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 25, 1997 Revised: _____ _____ _____

SUBJECT: The Administrative Procedure Act

	Analyst	Staff Director	Reference	Action
1.	Rhea	Wilson	GO	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

During the 1996 Regular Legislative Session, chapter 120, F.S., the Administrative Procedure Act (APA), was reorganized, simplified, and substantially revised. During the 1996-97 legislative interim, cross-reference errors, timing inconsistencies, and additional technical problems were identified. Additionally, some additional areas of concern were identified upon review of the substantially revised act.

The committee substitute amends the APA to correct cross-reference errors, timing inconsistencies, and other technical problems that were identified during the interim.

Additionally, the committee substitute makes the following changes to the APA: it clarifies that educational units are within the definition of "agency" under the act; provides that a notice of rule development is not necessary for repeal of a rule; permits an agency to provide a statement of how a person may obtain without cost a copy of any preliminary rule draft; provides that an agency's determination to utilize negotiated rulemaking is not agency action; provides that public employees are not persons subject to regulation for the purposes of petitioning for a variance or waiver; provides that agencies do not have authority to grant waivers or variances to rules required by the federal government for the agency's implementation or retention of federally approved or delegated programs, except as authorized by those programs or the Federal government; authorizes expedited time frames, limited notice, and limited comments on petitions for emergency waiver or variance; authorizes durational limits and the placement of conditions upon waivers or variances, but only to the extent necessary for the purpose of the underlying statute to be achieved; provides a process for provision of additional information upon review of a petition for waiver or variance; requires a determination to mediate to be made within 10 days after the time period state in the announcement for election of an administrative remedy; provides that the original parties to the case, not the administrative law judge, determine whether a case proceeds under the summary hearing process; provides that attorney's fees and costs do

not have to be awarded if an agency has not adopted a statement as a rule and statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receive federal funds; provides that the director and deputy director of the DOAH must meet the same requirements as administrative law judges; provides that the director of the DOAH is the chief administrative law judge; clarifies that agency heads and designees may be presiding officers who may not receive ex parte communications; clarifies that the entity that appoints the presiding officer is the entity that assigns a successor; reinserts language regarding judicial review and stays from the 1995 act that provides that the filing of a petition does not itself stay enforcement of the agency decision; excepts the Board of Trustees of the Internal Improvement Trust Fund from the default provisions of waiver and variance; provides that students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units; and provides that educational units and units of local government do not have to publish notices in the *Florida Administrative Weekly*.

This committee substitute amends the following sections of the Florida Statutes, 1996 Supplement: 120.52; 120.54; 120.541; 120.542; 120.56; 120.569; 120.57; 120.573; 120.574; 120.595; 120.60; 120.65; 120.66; 120.68; 120.74; 120.80; and 120.81.

II. Present Situation:

Chapter 120, F.S., the Administrative Procedure Act (APA) governs agency adjudication and rulemaking.[1] When an agency conducts investigations, grants or denies licenses or permits, and disciplines employees and licensees, it is performing executive functions. The Legislature, however, may delegate to an agency the power to adopt rules. When an agency promulgates rules, the agency performs a quasi-legislative function.

A rule is defined by s. 120.52(15), F.S., 1996 Supp., to mean:

> . . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . .

Rulemaking is not a matter of agency discretion. Section 120.54(1), F.S., 1996 Supp., provides that each agency statement defined as a rule must be adopted by the rulemaking procedure provided in the APA as soon as feasible[2] and practicable.[3]

[1]An agency is defined by s. 120.52(1), F.S., 1996 Supp., to mean: (a) the Governor when exercising executive powers which are not constitutionally derived; (b) each state officer and state department, departmental unit, commission, regional planning agency, board, multi county special district with a majority of its governing board comprised of non-elected persons, and authority; and (c) each unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to the act by general or special law or existing judicial decisions.

[2]Rulemaking is presumed feasible unless the agency proves that: (a) the agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; (b) related

The 1996 revision to the APA attempted to limit the authority of agencies to adopt rules by modifying some judicial standards that had developed over the years. The courts had provided agencies ". . . wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties."[4] As well, courts determined that, where the empowering provision of a statute states simply that an agency may make such rules and regulations as may be necessary to carry out the provisions of an act that ". . . the validity of the regulations promulgated thereunder will be sustained as long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious."[5]

Section 120.536, F.S., 1996 Supp., now provides the following standard for rules:

> 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.

An agency often devotes substantial amounts of time in formulating, drafting, and revising a proposed rule before a rule is adopted. Public participation in the formulation of rules is encouraged under the APA and, as a result, provision of public notice of rulemaking is emphasized. Generally, notice must be published in the *Florida Administrative Weekly* (FAW). Section 120.54(2)(a), F.S., 1996 Supp., requires an agency to provide a notice of the development of a proposed rule in the FAW. This notice must be provided prior to publication of a notice of the adoption of a proposed rule.[6]

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matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or (c) the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

[3]Rulemaking is presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that: (a) detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or (b) the particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

[4]Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 (Fla. 1 DCA, 1984).

[5]Department of Labor and Employment Security v. Bradley, 636 So. 2d 802 at 807 (Fla. 1 DCA, 1994).

[6]Section 120.54(3)(a), F.S., 1996 Supp.

An agency is authorized to hold public workshops for purposes of rule development, as well.[7] An agency must hold public workshops for rule development purposes, including workshops in various regions of the state, if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary.[8] If an agency conducts a public workshop for rule development purposes, the agency must give notice of the workshop in the FAW not less than 14 days prior to the scheduled date and ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal in order to respond to questions or comments regarding the rule that is being developed. Rule development workshops may be facilitated or mediated by a neutral third person. Additionally, an agency may employ negotiated rulemaking in developing rules,[9] as well as use other unidentified types of dispute resolution alternatives for the rule development workshop that are appropriate for rule development.

Prior to the adoption, amendment, or repeal of a non-emergency rule, an agency must, upon approval of the agency head, give notice of its intended action pursuant to s. 120.54(3)(a)1., F.S., 1996 Supp. This notice must be published in the FAW not less than 28 days prior to the intended action. It also must be mailed to all persons named in the proposed rule and to all persons who have requested, within 14 days prior to the mailing, that the agency provide them with advance notice of the proceedings. The agency also must provide the Joint Administrative Procedures Committee (JAPC) with a copy of the notice at least 21 days prior to the proposed adoption date.[10] The JAPC, pursuant to s. 120.545, F.S., 1996 Supp., examines each proposed agency rule as a legislative check on legislatively created authority.

The notice of intent to adopt, amend, or repeal a rule must set forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the *Florida Statutes* being implemented, interpreted, or made specific. Additionally, the notice must include a summary of the agency's statement of the estimated regulatory costs (SERC), if one has been prepared.[11] The

[7]Section 120.54(2)(c), F.S., 1996 Supp.

[8]The explanation is not final agency action subject to review under ss. 120.569 and 120.57, F.S., 1996 Supp.

[9]Negotiated rule development is recommended when a complex rule is being drafted or when strong opposition to the rule is anticipated. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule. When this process is used, an agency must publish in the FAW a notice of the process that includes a listing of the representative groups that will be invited to participate in the process.

[10]In addition to filing the notice with the JAPC, the agency must file a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and a copy of the proposed rule.

[11]Section 120.54(3)(b), F.S., 1996 Supp., encourages agencies to prepare a statement of estimated regulatory costs or SERC for a proposed rule, but an agency is only required to prepare a SERC if a substantially affected person submits a written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. Upon the submission of a lower cost regulatory

notice also must contain a statement that any person who wishes to provide the agency with information regarding the SERC, or to provide a proposal for a lower cost regulatory alternative, that they must do so in writing within 21 days after publication of the notice. The notice also must state the procedure for requesting a public hearing on the proposed rule.

Section 120.54(3)(c), F.S., 1996 Supp., authorizes an agency to hold a public hearing on the proposed action, and requires the agency, upon the request of any affected person received within 21 days after the date of publication of the notice of intended action, to give affected persons an opportunity to present evidence and argument on all issues under consideration. Any material pertinent to the issues under consideration that are submitted to the agency within 21 days after the date of publication of the notice or submitted at a public hearing must be considered by the agency and made a part of the record of the rulemaking proceeding.

If a person asserts that his or her substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests, and the agency agrees, the agency must suspend the rulemaking proceeding and convene a separate proceeding under ss. 120.569 and 120.57, F.S., 1996 Supp. This separate proceeding is commonly called a “draw out” proceeding. Upon conclusion of the draw out, the rulemaking proceeding resumes.

After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed or contains only technical changes, the adopting agency must file a notice to that effect in the FAW, with the JAPC, as well as provide copies to persons who request notice in writing, at least 21 days prior to filing the rule for adoption.

If an agency is required to publish its rules in the *Florida Administrative Code*, (FAC), it must file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies that are not required to publish in the FAC must file one certified copy of the proposed rule, as well as the other information required, in the office of the agency head.

At the time a rule is filed, an agency must certify that the time limitations prescribed have been met, that all statutory rulemaking requirements have been met, and that there is no administrative determination pending on the rule. At the time a rule is filed, the JAPC must certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The Department of State must reject any rule not filed within prescribed time limits, that does not satisfy all statutory rulemaking requirements, for which an agency has not responded in writing to all material and timely written inquiries, for which an administrative determination is pending, or which does not include a SERC, if one is required.

alternative, an agency must prepare a SERC, revise an existing SERC, adopt the alternative, or state the reasons for rejecting the alternative in favor of the proposed rule.

A proposed rule is adopted on being filed with the Department of State and becomes effective 20 days after being filed, unless a later date is specified.

The 1996 APA also provides for uniform rules of procedure. Section 120.54(5), F.S., 1996 Supp., requires the Administration Commission to adopt one or more sets of uniform rules by July 1, 1997. Agencies are required to comply with the uniform rules by July 1, 1998. Exceptions to the uniform rules are permitted, but a petition must be filed with, and approved by, the Administration Commission.

The 1996 APA states that:

> Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. This section does not authorize agencies to grant variances or waivers to statutes. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

Section 120.542(2), F.S., 1996 Supp., provides that variances and waivers must be granted when a person subject to a rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship[12] or would violate a principle of fairness.[13] An agency must grant or deny a petition within 90 days of its receipt. The agency's decision must be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57, F.S., 1996 Supp. Each agency must file a report with the Governor, the Senate President, and the Speaker of the House listing the number of petitions filed requesting variances and waivers and the number of petitions granted or denied. Emergency petitions and dispositions must be reported separately.

Any person who is substantially affected by a rule or a proposed rule may seek an administrative determination that the rule or proposed rule is an invalid exercise of delegated legislative authority under s. 120.56(1), F.S., 1996 Supp. The petition must be filed with the Division of Administrative Hearings (DOAH).[14] For a proposed rule, the petition must be filed within 21 days after the publication of intent to adopt or amend, within 10 days after the final public hearing, within 20 days after the preparation of a SERC, or within 20 days after the date of

[12]"Substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.

[13]"Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

[14]The DOAH is within the Department of Management Services but headed by a director appointed by the Administration Commission and confirmed by the Senate. The DOAH employs administrative law judges, who must have been members of the Florida Bar in good standing for the preceding 5 years, to conduct hearings.

publication of the notice of change or no change. A petition challenging a proposed rule must state the objections and the reasons that the proposed rule invalid. Thereafter the agency has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. For existing rules, the challenger must prove the rule is invalid. Within 30 days after the hearing the administrative law judge must render a decision, which is final agency action and appealable to the district court.

If an administrative law judge declares a proposed rule invalid, a judgment or order must be rendered against the agency for reasonable costs and reasonable attorney's fees unless the agency demonstrates that its actions were substantially justified[15] or special circumstances exist which would make the award unjust. If the agency prevails in the proceedings, reasonable costs and reasonable attorney's fees against the challenging party must be awarded if it is determined that the challenging party participated in the proceedings for an improper purpose.[16] No award of attorney's fees is permitted to exceed $15,000. The same attorney's fees and costs provisions apply for challenges to existing agency rules.

Substantially affected persons also may seek an administrative determination that an agency statement meets the definition of a rule but has not been properly promulgated. In such instances, if the challenger proves the allegations of the petition, the agency has the burden to prove that rulemaking is not feasible or practicable. If the challenger prevails, reasonable costs and reasonable attorney's fees must be awarded to the petitioner. There is, however, no $15,000 limit to the award of attorney's fees and the award must be paid from the budget entity of the secretary, executive director, or equivalent agency head. The agency is not entitled to payment of an award or reimbursement for payment of an award under any provision of law.

Sections 120.569 and 120.57, F.S., 1996 Supp., provide procedures for determining substantial interests. Unless waived by all parties, s. 120.57(1), F.S., applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2), F.S., applies.

The 1996 APA also authorized mediation of disputes, pursuant to s. 120.573, F.S., 1996 Supp. Each announcement of an agency action that affects substantial interests must advise whether mediation is available. Choosing mediation, however, does not affect the right to an administrative hearing. If all parties agree to mediation in writing, time periods for election of remedies are tolled during the mediation period. Mediation must be concluded within 60 days of the mediation agreement, unless otherwise agreed by the parties.

Section 120.574, F.S., 1996 Supp., also permits a summary hearing. Within 5 business days of the receipt of a petition or request for hearing, the DOAH must issue an order assigning the case to a specific administrative law judge. This order also must advise that a summary hearing is

[15]An agency's actions are "substantially justified"" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.

[16]An "improper purpose" means participation in a proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity.

available upon agreement of all parties. Upon agreement of all parties in writing, the summary proceeding must be conducted within 30 days of the agreement. In summary proceedings the types of motions, discovery, and the record are limited.

III. Effect of Proposed Changes:

Section 1. This section amends s. 120.52, F.S., 1996 Supp., which contains the definitions used in the act. The amendment includes educational units within the definition of an agency under s. 120.52(1)(b), F.S., 1996 Supp. The modification of the term "district" in 1996 has resulted in questions about whether some educational units are agencies. This clarifies that educational units are still agencies.

Section 2. This section republishes s. 120.53, F.S., 1996 Supp., which provides standards for the maintenance of orders, indexing requirements, listing, and organizational information.

Section 3. This section of the committee substitute modifies the rule development notice contained in s. 120.54(2)(a), F.S., 1996 Supp. First, it deletes the requirement for a notice of rule development when an existing rule is being repealed because there is no need to have rule development for a rule that already is developed and that is being repealed. The repeal still has to be noticed under s. 120.54(3), F.S., 1996 Supp., however, and full opportunity to have public hearings on the wisdom of the repeal or to challenge the legality of repeal of the rule will arise at that time.

The APA now requires that a preliminary text of proposed rules be contained in the rule development notice, if one is available. The amendment provides an alternative procedure by which the agency can state how a person may obtain a copy of a preliminary draft without cost, if a draft is available. This deletes the need for an agency to print the entire text in the notice. Agencies indicated that there is a high cost associated with printing a preliminary draft that is likely to undergo many changes and indicated that the current statutory language only requires printing the language "if it is available." The amendment provides an alternative which still results in dissemination of the preliminary draft.

Section 120.54(2)(c), F.S., 1996 Supp., is amended to clarify that districts or agencies with less than statewide jurisdiction need not hold workshops outside of their service area, and clarifies that the district or agency is required to hold workshops in various regions if those regions are within their respective service area.

The amendment to s. 120.54(2)(d), F.S., 1996 Supp., creates a new paragraph 3. It clarifies that an agency's decision to utilize negotiated rulemaking, its selection of representative groups, and its approval or denial of applications to participate in the negotiated rulemaking process are not actions that constitute "agency action." Agency action normally may be challenged in the DOAH and, upon appeal, to the District Court of Appeal. The clarification that these types of determinations in the negotiated rulemaking process are not agency action restricts the ability to challenge those determinations, but persons still may challenge a proposed rule. The amendment is in keeping with the standard used for mediation under the act.

Section 120.54(3)(a)1., F.S., 1996 Supp., is amended to add a new sentence to the notice of intent to adopt, amend, or repeal a rule. The language is intended to help citizens reading the rulemaking notice locate the earlier rule development notice without requiring them to search through earlier copies of the *Florida Administrative Weekly* or newspapers until they locate it. This will help to ensure that agencies have complied with the rule development notice requirement. It will similarly help the committee to locate the applicable rule development notice as the JAPC reviews and agency's rulemaking notice to make sure it has followed all required procedures.

The amendment to s. 120.54(3)(b)2.b.(I), F.S., 1996 Supp., reflects that the Department of Commerce no longer exists.

Section 120.54(3)(b)2.b.(II), F.S., 1996 Supp., is amended to grant the small business ombudsman 21 days to offer regulatory alternatives to a rule. Currently, there is no limitation on the amount of time during which an alternative may be offered. The amendment also clarifies that the 90-day period for filing a rule is extended for 21 days if the small business ombudsman offers an alternative.

Section 120.54(3)(d), F.S., 1996 Supp., relating to modification or withdrawal of rules, is amended. First, the word "final" is placed before "public hearing" on line 23 to clarify that there can be more than one public hearing and the deadline to make changes should include any written materials submitted on or before the date of the last of these. Second, the amendment places a time limit on the period during which a person may request a copy of the notice of change to no later than 21 days after the notice of rule adoption.

Section 120.54(3)(e)2., F.S., 1996 Supp., is amended to clarify the timing for filing a notice of change and to extend the 90-day time period by which an agency must file a rule. Currently, the statute provides 21 additional days. The amendment makes clear that the extensions apply to the existing period of time to file the rule for adoption, which with last year's new exceptions may or may not be 90 days. It also makes it easier to determine if the extension is permitted, because it requires the notice of change or of a public meeting to be published prior to the filing deadline. The term "[f]or purposes of this subparagraph. . . " is stricken as being unnecessarily restrictive.

Section 120.54(4)(a), F.S., 1996 Supp., is amended to clarify that a rule is what is being adopted by any procedure, and not a procedure. The language was omitted in the simplification process. As well, s. 120.54(7)(b), F.S., is amended to strike ". . . otherwise comply with the requested action . . ." This phrase was copied from s. 120.54(7)(a), F.S., but the underlined words have no application in paragraph (b) because that paragraph deals solely with petitions for rulemaking, not with petitions to provide minimum public information.

Section 4. Section 120.541, F.S., 1996 Supp., which relates to the Statement of Estimated Regulatory Costs (SERC), is amended so that the period during which a rule must be filed for final adoption is extended by 21 days if a proposal for a lower cost, alternative rule is submitted.

Section 5. Section 120.542, F.S., 1996 Supp., which relates to variances and waivers, is amended in several ways. First, the amendment to subsection (1) provides public employees are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules affecting their employment under the variance and waiver section. The community colleges have expressed a concern that employees will attempt to use the variance or waiver provisions as a remedy in addition to grievance procedures or civil service appeals.

Second, the waiver and variance provision is amended to clarify that an agency is authorized to limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant, but only to the extent necessary for the purpose of the underlying statute to be achieved.

Third, the waiver and variance section is amended to provide that agencies do not have authority to grant waivers or variances to rules required by the federal government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by that program or when the variance or waiver is also approved by the appropriate agency of the federal government. There is some concern among agencies that if they are required to grant variances or waivers for federal programs which they implement, they may lose the federal funding and the programs. This amendment clarifies that, unless the federal program permits variance or waiver or unless the federal government approves, the procedure does not apply.

The fourth amendment to the waiver and variance section relates to the adoption of uniform rules to implement the section by the Administration Commission. Subsection (3) currently permits, but does not require, the Administration Commission to adopt uniform procedural rules for the granting or denial of emergency and temporary variances and waivers. The amendment requires the Administration Commission to adopt uniform rules and adds power to adopt rules for revocation of a waiver or variance, as well. Furthermore, the amendment authorizes expedited time frames, waiver of limited public notice, and limited comments on the petition for emergency or temporary variances and waivers. The amendment also authorizes limits on the duration of such variances and waivers and authorizes imposition of certain conditions but only to the extent necessary for the purpose of the underlying statute to be achieved.

The fifth amendment to the waiver and variance section relates to filing of the petition for a waiver or variance. Currently, a petitioner who is subject to regulation only is required to file a petition with the regulating agency. The amendment requires that a copy be filed with the JAPC in order to permit the JAPC to monitor the waiver and variance process.

The sixth amendment to the waiver and variance process amends s. 120.542(6), F.S., 1996 Supp., which relates to the notice process for a petition. The new language specifies the contents of the notice, specifically: the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained.

The seventh amendment to the waiver and variance provision creates a new subsection (7) which requires an agency to review and request any necessary additional information within 30 days

after receipt of the petition. The amendment gives the agency an additional 30 days after receipt of additional information to review and then request any necessary information. If the petitioner asserts that any request for additional information is not authorized by law or by rule the petitioner may request in writing that the agency proceed to process the petition.

The last amendment amends the old subsection (7); renumbers it as (8) and then makes timing clarifications based upon the previous amendment. As well, the amendment requires that a copy of the order granting or denying the petition must be filed with the JAPC. The amendment also requires the agency to provide notice of the disposition of the petition to the Department of State, which must publish the notice in the next available issue of the FAW. The contents of the notice also are specified: a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained.

Section 6. Section 120.54(1)(a), F.S., 1996 Supp., provides that rulemaking is not a matter of agency discretion. Each agency statement that is defined as a rule must be adopted by the rulemaking procedure provided by the APA as soon as feasible and practicable. The committee substitute amends s. 120.56(4), F.S., 1996 Supp., which relates to rule challenges, so that any proceeding brought to determine a violation of s. 120.54(1)(a), F.S., 1996 Supp., may be consolidated with a proceeding under any other section of the APA. Currently, a rule challenge proceeding may be brought in conjunction with any other proceeding or consolidated with such a proceeding.

Section 7. Section 120.569, F.S., is amended so that the term “formal” proceeding is replaced with a reference to a s. 120.57(1), F.S., proceeding, in keeping with terminology changes made in the 1996 revision.

Section 8. Section 120.57(1), F.S., 1996 Supp., is amended to correct grammatical errors. Section 120.57(2)(a), F.S., 1996 Supp., is amended to include any decision, opinion, order, or report by the presiding officer to the record of a s. 120.57(2), F.S., 1996 Supp., hearing. This was an omission for the 1996 revision. The decision of the presiding officer is an important part of the record for review. The Florida Supreme Court, which adopts the Rules of Appellate Procedure, has already adopted this portion of the statute verbatim, and the court added the language of this amendment to their rule. It may be found at Rule 9.190(c)(2)(B) of the Florida Rules of Appellate Procedure. The statute should be amended to add this item and so conform to the rule.

The amendment to s.120.57(3)(a), F.S., 1996 Supp., conforms the section to other provisions regarding the uniform rules of procedures.

The amendment to s. 120.57(3)(c), F.S., 1996 Supp., so that Saturdays, Sundays, and legal holidays are excluded from computation of 72-hour time periods provided in the section.

Section 9. The amendment to s. 120.573, F.S., 1996, Supp., relating to mediation of disputes under the APA, requires agreement in writing within 10 days after the time period stated in the

announcement for election of an administrative remedy under s. 120.569 and s. 120.57, F.S., 1996 Supp. The language inserted in 1996 creates third party intervenor problems. The problem can be resolved by requiring the agreement soon after the original 21 days. A 10-day period should provide adequate time to enter into the agreement and still allow the remainder of the provisions to operate as intended.

Section 10. The amendment to s. 120.574, F.S., 1996 Supp., relates to the summary hearing process. The current language provides that intervenors are governed by the decision of the administrative law judge regarding whether the case will proceed in accordance with the summary hearing process. The amendment deletes the decision of the administrative law judge and inserts that the original parties make this determination.

Section 11. The amendment to s. 120.569, F.S., 1996 Supp., modifies the attorney's fee section by providing that if an agency statement violates s. 120.54(1)(a), F.S., 1996 Supp., which requires agencies to adopt their statements or policies as rules as soon as feasible and practicable, then attorney's fees and costs do not have to be awarded if the agency can demonstrate that the statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receive federal funds.

Section 12. Section 120.60, F.S., 1996 Supp., is amended in subsection (3) so that an agency is required to state with particularity the grounds or basis for its issuance or denial of a license unless issuance of the license is a ministerial act. The section also amends subsection (6) to provide that, if an agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances if: (a) the procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the U.S. Constitution; (b) the agency takes only that action necessary to protect the public interest under the emergency procedure; and (c) the agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public and its reasons for concluding that the procedure used is fair under the circumstances.

Section 13. Section 120.65, F.S., 1996 Supp., relates to administrative law judges. The amendment notes that the director of DOAH will also serve as the chief administrative law judge. It also requires the director and the deputy to meet the same minimum qualifications as other administrative law judges.

Section 14. Section 120.66, F.S., 1996 Supp., relates to ex parte communications to presiding officers. It clarifies that agency heads and their designees may be presiding officers and may not receive ex parte communications. The amendment also clarifies that the entity which appointed the presiding officer, not just the DOAH, should be the entity that assigns a successor presiding officer.

Section 15. This section amends s. 120.68, F.S., 1996 Supp., which relates to judicial review under the APA. During the simplification process, the standard contained in the act was modified without debate of the impact of the modification. The amendment simply reinserts the language

that was in the act in 1995. Specifically, it provides that filing of a petition does not itself stay enforcement of an agency decision. If, however, the agency decision has the effect of suspending or revoking a license, supersedeas[17] must be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition by the agency, determines that supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The amendment also permits the agency to grant a stay upon appropriate terms, but a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas.

Section 16. Section 120.74, F.S., 1996 Supp., which provides for an agency review and report on its rules, is amended to strike a reference to "annual" that should have been stricken when the review was made bi-annual.

Section 17. Section 120.81, F.S., 1996 Supp., provides exceptions to the APA. The amendment places educational units and units of local government in the same position they were prior to 1996 for noticing their rules. A new s. 120.81(1)(j) is created which provides that students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units under s. 120.542, F.S., 1996 Supp.

Section 18. The committee substitute has an effective date upon becoming 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:

[17]Supersedeas is ". . . the name of a writ containing a command to stay the proceedings at law. A suspension of the power of a trial court to issue an execution on judgment appealed from, or, if a writ of execution has issued, it is a prohibition emanating from court of appeal against execution of writ. . . . Originally, it was a writ directed to an officer, commanding him to desist from enforcing the execution of another writ which he was about to execute, or which might come in his hands. In modern times the term is often used synonymously with a "stay of proceedings," and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment." *Black's Law Dictionary*, page 1289 (1979 edition).

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The committee substitute should clarify the rulemaking process, the variance and waiver process, among other issues, and thereby, assist the public.

C. Government Sector Impact:

By clarifying rulemaking and variance and waiver processes, agencies should be able to perform their roles in these processes more effectively.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.