely determines whether sanctions should be imposed.

Additionally, if DCA determines that a local government has failed to adopt LDRs, it is authorized under section 163.3202, Florida Statutes, to institute an action in circuit court to

require the local government to adopt the LDRs.

2. DRI and ACSC Proceedings

DCA is authorized by section 380.07, Florida Statutes, to challenge local government issuance of DRI development orders and local government issuance of development orders for development proposed in ACSC. These cases are referred to DOAH for a section 120.57(1) hearing, and the final order is entered by the Florida Land and Water Adjudicatory Commission.

DCA is authorized by section 380.11, Florida Statutes, to bring an action for injunctive relief in circuit court against any person or developer who violates Chapter 380, Florida Statutes, or any rules, regulations, or orders issued under the authority of Chapter 380. Section 380.11 also authorizes DCA to institute administrative proceedings to prevent, abate, or control activities that violate Chapter 380; enjoin development in violation of ACSC statutory requirements, rules or development orders; and enforce binding letters, rules, agreements, orders, and development orders.

3. Enforcement of Development Agreements

Section 163.3243, Florida Stat-

utes, authorizes DCA to file an action in circuit court to enforce the terms of a development agreement or to challenge compliance of the development agreement with the Florida Local Government Development Agreement Act, sections 163.3220 - 163.3243, Florida Statutes.

Practice Tips

Practice before DCA entails complex matters involving numerous statutes and rules and extensive administrative and judicial case law. The agency encourages attorneys to review its website at: <http://www.dca.state.fl.us/> to obtain basic information regarding DCA's substantive programs and practice areas and to review the applicable substantive statutes, rules, and orders. DOAH's website at: <http://www.doah.state.fl.us/internet/default.cfm>, also contains a wealth of information regarding the procedural requirements and substantive standards for initiating or intervening in growth management and other cases and provides numerous examples of pleadings and other documents filed in these cases.

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workshops, in two respects. First, the bill expands the required public notice by requiring the notice to also be published on the agency's website not less than seven days before the event. In addition, the bill requires the agenda, along with any meeting materials available in electronic format (excluding confidential and exempt information) to be published on the agency's website at least seven days before the event.

Requires statement of agency organization and operations to be published on agency website. Similarly, Section 4 of the bill revises section 120.54(5)(b)7 to provide that the Uniform Rules of Procedure must

require that the statement concerning the agency's organization and operations be published on the agency's website. Presently, the uniform rules simply require the agency head to provide a copy of the statement upon request.² The agency statement contains considerable useful information, such as whether documents may be filed by electronic mail or facsimile transmission and, if so, the applicable address or telephone number.³ As such, publication of the statement on the agency's website should prove particularly helpful to administrative lawyers who practice before the agency.⁴

Revises rulemaking requirements. Section 4 of the bill makes several other changes to the rulemaking requirements in section 120.54. These include:

Emphasizes that staff must be available at public hearing. The bill revises section 120.54(3)(c) to provide that when a public hearing is held on a proposed rule, the agency must ensure that staff are available to explain the agency's proposal and to respond to questions or comments regarding the proposed rule. Since 1996, similar language has been in section 120.54, in paragraph (2)(c), dealing with rule development and public workshops.⁵ Adding it to paragraph (3)(c), regarding rule adoption and public hearings,⁶ was thought to provide the public with better notice that this requirement also applies to public hearings.

Clarifies what materials must be considered and may provide a basis for change. The bill revises section 120.54(3)(c) and (d) to clarify that material submitted to the agency within 21 days after publication of notice of proposed rulemaking and between the date of publication of the notice and the end of the final public hearing must be considered by the agency and may serve as a basis for modification of the proposed rule.

Revises notice of effective date. The bill revises section 120.54(3)(e) to require that the effective date of a rule be specified in the notice of proposed rule.

Effective date. Section 6 of the bill provides that it is to take effect on July 1, 2009.

Two other bills may be of interest

to administrative lawyers, although these bills do not amend the APA.

HB 935, Area Agencies on Aging.

This bill is a legislative response to the decision of the Fourth District Court of Appeal in *Mae Volen Senior Center v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, that an area agency on aging is an "agency" subject to the APA for purposes of a bid protest proceeding.⁷ The First District Court of Appeal reached the opposite conclusion in a case in which only a per curiam affirmed decision was issued.⁸ A similar issue is currently pending before the Third District Court of Appeal.⁹

HB 935 makes several revisions to the applicable statutes to clarify that an area agency on aging is a non-governmental, independent, not-for-profit corporation and is not a state "agency" as that term is defined in the APA. Accordingly, this legislation confirms that an area agency on aging is not subject to any aspect of the APA, including but not limited to the bid protest procedures in the APA.

However, the bill also requires the Department of Elderly Affairs to adopt, by August 1, a rule creating a dispute resolution mechanism with respect to the designation of lead agencies by area agencies on aging under the Community Care for the Elderly Program. This rule must establish standards for a bid protest and a procedure for resolution that incorporate many of the principles of the APA. These include the opportunity for a hearing to be held by a qualified, independent decision-maker and then an opportunity for review by a qualified impartial reviewer. HB 935 was approved by the Governor on May 20 and became effective on becoming a law.¹⁰

HB 7089, Exceptional Students.

This measure provides that exceptional education due process hearings must be conducted by an administrative law judge ("ALJ") from the Division of Administrative Hearings ("DOAH") pursuant to a contract between the Department of Education and DOAH. The decision of the ALJ is final. Any party aggrieved by the ALJ's order may bring an action in circuit court; however, if the student is identi-

fied as gifted, then judicial review may be sought in the district court of appeal as provided in section 120.68. This act takes effect on July 1, 2009.

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Endnotes:

¹ A similar measure was filed in the House as a proposed committee bill, PCB GAP 09-15, by the Governmental Affairs Policy Committee. It was assigned HB 7047.

² See R. 28-101.001(3), Fla. Admin. Code.

³ See R. 28-101.001(2)(e), Fla. Admin. Code.

⁴ As this requires the amendment of the Uniform Rules of Procedure, it could provide the Administration Commission with an opportunity to update these rules.

⁵ See § 120.54(2)(c), Fla. Stat. ("When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed.") For a discussion of this requirement, see Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform*, 48 Fla. L. Rev. 93, 119-20 (1996).

⁶ The language added to paragraph (3)(c) is not identical to the language that is still found in paragraph (2)(c). The existing language requires the agency to ensure that the "persons responsible for preparing the proposed rule" are available, while the new language only requires the agency to ensure that "staff" are available. The latter recognizes that the persons responsible for preparing the proposed rule may no longer be employed by the agency.

⁷ 978 So. 2d 193 (Fla. 4th DCA 2008). For a discussion of this decision, see Amy W. Schrader, *New Opinion Issued by Fourth DCA in Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, Vol. XXIX, No. 4 Admin. L. Section Newsletter 8 (June 2008), and Amy W. Schrader, *Protest-Proof Procurements?: A Commentary on Mae Volen Senior Center, Inc. v. Area Agency on Aging Palm Beach/Treasure Coast, Inc.*, Vol. XXIX, No. 1 Admin. L. Section Newsletter 11 (Sept. 2007).

⁸ *First Quality Home Care, Inc. v. State of Fla., Dep't of Elder Affairs*, Case No. 1D05-4969 (per curiam) (Fla. 1st DCA 2006).

⁹ *First Quality Home Care, Inc. v. Alliance for Aging, Inc.*, Case No. 3D08-2949 (oral argument held February 17, 2009).

¹⁰ Regarding pending litigation, HB 935 provides that, "[f]or any lead agency designation conducted prior to the effective date of this subsection that is the subject matter of litigation on the date on which this subsection becomes law, the litigants shall be entitled to proceed with discovery under the Florida Rules of Civil Procedure immediately upon the date on which this subsection becomes law, and the litigants shall further be entitled to participate in the bid protest procedures enacted by rule pursuant to this subsection."