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## Access to Florida Administrative Proceedings

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## ACCESS TO FLORIDA ADMINISTRATIVE PROCEEDINGS

PATRICIA A. DORE\*

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## ACCESS TO FLORIDA ADMINISTRATIVE PROCEEDINGS

PATRICIA A. DORE

*[F]or us to blindly adhere to an erroneous rule, merely because it has been declared in a recent earlier decision, tends to enshrine and perpetrate the dead error of yesterday . . . .<sup>1</sup>*

## I. INTRODUCTION

The Florida Administrative Procedure Act establishes procedural ground rules which govern the decisionmaking activities of the executive branch agencies. The statute makes several kinds of proceedings available to persons who are affected by proposed agency action. With the exceptions of judicial review and judicial enforcement, all the proceedings available under the statute are administrative and take place in an executive forum. Nevertheless, when a person's right to initiate an administrative proceeding is challenged, lawyers and courts instinctively treat the question as if it involved the right to sue on a claim in a judicial forum. The lawyers argue about whether the person has "standing" and they turn to the largest body of law on the subject of standing—federal court decisions concerned with federal constitutional limitations on the federal judicial power—to support their arguments. Consequently, an incongruous body of law has developed in this state which makes a person's right to initiate an administrative proceeding in an executive forum turn on his ability to satisfy tests enunciated by the federal courts for judicial standing.<sup>2</sup>

This Article critically examines this body of law and rejects the use of any judicial standing test to determine the right of access to administrative proceedings. In addition, it proposes to banish the word "standing" from the discussion of the right to initiate any executive branch proceeding. If indeed "[l]anguage is the . . . ma-

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1. *Therrell v. Reilly*, 151 So. 305, 306 (Fla. 1932), quoted in *Stephen Bodzo Realty, Inc. v. Willits International Corp.*, 428 So. 2d 225, 227 (Fla. 1983).

2. One commentator has noted that federal standing law and state administrative law make strange bed fellows. Kavanaugh, *Administrative Standing Under Chapter 403: What Does the Jerry Case Mean?*, 53 FLA. B.J. 729, 730-34 (1979). Two others have suggested that the marriage brings a desirable uniformity to the law. Dubbin & Dubbin, *Administrative Law: Access to Review of Official Action—Standing Under the Florida Administrative Procedure Act*, 35 U. MIAMI L. REV. 815, 820-28 (1981).

trix of perception,"<sup>3</sup> the writer hopes to change the way lawyers and judges perceive executive branch proceedings by changing the language they use to talk about them. Throughout this Article the reader will encounter phrases like "access," "access criteria," "the right of access to a proceeding," and "the right to initiate a proceeding." The word "standing" appears only for accurate quotation or when the discussion concerns the right to seek judicial review.

It is hoped that by using language that carries no judicial overtones, the discussion about access to administrative proceedings can be refocused on what the legislature intended when it created the proceedings. To that end, a new analytical approach is suggested. The statutory access language for each proceeding is examined and access criteria are proposed which are consistent with the plain meaning of the language used, evidence of legislative intent available from extrinsic sources, and the function and purpose of each proceeding. Cases in which courts have used judicial standing rules to determine access to executive branch proceedings are analyzed and an alternative analysis based on the access criteria developed for that proceeding is given.

## II. CRITICAL ANALYSIS OF *Jerry* AND *Florida Home Builders*

While an inmate in a state prison, Leroy Jerry was found guilty of unarmed assault and placed in disciplinary confinement. After serving this penalty,<sup>4</sup> Jerry filed a petition with the Division of Administrative Hearings (DOAH) challenging the validity of the Department of Offender Rehabilitation's rule under which inmates are subjected to disciplinary confinement and loss of gain time.<sup>5</sup> The Department contended that Jerry lacked "standing" to challenge the rule because he had already been found guilty, had served his penalty, and, therefore, was not presently affected by the rule. The hearing officer rejected this contention, ruling that Jerry had the requisite interest to challenge the rule because he was an inmate contesting procedures he had been subjected to in

3. E. PAWEL, *THE NIGHTMARE OF REASON* 22 (1984).

4. It is unclear from the hearing officer's final order whether Jerry's petition was filed before or after he completed his disciplinary confinement. The final order recites the Department's argument as addressing the rule's effect on Jerry at the time of the final hearing in the rule challenge proceeding rather than at the time the petition was filed. Jerry v. Florida Dep't of Offender Rehab., DOAH Case No. 76-1951R, Final Order at 2; compare *Department of Health & Rehab. Servs. v. Alice P.*, 367 So. 2d 1045 (Fla. 1st DCA 1979).

5. FLA. ADMIN. CODE R. 33-3.08 (1976). "Gain time" is a deduction from the sentence of a prisoner who commits no violation of Department rules or laws of the State and satisfactorily performs assigned tasks. FLA. STAT. § 944.275 (1985).

the past and to which he might be subjected in the future.<sup>6</sup> The First District Court of Appeal reversed the hearing officer's final order and held that Jerry lacked "standing" to initiate the rule challenge proceeding.<sup>7</sup> The court used the occasion to "attempt to comprehend in depth the meaning of standing," which it said, "involves a careful study of the pertinent provisions of the new APA, compared with the 1961 Act as well as a comparison with the Federal APA and the cases interpreting it."<sup>8</sup>

Unfortunately, the *Jerry* court's study of the access provisions in chapter 120 was cursory; its resort to the Federal APA and federal case law was misconceived. Still, no court since has questioned the basic but unarticulated analytic premise of the *Jerry* court: that when interpreting unique Florida statutory provisions granting access to state administrative proceedings, it is appropriate to rely on a dissimilar federal statute, on cases interpreting that federal statute, and on United States Supreme Court cases construing the constitutional "cases or controversies" limitation on federal court jurisdiction.<sup>9</sup> Indeed, in *Florida Home Builders Association v. Department of Labor and Employment Security*,<sup>10</sup> the Florida Supreme Court also resorted to federal cases and to the judicial review provision of the Federal APA<sup>11</sup> in formulating a standard for associational access to section 120.56 rule challenge proceedings. As in *Jerry*, no attempt was made to explain why a federal constitutional standard for standing to invoke the jurisdiction of the federal courts was relevant to resolution of a question of access to executive branch proceedings under Florida law.<sup>12</sup> A careful

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6. *Jerry v. Department of Offender Rehab.*, DOAH Case No. 76-1951R, Final Order at 2.

7. *Department of Offender Rehab. v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA), *cert. denied mem.*, 359 So. 2d 1215 (Fla. 1978).

8. *Id.* at 1232.

9. Shortly after *Jerry*, another panel of the same court observed: "Whatever the law may be in Federal courts or other jurisdictions, the Florida law on the subject has been clearly and unambiguously settled by this court's opinion . . . in [*Jerry*] . . . . The opinion is clearly and lucidly written, numerous authorities are cited and the court's reasoning allows no room for doubt." *Department of Health & Rehab. Servs. v. Alice P.*, 367 So. 2d 1045, 1051 (Fla. 1st DCA 1979).

10. 412 So. 2d 351 (Fla. 1982).

11. 5 U.S.C. § 702 (1982).

12. Although the court recognized that the federal cases it relied on were concerned with the article III "cases or controversies" requirement, it nevertheless justified their use because it said the same rule had been applied to cases brought under the Federal APA. 412 So. 2d at 353. This is, of course, correct. But it begs the question. 5 U.S.C. § 702 is the judicial review provision of the Federal APA. It establishes the standard that one injured by federal administrative action must meet in order to initiate federal court review of that action. The standing requirement to gain admittance to federal courts imposed by the

examination of the federal authorities relied on in *Jerry* and in *Florida Home Builders* reveals the inappropriateness of their use and demonstrates the need to rethink the administrative access question from a state law rather than a federal law perspective.

Although for different purposes, the language of the Federal APA judicial review provision was used in both *Jerry* and *Florida Home Builders*. Both courts also used Supreme Court decisions concerning the standing requirements of article III for determining the requisite interest necessary to initiate executive branch proceedings established by chapter 120. The appropriateness of relying on these two bodies of federal law is examined separately.

### A. *The Federal Administrative Procedure Act*

In *Jerry* and *Florida Home Builders* the courts were concerned with whether the respective petitioners were "substantially affected" within the meaning of section 120.56(1) and, therefore, could initiate an administrative challenge to question the validity of a rule before the DOAH.<sup>13</sup> The DOAH was created by the legislature to conduct hearings required by chapter 120 and other laws.<sup>14</sup> Because the DOAH is not one of the courts enumerated in article V of the Florida Constitution, it may not exercise the judicial power of the state.<sup>15</sup> Rather, the DOAH is part of the executive branch and its adjudicatory power, like that of other executive branch agencies, is limited constitutionally to that which is considered "quasi-judicial."<sup>16</sup>

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"cases or controversies" requirement applies to *all* article III courts, trial and appellate. Because the requirement is constitutionally based, Congress may not lessen it by statute. In *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488, n.24 (1982), the Court stated: "Neither the [APA], nor any other congressional enactment, can lower the threshold requirements of standing under Art. III." All of the authorities relied on by the Florida Supreme Court were concerned with the article III "cases or controversies" limitation on the federal courts.

13. FLA. STAT. § 120.56(1) (1985) provides that "[a]ny person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

14. *Id.* § 120.65(2).

15. FLA. CONST. art. V, § 1 provides in relevant part that "[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state . . . ."

16. art. V, § 1 specifies that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices." See also *Point Management, Inc. v. Department of Business Reg.*, 449 So. 2d 306 (Fla. 4th DCA 1984); *Bowen v. Department of Env'tl. Reg.*, 448 So. 2d 566, 568 (Fla. 2d DCA 1984) (ruling that inverse condemnation actions may not be adjudicated by administrative agencies), *aff'd mem.*, 472 So. 2d 460 (Fla. 1985); *Winter Springs Dev. Corp.*

Nevertheless, when the *Jerry* and *Florida Home Builders* courts sought assistance from the Federal APA in interpreting Florida's statutory access requirements concerning proceedings conducted by this executive branch agency, they both converged on the judicial review provision in that federal statute. This may be explained, in part, by the fact that the Federal APA makes no allowance for the administrative challenge to rules. Under the Federal APA, the closest analogue is the adjudicatory hearing provision; however, that section offers no guidance on the access question because its operation is dependent upon statutes external to the APA.<sup>17</sup> Consequently, the only provision in the Federal APA bearing on the question of access is section 702. In that section the standards for *judicial review* of agency action are prescribed in the following terms: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."<sup>18</sup> The *Florida Home Builders* court found this language sufficiently similar to the "[a]ny person substantially affected by a rule" language of section 120.56(1) to justify reliance on all federal standing cases.<sup>19</sup> The *Jerry* court, on the other hand, had suggested that the federal section 702 language was "practically the same standard" as that found in Florida Statutes section 120.68(1), which affords judicial review to "[a] party who is adversely affected by final agency action," but noted the dissimilarity between the

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v. Florida Power Corp., 402 So. 2d 1225, 1228 (Fla. 5th DCA 1981) (stating that an administrative agency is without power to award money damages for breach of contract); Peck Plaza Condominium v. Division of Fla. Land Sales & Condominiums, 371 So. 2d 152, 154 (Fla. 1st DCA 1979) (ruling that an agency may not interpret contracts); Carrollwood State Bank v. Lewis, 362 So. 2d 110, 113-14 (Fla. 1st DCA 1978) (ruling that an agency may not resolve a constitutional challenge to a statute or rule), *cert. denied mem.*, 372 So. 2d 467 (1979); Biltmore Constr. Co. v. Department of Gen. Servs., 363 So. 2d 851, 854 (Fla. 1st DCA 1978) (ruling that an agency may not order specific performance of a contract which only a court in the exercise of its equitable powers may decree); Department of Env'tl. Reg. v. Leon County, 344 So. 2d 297, 298 (Fla. 1st DCA 1977) (ruling that DOAH hearing officers exercise quasi-judicial power only when holding proposed rules invalid because violative of Florida Constitution); Department of Admin. v. Stevens, 344 So. 2d 290, 293-94 (Fla. 1st DCA 1977) (ruling that DOAH hearing officers exercise quasi-judicial power when deciding whether an agency rule is a valid exercise of the power delegated to it); Department of Admin., Div. of Personnel v. Department of Admin., Div. of Admin. Hearings, 326 So. 2d 187, 189 (Fla. 1st DCA 1976) (ruling that the DOAH is without power to declare a rule invalid on federal constitutional grounds).

17. 5 U.S.C. § 554(a) (1982) provides that "[t]his section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."

18. *Id.* § 702.

19. 412 So. 2d at 353 n.5.



federal term "adversely affected or aggrieved" and the Florida term "substantially affected."<sup>20</sup>

To the extent *Jerry* was inconsistent with its opinion in *Florida Home Builders*, the Florida Supreme Court disapproved it.<sup>21</sup> Presumably, then, the supreme court's finding of sufficient language similarity between section 702 and section 120.56(1) displaces the contrary conclusion reached by the lower court in *Jerry*. However, the court in *Florida Home Builders* expressed no view concerning the similarity between section 702 and section 120.68(1); therefore, the *Jerry* court's *dictum* on that point remains undisturbed. Consequently, the federal standing requirement for seeking judicial review of federal administrative action has been superimposed upon or substituted for two quite differently worded provisions in chapter 120. These provisions grant access to two state forums—an executive branch agency and article V courts—as different from each other in origin and function as they both are from the federal courts.

The *Florida Home Builders* court used section 702 as a means to an end. The end was adoption of the *Hunt v. Washington State Apple Advertising Commission*<sup>22</sup> federal rule governing the standing of associations to sue in federal court on behalf of their members. The problem, as the court recognized, was that *Hunt* concerned the "cases or controversies" requirement of the federal constitution. To justify its use in any event, the court tried constructing a bridge to the administrative process by noting that the same standing requirement was applied to section 702 cases. Subsequently, the language of section 702 was found to approximate the language of section 120.56(1), thereby justifying looking to *Hunt* and other federal judicial standing cases when considering access to rule challenge proceedings. The court's analysis is flawed on two accounts: first, section 702 does not establish the necessary link to the administrative process; second, the language dissimilarities between the federal and state statutes are too palpable to be dismissed *ipse dixit*.

That the same standing requirements found in Federal non-APA cases are applied to cases brought under section 702 does not support the proposition that those standing requirements are or ought to be imposed on the administrative process whether federal or

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20. 353 So. 2d at 1233.

21. 412 So. 2d at 354.

22. 432 U.S. 333 (1977).

state. Section 702 is the *judicial* review provision of the Federal APA. It establishes the standard one injured by federal administrative action must meet to initiate federal court review of that action. Federal court standing requirements imposed by the "cases or controversies" clause of article III apply to *all* article III courts, trial and appellate.<sup>23</sup> Because the requirements are constitutionally imposed, Congress could not lower them through section 702.<sup>24</sup> Consequently, the *Florida Home Builders* reference to section 702 did not supply the missing link; rather the court ended up precisely where it began—with article III of the United States Constitution.

After quoting section 702, the court resolved the question of language similarity between section 702 and section 120.56(1) in a footnote, stating: "We believe that the standing requirement of this statute is so similar to the 'substantially affected' requirement of section 120.56(1) that we are justified in looking to federal case law for guidance in formulating our rule regarding associational standing under section 120.56."<sup>25</sup> On examination, it is difficult to accept this assertion.

Using the dictionary, the *Jerry* court found that "[a]dverse" is different in meaning from 'substantial,' the former defined as 'acting against or in a contrary direction'; the latter defined as 'consisting of or relating to substance, . . . not imaginary or illusory . . . considerably large.'<sup>26</sup> However helpful the dictionary's distinctions between the sections' key words, the more compelling argument is found within the four corners of chapter 120. The Florida Legislature did use the phrase "adversely affected" as a requirement for standing to seek judicial review under section 120.68(1). But "adversely affected" purposefully appears in no other provision in the chapter. If the legislature intended the same standards governing standing in the courts to govern access to executive branch proceedings, would it not have continued the same language? What is gained by saying that a person "substantially

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23. U.S. CONST. art. III, §§ (1)-(2).

24. *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972). Several commentators have taken issue with the constitutional status given to the injury in fact requirement by the Supreme Court. See L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 462-67 (1965); Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 *YALE L.J.* 816 (1969); Sedler, *Standing and the Burger Court: An Analysis and Some Proposals for Legislative Reform*, 30 *RUTGERS L. REV.* 863 (1977).

25. 412 So. 2d at 353 n.5.

26. 353 So. 2d at 1233.

affected" by a rule may challenge it—not in a court, but before an executive branch agency—if what was meant was that the person had to be "adversely affected," language with which the legislature was familiar? It is unfortunate that the *Florida Home Builders* court implicated section 702 in its construction of section 120.56(1). Its use did not serve the intended purpose; its application encourages resort to a body of federal law which should not be considered when construing access provisions in chapter 120.

The *Jerry* court did not use section 702 to determine access to administrative rule challenge proceedings. However, in *dictum* that court noted the similarity between the language of section 702 and that of section 120.68(1). To date, no court has held that section 702 and its interpretative cases should influence whether one is entitled to seek judicial review of final agency action under section 120.68(1).<sup>27</sup> Perhaps it is not too late to sound the warning.

Because both sections 702 and 120.68(1) concern standing to seek judicial review of agency action, reliance on the federal statute when interpreting the state provision might appear more appropriate here than in the context of executive branch proceedings. In fact, the Federal APA judicial review criteria are no more relevant to the meaning of section 120.68(1) than they are to the meaning of section 120.56(1). This is so for several reasons: first, Florida courts are not constitutionally restricted to hearing only "cases or controversies" as are the federal courts; second, the federal and state judicial review provisions operate as part of vastly different administrative law schemes; third, the meaning of the operative terms in the federal provision are not clear and continue to be the subject of scholarly criticism and debate.

Article V of the Florida Constitution, unlike article III of the United States Constitution, contains no "cases or controversies" limitation on the exercise of state court jurisdiction. Although Florida courts generally require a person to demonstrate "special injury" to have standing to sue,<sup>28</sup> "special injury" is not constitutionally mandated and it may be abrogated by the courts or the

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27. In *Florida Home Builders Ass'n v. Division of Labor*, 355 So. 2d 1245, 1247 (Fla. 1st DCA 1978), the court denied standing to seek judicial review of an emergency rule to petitioners who failed to show they were adversely affected by it with citation to *Jerry*. That citation, without more, cannot be read as an acceptance of the *Jerry* dictum. The emergency rule contained an escape clause which permitted the petitioners, at their option, to be relieved of the rule's requirements. Because they could avoid the effect of the emergency rule, the petitioners were not adversely affected by it.

28. *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974).

legislature.<sup>29</sup> This difference between the constitutional boundaries of federal court jurisdiction and of state court jurisdiction makes resort to section 702 particularly hazardous. Federal court cases interpreting section 702 will and must do so with an eye focused on federal constitutional limitations. But these limitations are irrelevant to Florida courts and, therefore, so are the federal cases concerned with them.

When chapter 120 was adopted in 1974, one of the stated legislative purposes was to make uniform provision for judicial review.<sup>30</sup> This purpose was achieved by providing that all review petitions be filed in the appropriate district court of appeal, except when review by the supreme court is provided by law.<sup>31</sup> While the constitutionally grounded prerogative writ jurisdiction of the circuit courts has generated substantial litigation concerning the circuit courts' proper function in policing administrative activity,<sup>32</sup> this is-

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29. Florida Wildlife Fed'n v. Department of Env'tl. Reg., 390 So. 2d 64 (Fla. 1980).

30. FLA. STAT. § 120.72(1)(a) (1985).

31. *Id.* § 120.68(2). By operation of FLA. CONST. art. V, § 3(b)(2), Public Service Commission rules and orders relating to rates and services of electric, gas, and telephone utilities are reviewable in the supreme court.

32. FLA. CONST. art. V, § 5(b); *see, e.g.*, Junco v. Board of Accountancy, 390 So. 2d 329 (Fla. 1980); Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc. 361 So. 2d 695 (Fla. 1978); Department of Revenue v. Amrep Corp., 358 So. 2d 1343 (Fla. 1978); Bowen v. Florida Dep't of Env'tl. Reg., 448 So. 2d 566 (Fla. 2d DCA 1984), *aff'd mem.*, 472 So. 2d 460 (Fla. 1985); Board of Trustees of the Internal Improvement Trust Fund v. Ray, 444 So. 2d 1110 (Fla. 4th DCA 1984); State v. Atlantic International Inv. Corp., 438 So. 2d 868 (Fla. 1st DCA 1983), *aff'd*, 478 So. 2d 805 (Fla. 1985); Commission on Ethics v. Sullivan, 430 So. 2d 928 (Fla. 1st DCA 1983); Department of Business Reg. v. Carl & Mike, Inc., 425 So. 2d 190 (Fla. 3d DCA 1983); Key Haven Associated Enters. v. Board of Trustees of the Internal Improvement Fund, 400 So. 2d 66 (Fla. 1st DCA 1981), *aff'd in part, rev'd in part*, 427 So. 2d 153 (Fla. 1982); Department of Env'tl. Reg. v. Falls Chase Special Taxing Dist., 424 So. 2d 787 (Fla. 1st DCA 1982), *petition for review denied*, 436 So. 2d 98 (Fla. 1983); Smith v. Willis, 415 So. 2d 1331 (Fla. 1st DCA 1982); Communities Fin. Corp. v. Florida Dep't of Env'tl. Reg., 416 So. 2d 813 (Fla. 1st DCA 1982); 2829 Corp. v. Division of Alcoholic Beverages & Tobacco, 410 So. 2d 539 (Fla. 4th DCA 1982); Ortega v. Owens-Corning Fiberglas Corp., 409 So. 2d 530 (Fla. 1st DCA 1982); Department of Professional Reg. v. Fernandez-Lopez, 407 So. 2d 286 (Fla. 3d DCA 1981); Department of Business Reg. v. 27th Ave. Corp., 402 So. 2d 56 (Fla. 3d DCA 1981); Department of Business Reg. v. Provende, Inc., 399 So. 2d 1038 (Fla. 3d DCA 1981); Department of Business Reg. v. N.K., Inc., 399 So. 2d 416 (Fla. 3d DCA 1981); Department of Professional Reg. v. Hall, 398 So. 2d 978 (Fla. 1st DCA 1981); Deseret Ranches, Inc. v. Department of Agriculture & Consumer Servs., 392 So. 2d 1016 (Fla. 5th DCA 1981); Laborers' International Union v. Greater Orlando Aviation Auth., 385 So. 2d 716 (Fla. 5th DCA 1980); E.T. Legg & Co. v. Franza, 383 So. 2d 962 (Fla. 4th DCA 1980); Freeman v. School Bd. of Broward County, 382 So. 2d 140 (Fla. 4th DCA 1980); Department of Env'tl. Reg. v. Whitfield, 382 So. 2d 89 (Fla. 1st DCA 1980); Brown v. State, 375 So. 2d 66 (Fla. 2d DCA 1979); Coulter v. Davin, 373 So. 2d 423 (Fla. 2d DCA 1979); Department of Health & Rehab. Servs. v. Lewis, 367 So. 2d 1042 (Fla. 4th DCA 1979); Metropolitan Dade County v. Department of Commerce, 365 So. 2d 432 (Fla. 3d DCA 1978);

sue has largely been resolved in favor of review by the district courts of appeal after the administrative process has been exhausted.<sup>33</sup>

In contrast, judicial review of federal agency action may be by way of prerogative writ (nonstatutory review),<sup>34</sup> or specific review authority in the various agencies' organic statutes (statutory review),<sup>35</sup> or section 702 of the Federal APA.<sup>36</sup> This elaborate federal scheme appears cumbersome when compared to the elegant simplicity of Florida's approach. Both elegance and simplicity are threatened if Florida courts import—even in part—federal law by using section 702 as an aid to construing section 120.68(1).

Section 702 extends the right to judicial review to "[a] person suffering legal wrong because of agency action" or to a person "adversely affected or aggrieved by agency action within the meaning of a relevant statute." This language has been on the books since the Federal APA's enactment in 1946, but its reach and meaning remain in issue. Professor Kenneth Davis argues persistently, if not successfully, that Congress intended anyone injured in fact by

School Bd. of Broward County v. Constant, 363 So. 2d 859 (Fla. 4th DCA 1978); Carrollwood State Bank v. Lewis, 362 So. 2d 110 (Fla. 1st DCA 1978), *cert. denied mem.*, 372 So. 2d 467 (Fla. 1979); State ex rel. Fla. State Bd. of Nursing v. Santora, 362 So. 2d 116 (Fla. 1st DCA 1978); Department of Revenue v. Young Am. Builders, 358 So. 2d 1096 (Fla. 1st DCA 1976), *aff'd sub. nom.* Department of Revenue v. Silver Springs Shores, 376 So. 2d 849 (Fla. 1979); Adams Packing Ass'n v. Florida Dep't of Citrus, 352 So. 2d 569 (Fla. 2d DCA 1977); Hill v. School Bd. of Leon County, 351 So. 2d 732 (Fla. 1st DCA 1977), *cert. denied mem.*, 359 So. 2d 1215 (1978); Department of Transp. v. Morehouse, 350 So. 2d 529 (Fla. 3d DCA 1977), *cert. denied mem.*, 358 So. 2d 129 (Fla. 1978); United Faculty v. Branson, 350 So. 2d 489 (Fla. 1st DCA 1977); Jefferson Nat'l Bank v. Lewis, 348 So. 2d 348 (Fla. 1st DCA 1977); School Bd. of Leon County v. Mitchell, 346 So. 2d 562 (Fla. 1st DCA 1977), *cert. denied mem.*, 358 So. 2d 132 (Fla. 1978); State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580 (Fla. 1st DCA 1977); Florida Dep't of Revenue v. Estero Bay Dev. Corp., 336 So. 2d 479 (Fla. 2d DCA 1976), *cert. denied mem.*, 345 So. 2d 422 (Fla. 1977); Department of Revenue v. University Square, Inc., 336 So. 2d 371 (Fla. 1st DCA 1976); Department of Revenue v. Young Am. Builders, 330 So. 2d 864 (Fla. 1st DCA 1976); General Care Corp. v. Forehand, 329 So. 2d 49 (Fla. 1st DCA 1976).

33. See *Key Haven Associated Enterprises*, 427 So. 2d at 156; *Amrep Corp.*, 358 So. 2d 1343; *State ex rel. Willis*, 344 So. 2d at 589; *Mitchell*, 346 So. 2d at 568. But see *Bowen*, 448 So. 2d 566; *Gulf Pines Memorial Park*, 361 So. 2d at 698-99.

34. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 23.04-.06, at 307-17 (1958); L. JAFFE, *supra* note 24, at 165-94, 213-32, 320-93; B. SCHWARTZ, ADMINISTRATIVE LAW 435-37 (1976); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425, 432-38, 456-64 (1974); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 648-54 (1973).

35. K. DAVIS, *supra* note 34, § 23.03, at 300-07; L. JAFFE, *supra* note 24, at 155-59; B. SCHWARTZ, *supra* note 34, at 30-32; Albert, *supra* note 34, at 429-32; Scott, *supra* note 34, at 654-58.

36. K. DAVIS, *supra* note 34, § 23.02, at 296-300; B. SCHWARTZ, *supra* note 34, at 449-54; Scott, *supra* note 34, at 658-59.

agency action to have standing to seek judicial review.<sup>37</sup> Professors Scott and Albert, on the other hand, interpret the "legal wrong" portion as extending standing to one who has suffered injury to a right protected by the common law and the "adversely affected or aggrieved" portion as concerning one whose standing is specifically conferred by statute.<sup>38</sup> Disagreeing with all of them, Professor Stewart suggests that the "legal wrong" portion refers to both common law and statutory rights, and that the "adversely affected or aggrieved" portion "refers to statutory review proceedings which can encompass both those who suffer legal wrong and 'surrogate' plaintiffs who do not."<sup>39</sup>

In *Association of Data Processing Service Organizations v. Camp*,<sup>40</sup> the Supreme Court interpreted section 702 as conferring standing on anyone "injured in fact" by agency action if the interest being asserted was "arguably within the zone of interests to be protected or regulated" by the relevant statute.<sup>41</sup> The "zone of interest" standard was hailed by some as liberalizing standing,<sup>42</sup> but condemned by most as "opaque" and vague,<sup>43</sup> "needlessly complex,"<sup>44</sup> "analytically faulty, . . . cumbersome, inconvenient, and artificial."<sup>45</sup> Even the Supreme Court apparently has abandoned the "zone of interest" inquiry.<sup>46</sup> Yet, despite these warnings, Florida courts have permitted the "zone of interest" concept to gain a foothold in Florida administrative law.<sup>47</sup>

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37. K. DAVIS, *supra* note 34, § 22.02, at 211-13; Davis, *Standing to Challenge Governmental Action*, 39 MINN. L. REV. 353, 355-56 (1955); Davis, "Judicial Control of Administrative Action": A Review, 66 COLUM. L. REV. 635, 668-69 (1966); Davis, *Standing: Taxpayers and Others*, 35 U. CHI. L. REV. 601, 617-36 (1968); Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 465-68 (1970) [hereinafter cited as Davis, *Liberalized Law of Standing*]; K. DAVIS, *ADMINISTRATIVE LAW TEXT* 419-22 (3d ed. 1972); 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:3, at 214-19 (2d ed. 1983).

38. Albert, *supra* note 34, at 451 n.105; Scott, *supra* note 34, at 658.

39. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1727 n.285 (1975).

40. 397 U.S. 150 (1970).

41. *Id.* at 152-53.

42. Davis, *Liberalized Law of Standing*, *supra* note 37, at 450; Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359, 367 (1972); Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479, 484-88 (1972).

43. Stewart, *supra* note 39, at 1731.

44. B. SCHWARTZ, *supra* note 34, at 466.

45. Davis, *Liberalized Law of Standing*, *supra* note 37, at 457-58.

46. 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 24:17, at 276-78 (2d ed. 1983).

47. See *Florida Medical Ass'n v. Department of Professional Reg.*, 426 So. 2d 1112, 1114 (Fla. 1st DCA 1983); *City of Panama City v. Board of Trustees of the Internal Improvement Trust Fund*, 418 So. 2d 1132, 1134 (Fla. 1st DCA 1982); *All Risk Corp. v. Department of Labor & Employment Sec.*, 413 So. 2d 1200, 1202 (Fla. 1st DCA 1982); *Agrico Chem. Co. v.*

The federal constitutional and administrative frameworks are not comparable to Florida's. Florida's judicial review provision is not yet fraught with the contradiction and controversy that continue to surround section 702. Under Florida's section 120.68(1) "[a] party who is adversely affected by final agency action is entitled to judicial review." Two of the provision's three critical terms are defined: "party"<sup>48</sup> and "agency action."<sup>49</sup> If the agency action involved is an order, finality is statutorily defined;<sup>50</sup> if the agency action sought to be reviewed is a rule, finality has been judicially defined.<sup>51</sup> The remaining phrase, "adversely affected," is the only phrase common to both the federal and the Florida provisions. Wisely, the Florida courts have begun to develop its meaning by considering its place in Florida's overall statutory and administrative framework.<sup>52</sup> This effort should not be sidetracked by casual references to a common phrase plucked out of federal law and out of context. Section 702 comes with too much baggage, and the freight costs are too high.

The Federal APA and the federal cases interpreting it are irrelevant to the judicial interpretation of the administrative access provisions and the judicial standing provisions in chapter 120. The language differences are significant, and the administrative schemes are not comparable. There is no indication in the history of chapter 120's development that the Federal APA was used as a model. The use of section 702 in *Florida Home Builders* was unfortunate and unnecessary; the passing reference to it in the *Jerry* dictum ought to be ignored. Florida courts should not burden chapter 120 with wholly inappropriate federal baggage.

Department of Env'tl. Reg., 406 So. 2d 478, 480-82 (Fla. 2d DCA 1981), *petition for review denied*, 415 So. 2d 1559 (Fla. 1982).

48. FLA. STAT. § 120.52(11) (1985).

49. *Id.* § 120.52(2).

50. *Id.* § 120.52(10). An order is final "when reduced to writing and filed with the person designated by the agency as clerk." *Id.* This definition of an order was amended by the legislature to reflect the ruling of the court in *Bank of Port St. Joe v. Department of Banking & Fin.*, 362 So. 2d 96 (Fla. 1st DCA 1978).

51. *Florida Admin. Comm'n v. District Court of Appeal, First Dist.*, 351 So. 2d 712, 714 & n.4 (Fla. 1977) (holding that final agency action occurs when a rule is filed with the Department of State).

52. *E.g.*, *School Bd. of Pinellas County v. Noble*, 372 So. 2d 1111 (Fla. 1979); *Daniels v. Florida Parole & Probation Comm'n*, 401 So. 2d 1351 (Fla. 1st DCA 1981), *aff'd sub nom. Roberson v. Florida Parole & Probation Comm'n*, 444 So. 2d 917 (Fla. 1983); *Sarasota County v. Department of Admin.*, 350 So. 2d 802 (Fla. 2d DCA 1977), *cert. denied mem.*, 362 So. 2d 1056 (Fla. 1978); *4245 Corp., Mother's Lounge v. Division of Beverage*, 348 So. 2d 934 (Fla. 1st DCA 1977).

B. Article III "Cases or Controversies" Cases

There is conflict among federal cases whether judicial standing requirements and administrative access requirements are interchangeable. Some early Supreme Court decisions held they were not, but those cases involved situations in which the petitioner, having been permitted to intervene in an agency proceeding, sought to base his right to judicial review of the adverse administrative decision on this intervenor status. The Court ruled that participation in an agency proceeding was controlled by statute, but standing to initiate court review of an agency action could not be maintained unless one had suffered an injury to a personal legal right<sup>53</sup>—the article III standing requirement at the time.<sup>54</sup>

When a federal agency denied intervention in its proceedings and sought to defend its action by urging that judicial standing requirements were not met, several courts did apply the judicial requirements to determine access to the administrative proceeding.<sup>55</sup> Courts taking this approach cited as authority a footnote in *Office of Communication of the United Church of Christ v. FCC*.<sup>56</sup> However, that footnote clearly indicated that the question was not contested by the parties, and the court did not analyze the issue. While practical and theoretical differences between the judicial and the administrative forums were recognized by some courts<sup>57</sup> and commentators,<sup>58</sup> a comprehensive analysis was not undertaken until 1978 when Judge Bazelon wrote his concurring opinion in

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53. *Alexander Sprunt & Son, Inc. v. United States*, 281 U.S. 249, 254-57 (1930); *Pittsburgh & W. Va. Ry. Co. v. United States*, 281 U.S. 479, 486-88 (1930).

54. *Stewart*, *supra* note 39, at 1723-24.

55. *Martin-Trigona v. Federal Reserve Bd.*, 509 F.2d 363, 365-66 (D.C. Cir. 1975); *American Civil Liberties Union v. FCC*, 523 F.2d 1344 (9th Cir. 1975); *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732-33 (D.C. Cir. 1970); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994, 1000 n.8 (D.C. Cir. 1966).

56. 359 F.2d at 1000 n.8 (citations omitted):

All parties seem to consider that the same standards are applicable to determining standing before the Commission and standing to appeal a Commission order to this court. We have, therefore, used the cases dealing with standing in the two tribunals interchangeably.

57. *Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976); *Chemehuevi Tribe of Indians v. FPC*, 489 F.2d 1207, 1212 n.12 (D.C. Cir. 1973), *vacated*, 420 U.S. 395 (1975); *United States v. Board of School Comm'rs of Indianapolis*, 466 F.2d 573, 576-77 (7th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *National Motor Freight Traffic Ass'n v. United States*, 205 F. Supp. 592, 593-94 (D.D.C.), *aff'd*, 371 U.S. 223 (1962) (*per curiam*), *reh'g denied and opinion clarified*, 372 U.S. 246 (1963).

58. K. DAVIS, *supra* note 34, § 22.08, at 239-43; L. JAFFE, *supra* note 34, at 524; Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 726, 767 (1968); *Stewart*, *supra* note 39, at 1748-52.



*Koniag, Inc., Village of Uyak v. Andrus.*<sup>59</sup>

Bazelon's analysis began with the observation that, while federal administrative agencies often exercise adjudicatory power, agencies are not article III courts. Their members do not enjoy life tenure and guaranteed compensation.<sup>60</sup> Thus, the judicial "cases or controversies" limitation is not binding on them. "Congress, in its discretion, can require that any person be admitted to administrative proceedings, whether or not that person has alleged 'injury in fact' or has satisfied the other constitutional standing requirements recognized by the Supreme Court."<sup>61</sup> Also dismissing as inapplicable the so-called prudential rules<sup>62</sup> of standing, Bazelon wrote: "[P]rudential limitations reflect a concern about the limited authority and competence of the judiciary in setting general policy. As such, prudential limitations are no more applicable to administrative agencies than Article III limitations."<sup>63</sup> According to him, standards for determining access to administrative proceedings should be gleaned from the language of the statute. When the statutory language does not supply specific criteria, Judge Bazelon suggested that a functional analysis be used.<sup>64</sup> But "[t]he important point is that administrative standing should be tailored to the functions of the agency, not to arcane doctrine from another area of the law."<sup>65</sup>

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59. 580 F.2d 601, 611-17 (D.C. Cir. 1978) (Bazelon, J., concurring), *cert. denied mem.*, 439 U.S. 1052 (1978).

60. U.S. CONST. art. III, § 1, mandates that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

61. 580 F.2d at 612.

62. The prudential standing limitations mentioned by Judge Bazelon are that the plaintiff assert an interest "'arguably within the zone of interests to be protected or regulated' by the statutory framework within which his claim arises," that the plaintiff assert more than "a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens," and that the plaintiff assert his own rights and interests, rather than those of third parties.

*Id.* (citations omitted).

63. *Id.*

64. Bazelon's functional analysis takes into account the following five factors:

- (1) The nature of the interest asserted by the potential participant.
- (2) The relevance of this interest to the goals and purposes of the agency.
- (3) The qualifications of the potential participant to represent this interest.
- (4) Whether other persons could be expected to represent adequately this interest.
- (5) Whether special considerations indicate that an award of standing would not be in the public interest.

*Id.* at 616.

65. *Id.* The Fifth Circuit Court of Appeals, citing Judge Bazelon's concurring opinion,

The *Florida Home Builders* court and the *Jerry* court justified their reliance on federal cases concerned with the "cases or controversies" limitation on federal court jurisdiction when formulating standards for access to the administrative rule challenge proceeding provided in section 120.56. The *Florida Home Builders* court reached for and cited *Warth v. Seldin*<sup>66</sup> and *Hunt v. Washington State Apple Advertising Commission*<sup>67</sup> through misperception.<sup>68</sup> The *Jerry* court was led to *Sierra Club v. Morton*,<sup>69</sup> *United States v. SCRAP*,<sup>70</sup> *Roe v. Wade*,<sup>71</sup> and *O'Shea v. Littleton*<sup>72</sup> by *Webster's New Collegiate Dictionary*.<sup>73</sup> Among the definitions the court found for the section 120.56(1) word "substantial" was the phrase "not imaginary or illusory."<sup>74</sup> Apparently, it was the word "illusory" that triggered the plunge into the federal case law because, as the *Jerry* court explained, "decisions involving standing in the federal courts often turn upon issues pertaining to whether a person seeking relief has shown that his interests are substantial and not illusory."<sup>75</sup>

Both Florida courts treated standing to invoke federal court jurisdiction and access to a state executive branch proceeding as essentially fungible. Neither court addressed the nature of the particular proceeding or the nature of the forum to which access was sought. If article III judicial standing limitations are inappropriate for determining access to *federal* administrative proceedings, how can they have any relevance for determining access to *state* administrative proceedings? None of the policy considerations underlying article III requirements and the federal prudential rules of standing makes sense in the context of state executive branch proceedings.

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has also rejected use of judicial standing limitations when determining access to administrative agencies. *Ingalls Shipbuilding v. White*, 681 F.2d 275, 285 (5th Cir. 1982), *overruled on other grounds*, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 407 (5th Cir. 1984); *American Trucking Ass'ns v. ICC*, 673 F.2d 82, 85 n.4 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *ECEE, Inc. v. Federal Energy Regulatory Comm'n*, 645 F.2d 339, 349-50 (5th Cir. 1981); *Pennzoil Co. v. Federal Energy Regulatory Comm'n*, 645 F.2d 360, 391 (5th Cir. 1981), *cert. denied mem.*, 454 U.S. 1142 (1982).

66. 422 U.S. 490 (1975).

67. 432 U.S. 333 (1977).

68. *Florida Home Builders*, 412 So. 2d at 353.

69. 405 U.S. 727 (1972).

70. 412 U.S. 669 (1973).

71. 410 U.S. 113 (1973).

72. 414 U.S. 488 (1974).

73. *Jerry*, 353 So. 2d at 1233 n.8.

74. *Id.* at 1233.

75. *Id.*

The Florida Constitution limits administrative agencies to the exercise of "quasi-judicial power."<sup>76</sup> This restriction is not merely unlike article III's limitation; it is the antithesis of that limitation. Federal courts may only exercise judicial power, and only at the behest of a plaintiff who has a "personal stake" in the outcome.<sup>77</sup> Florida administrative agencies may not exercise judicial power at all.

The prudential standing rules were formulated to "limit the role of courts in resolving public disputes"<sup>78</sup> and to define "the proper judicial role relative to the other major governmental institutions in the society."<sup>79</sup> But application of restrictive judicial standing requirements to administrative proceedings of any kind does not limit the role of courts in resolving public disputes; if anything, it limits executive branch agencies in the performance of the responsibilities clearly imposed on them by the legislature. Imposition of judicial standing requirements in the administrative context does not define the proper role of courts relative to other branches of government. It does define the role and limit the function of the executive branch in terms of the judicial model. The policy considerations that inform federal standing rules are turned upside down when those rules are misapplied to state executive branch proceedings. Applied out of context, the rules do not restrict the role of the judiciary, they expand it, and simultaneously frustrate the intended growth and development of other major governmental institutions.

### III. A BETTER APPROACH

Judge Bazelon's prescription for determining access to federal administrative proceedings cannot be totally followed in Florida because of the vast differences between the federal and the Florida administrative procedure statutes and the differences between the federal and Florida administrative structures. There are, however, two aspects of his approach to the problem that can be borrowed and put to good use in Florida. The first is his premise; the second is his functional analysis.

Bazelon's premise is that the best approach to administrative ac-

76. See *supra* note 16.

77. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

78. *Warth v. Seldin*, 422 U.S. at 500.

79. *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 139 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978), *quoted in* *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d at 612 (Bazelon, J., concurring).

cess questions is to reject arcane, judicially conceived constitutional and prudential standing rules and to accept legislatively designed statutory access rules. This approach is sound whether the access question arises in a federal or a state administrative setting. The Florida Legislature, no less than the Congress, could, in its discretion, require that all persons be admitted to administrative proceedings. Persons need not allege "injury in fact" or satisfy the other constitutional or prudential standing requirements recognized as necessary to gain admittance to the courts. Of course, the converse is also true. The Florida Legislature, in its discretion, could require all persons to allege and to prove "injury in fact" to gain admittance to some or all administrative proceedings. The choice lies with the legislature not with the courts.

When a person's right to initiate or to participate in the administrative proceedings authorized by chapter 120 is questioned, the analysis should not be driven by the assumption that the legislature chose to impose judicial standing requirements. Rather, the analysis should focus on the access standard the legislature provided for that particular proceeding. Even casual perusal of the administrative proceedings available under chapter 120 shows that each proceeding has its own statutory access language. Although the language in some is similar to the language in others, none is identical and none is formulated in terms commonly associated with judicial standing requirements. The diversity of language signals the inappropriateness of imposing a single access standard for the seven different administrative proceedings. The absence of "special injury" or "injury in fact" language suggests that the legislature exercised its discretion by deciding to allow persons meeting the various access standards to initiate or participate in the proceedings. Proper respect for legislative authority requires rejection of the assumption that the legislature chose to impose judicial standing rules to determine access to all seven chapter 120 proceedings.

Occasionally, the Florida Legislature expresses its will on the access question with great clarity and specificity. For example, in chapter 380 the legislature identified the participants in the development of regional impact process as including only the owner, the developer, the appropriate regional planning agency, and the state planning agency.<sup>80</sup> Florida courts have had little difficulty applying

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80. FLA. STAT. § 380.07(2) (1985).

chapter 380's access standard because it is so precise.<sup>81</sup> But nothing approaching chapter 380's precision is found in any of chapter 120's access provisions. Sometimes the legislature uses a nonspecific term like "affected person" but then defines the term in precise language. For example, in chapter 163 the legislature provided an opportunity for an "affected person" to challenge administratively a decision by the state land planning agency that a local government comprehensive plan is in compliance with state requirements. "Affected person" for these purposes is defined to mean

the affected local government, persons owning property or residing or owning or operating a business within the boundaries of the local government whose plan is the subject of the review, and adjoining local governments who can demonstrate that adoption of the plan as proposed would produce substantial impacts on the increased need for publicly funded infrastructure, or substantially impact on areas designated for protection or special treatment within their jurisdiction.<sup>82</sup>

In chapter 120, the legislature used similar terms to indicate who is entitled to participate in various proceedings, but left the terms undefined—"any affected person," "any substantially affected person," "any person regulated by an agency or having a substantial interest in an agency rule," "a person timely asserts that his substantial interests will be affected . . . and affirmatively demonstrates . . . that the proceeding does not provide adequate opportunity to protect those interests," "any person substantially affected by a rule," and "the substantial interests of a party are determined by an agency."<sup>83</sup> When viewed in isolation, these nonspecific terms seem to provide little insight into legislative intent. But even nonspecific statutory language may yield useful criteria for determining access if the words are given their common meaning and if the language relating to access is examined carefully and in context. However, relying on plain meaning and context alone to coax meaningful criteria from vague legislative expressions can be risky business. That risk can be minimized by considering certain

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81. See *infra* note 385.

82. Ch. 85-55, § 8, 1985 Fla. Laws 207, 221 (codified at FLA. STAT. § 163.3184(3)(a) (1985)).

83. To be sure, there is an elaborate, if not specific, definition of the word "party" in FLA. STAT. § 120.52(11) (1985). But the word "party" is used in connection with access to only one of the seven administrative proceedings available. Consequently, the definition's usefulness is limited.

extrinsic sources and by introducing the second aspect of Bazelon's approach—a functional analysis—into the search for useful standards.

The purpose of judicial construction of statutes is to ascertain legislative intent. To the extent legislative intent is discoverable from extrinsic sources, it should be used to support or, if necessary, to modify any access standards drawn by attributing plain meaning to vague statutory language. The most valuable extrinsic aids are those reflecting legislative intent during the enactment process—"committee reports, statements of sponsors and other legislators, transcripts of committee hearings and floor debates, and house journals."<sup>84</sup> Because the House bill revising chapter 120 was largely a product of the Florida Law Revision Council, the Council's records are also important extrinsic sources.<sup>85</sup> But as other commentators have observed, "[i]n Florida, anyone interested in statutory history must be both diligent and fortunate."<sup>86</sup> That warning has special significance for anyone researching the history of chapter 120. Little evidence survives from which legislative intent can be gleaned, even though revision of the 1961 Administrative Procedure Act was a legislative priority during the 1974 Regular Session, and the Florida Law Revision Council, at the request of the Speaker of the House of Representatives, undertook a far reaching revision project.

The Law Revision Council records are probably the most complete. The Council contracted with Arthur England to be the reporter on its revision project. England prepared, and the Council debated, five drafts of the proposed revision. The drafts, complete

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84. Rhodes, White & Goldman, *The Search For Intent: Aids To Statutory Construction in Florida*, 6 FLA. ST. U.L. REV. 383, 383 (1978).

85. The Florida Law Revision Council was composed of twelve members, two members of the Senate appointed by the President of the Senate, two members of the House of Representatives appointed by the Speaker of the House, and eight persons, who were either members of the Florida Bar or law faculty members from an accredited college of law in the state, appointed by the Governor. FLA. STAT. § 13.91 (1973). The functions of the Council were to examine the law of the state and to make recommendations "to modify or eliminate antiquated and inequitable rules of law, and to bring the law of the state into harmony with modern conditions." *Id.* § 13.96(1)-(2). In 1977, the Council's name was changed to the Florida Legislative Law Revision Council. Ch. 77-37, § 1, 1977 Fla. Laws 48, 48 (codified at FLA. STAT. § 13.90 (1977)). The appointment process was also changed so that the Senate President appointed four members, at least two of whom were from the Senate; the Speaker of the House appointed four members, at least two of whom were from the House; and the Board of Governors of the Florida Bar appointed four members, who were either members of the Bar or law faculty from an accredited college of law in the state. *Id.*, § 1977 Fla. Laws at 49 (codified at FLA. STAT. § 13.91 (1977)).

86. Rhodes, White & Goldman, *supra* note 84, at 402.

with reporter's comments, are available.<sup>87</sup> The House Committee on Governmental Operations and its Subcommittee on Administrative Procedure conducted public hearings on the various Subcommittee and Law Revision Council drafts. Tape recordings of some of these public hearings still exist.<sup>88</sup> The Senate President directed the Senate Committee on Rules and Calendar to address the more narrow topic of reforming administrative rulemaking.<sup>89</sup> None of the meetings or public hearings conducted by the Senate Rules Committee were tape recorded. Tape recordings of the floor debate in both the House and the Senate exist,<sup>90</sup> but the conference committee neither tape recorded its meetings nor issued a conference committee statement explaining the resolution of differences between the House and Senate versions of the revision.<sup>91</sup> None of the existing tape recordings have been transcribed. Thus, with the exception of the Law Revision Council's records, most of the historical materials are relatively inaccessible. Nevertheless, a complete review of the available historical materials does yield some insight into legislative intent on the question of access standards for several administrative proceedings, and, therefore, should be considered valuable aids in the construction of ambiguous statutory terms.<sup>92</sup>

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87. The work papers of the Council's Reporter, including preliminary materials, the five drafts of the statute and their commentary, are available at the library of the Florida Supreme Court, in the archives of the Law Revision Council on file with the Florida Legislature's Division of Legislative Library Services, and at the Florida State University College of Law Library.

88. Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 11, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.); Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Admin. Procedure, tape recording of proceedings (Jan. 16, 1974 & Apr. 4, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs.).

89. Fla. S., tape recording of proceedings (May 14, 1974) (on file with Secretary) (statement of Sen. Barron).

90. Fla. H.R., tape recording of proceedings (Apr. 17, 1974) (on file with Clerk); Fla. S., tape recording of proceedings (May 14, 1974) (on file with Secretary).

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[R]eports of conference committees generally take the form of brief letters of transmittal to the officers of the two houses, recommending specific amendments to reconcile the differing versions of the legislation. Little is revealed about explicit legislative intent, although much can be inferred by the adoption of one alternative instead of another.

Rhodes, White & Goldman, *supra* note 84, at 395.

92. Florida courts have been willing to consider the Reporter's Comments to determine legislative intent. See *Florida Home Builders Ass'n v. Department of Labor & Employment Sec.*, 412 So. 2d 351, 353 n.2 (Fla. 1982); *Florida Bar v. Moses*, 380 So. 2d 412, 415 (Fla. 1980); *Florida Real Estate Comm'n v. Webb*, 367 So. 2d 201, 203 n.4 (Fla. 1978); *In re Advisory Opinion of the Governor*, 334 So. 2d 561, 562 (Fla. 1976); *City of Plant City v.*

The comments of Representative Hector, Chairman of the Subcommittee on Administrative Procedure, and the reporter's comments on the various draft statutes presented to the Law Revision Council, reflect that in the course of revising chapter 120 the administrative procedure statutes of other states and the Revised Model Act were considered.<sup>93</sup> These comments suggest the possibility of another extrinsic source to be considered in the effort to ascertain the meaning of vague statutory language. If it can be determined that the legislature borrowed language from another state statute which had been construed to have a certain meaning, then that construction ought to be considered evidence of legislative intent in Florida.

Perhaps the most useful aid in determining the meaning of vague statutory language is the function or the purpose the particular proceeding was designed to achieve. In the federal context, rights to participate in agency proceedings are conferred by Congress in the various agencies' organic statutes. Thus, Bazelon's functional analysis stressed the importance of tailoring administrative access to the particular function of the agency in question.<sup>94</sup> Under the Florida scheme, however, rights to initiate and to participate in administrative proceedings are conferred by chapter 120, a general statute applicable to all governmental agencies as defined.<sup>95</sup> Therefore, because the same administrative proceedings may be invoked to check the action of all agencies, the particular functions of the individual agencies are not especially relevant to

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Mayo, 337 So. 2d 966, 970 n.3 (Fla. 1976); *Lewis v. Judges of the Dist. Court of Appeal, First Dist.*, 322 So. 2d 16, 19 (Fla. 1975); *State v. General Dev. Corp.*, 448 So. 2d 1074, 1084 n.28 (Fla. 2d DCA 1984); *Guerra v. Department of Labor & Employment Sec.*, 427 So. 2d 1098, 1101 n.4 (Fla. 3d DCA 1983); *Bigler v. Department of Banking & Fin.*, 368 So. 2d 449, 451 (Fla. 1st DCA 1979), *aff'd mem.*, 394 So. 2d 989 (Fla. 1981); *School Bd. of Broward County v. Constant*, 363 So. 2d 859, 861 (Fla. 4th DCA 1978); *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 582 n.9 (Fla. 1st DCA 1977); *Postal Colony Co. v. Askew*, 348 So. 2d 338, 341 n.3 (Fla. 1st DCA 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978); *School Bd. of Leon County v. Mitchell*, 346 So. 2d 562, 566 n.9 (Fla. 1st DCA 1977), *cert. denied mem.*, 358 So. 2d 132 (Fla. 1978); *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 592 n.12 (Fla. 1st DCA 1977).

93. Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 11, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.). Rep. Hector, in explaining the development of the bill, told the House Committee on Governmental Operations that the APA's of Missouri, Texas, Oregon, and Massachusetts were considered by the Subcommittee on Administrative Procedure. See REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1961, § 6, at 400, 14 U.L.A. 371, 400 (1980) [hereinafter cited as 1961 MODEL ACT].

94. *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d at 615-17 (Bazelon, J., concurring).

95. FLA. STAT. § 120.52(1) (1985).



the access question. Rather, in the context of Florida's chapter 120, the important point is that access standards should be tailored to further the function of each administrative proceeding. Each of the seven administrative proceedings created by chapter 120 has a distinct purpose; each is conceptually different from the others; each is designed to achieve a particular end. The access rule for each proceeding, therefore, should be crafted with a view toward facilitating the purpose of each proceeding established by the legislature.

In the sections that follow, this approach is used to examine each of the administrative proceedings available under chapter 120. A tentative access standard for each proceeding is drawn by attributing plain meaning to the language used by the legislature. That tentative standard is either validated or modified in light of evidence of legislative intent disclosed by extrinsic sources. The standard then is refined by analyzing the function and purpose of the proceeding and determining the extent to which the standard facilitates them. Finally, in each section the cases which have ruled on persons' rights to initiate or to participate in the proceeding under study are critically examined and an alternative analysis based on the access standard developed for that proceeding is presented.

#### IV. ACCESS TO RULEMAKING PROCEEDINGS

Rulemaking under chapter 120 is a complex process. This complexity results from the different approaches taken by the House of Representatives and the Senate during the revision of the Administrative Procedure Act.<sup>96</sup> The House, through its Committee on Governmental Operations and Subcommittee on Administrative Procedure, worked closely with the Law Revision Council on a comprehensive revision of agency rulemaking, adjudication procedures, and judicial review standards.<sup>97</sup> As a result, the bill debated in the House was substantially the same as the final draft approved by the Law Revision Council.<sup>98</sup> The Senate bill, on the other hand, was almost exclusively concerned with agency rulemaking.<sup>99</sup> The conference committee report ultimately ap-

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96. Levinson, *A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts*, 3 FLA. ST. U.L. REV. 72, 74 (1975).

97. Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617, 621-22 (1975).

98. *Id.* at 622.

99. *Id.*

proved by both chambers retained the rulemaking provisions developed by the Law Revision Council and the House—the initiative, the information gathering hearing, and the drawout—and added to them the administrative validity challenge independently developed by the Senate.<sup>100</sup> Consequently, there are four distinct proceedings that may occur during agency rulemaking that offer opportunities for participation in the process to persons having the requisite interest. Because each of the four proceedings has its own access requirements, each provision must be examined separately to determine the nature of the interest a person must have to invoke each process.

### A. *The Initiative Provision*

“Any person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by s. 120.53.”<sup>101</sup> The statutory language recognizes two classes of persons vested with the right to petition an agency for the adoption, amendment, or repeal of a rule. Persons regulated by an agency are included in the first class. Persons with a substantial interest in an existing or proposed agency rule constitute the second.

The first class can be defined narrowly to include only those individuals and businesses licensed by the state. This construction would include members of the professions and occupations regulated by various boards under the Department of Professional Regulation’s supervision: accountants, barbers, cosmetologists, engineers, health care professionals, harbor pilots, real estate agents, and so on, and the highly regulated businesses: alcoholic beverages, banking, insurance, securities, and utilities. Through an initiative

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100. *Id.* at 635.

101. FLA. STAT. § 120.54(5) (1985) (emphasis added). The minimum public information required by § 120.53 includes a description of the agency’s organization, the general course and method of its operations, the ways through which the public may obtain information from the agency and communicate information to the agency, the nature and requirements of all formal and informal procedures used by the agency in its dealings with the public, a list of all forms and instructions used by the agency in dealing with the public, the rules of procedure appropriate for the presentation of arguments on issues of law or policy and for the presentation of evidence on factual disputes, the rules for the scheduling of meetings, hearings, and workshops, and the availability of agenda. In addition, each agency must make available for public inspection and copying all rules formulated, adopted, or used by the agency, all agency orders, and a current subject-matter index to all rules and orders adopted or issued since January 1, 1975. *Id.* § 120.53(1)-(2).

petition submitted to the appropriate agency, any licensed individual or business certainly has the right to try to change the rules governing his profession, occupation, or business. But to limit this class to licensed individuals and businesses is unduly restrictive and is not supported by the language of the provision.

Although the term "license" is defined in chapter 120,<sup>102</sup> it was not used in connection with the initiative provision. Instead, the legislature chose the term "regulated," which has broader reach and connotation. To regulate is to control. Therefore, the first class must be understood to include any person whose conduct is controlled by an agency, that is, any person whose conduct is subject to agency approval or whose conduct must be structured to comply with agency requirements. Under this construction, licensed individuals and businesses remain in the class, but many more are added. For example, agency employees, parolees, state hospital patients, prison inmates, license applicants, public employee unions, and students are considered persons regulated by an agency.

The second category, any person having a "substantial interest" in an agency rule, is more problematic. The "substantial interest" requirement used here and in connection with several other chapter 120 proceedings is a critical but undefined term. Unlike other sections requiring that substantial interests be "affected,"<sup>103</sup> or "determined,"<sup>104</sup> or adequately protected,<sup>105</sup> the initiative provision simply provides that a person have a "substantial interest" in an agency rule. Further, the initiative provision's "substantial interest" requirement is not the sole legislative standard concerning access. It appears in the disjunctive with the phrase "any person regulated by an agency." The breadth of that phrase's coverage, the use of the disjunctive, and the absence of language requiring personal impact suggest an intent, in the context of the initiative provision, to confer the right to petition on persons who would not necessarily be personally affected by a rule, amendment, or repeal proposed by the petition.<sup>106</sup>

102. *Id.* § 120.52(8).

103. *Compare id.* § 120.54(4) with *id.* § 120.56(1).

104. *See id.* § 120.57.

105. *See id.* § 120.54(17).

106. In *Florida Institutional Legal Servs., Inc. v. Florida Parole & Probation Comm'n*, 391 So. 2d 247, 249 (Fla. 1st DCA 1980), the court characterized the initiative provision's access language as "rather liberal . . . in contrast to somewhat more restrictive standards written elsewhere in the APA." Without specifying whether prisoners were persons regulated by the Parole and Probation Commission or were persons with a substantial interest in Commission rules, the court ruled that prisoners were entitled to use the initiative mecha-

### 1. History of the Initiative Provision

This legislative access standard is ambiguous and the history of its development offers no insight into legislative intent. Through all five Law Revision Council drafts, "any person" could petition for the adoption, amendment, or repeal of a rule or to require compliance with the public information provision.<sup>107</sup> The limiting language, "regulated by an agency or having a substantial interest," was later supplied by the legislature. On this point, the Senate and the House basically agreed from the beginning.<sup>108</sup> The language adopted was that drafted by the Senate Committee on Rules and Calendar.<sup>109</sup> Unfortunately, no available record exists explaining why the legislature rejected the more permissive Law Revision Council formulation.

### 2. Initiative Provisions in Other States

Administrative procedure statutes of other states are very similar to each other. But there is little similarity to the Florida provi-

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nism to require Commission compliance with the § 120.53 mandate that each agency adopt certain rules of practice, procedure and organization. *Id.* Access to the initiative process also was granted to Florida Institutional Legal Services, Inc. (FILS) as a "person . . . having a substantial interest" in the Commission's rules. The court recognized that as "a legal service corporation which by contract with the Commission provides indigent inmates representation and other legal services in parole matters," FILS had a "substantial interest" in Commission rules relating to practice, procedure, and organization. *Id.*

107. ADMINISTRATIVE PROCEDURE ACT § 0120.4(4) (Florida Law Revision Council, Reporter's Draft No. 1, with commentary, Oct. 26, 1973) *in* 3 PRELIMINARY MATERIALS DEALING WITH THE FLORIDA ADMINISTRATIVE PROCEDURE ACT 8 (available at the Florida Supreme Court Library and the Florida State University College of Law Library) [hereinafter cited as Reporter's Draft No. 1]; ADMINISTRATIVE PROCEDURE ACT § 0120.4(3) (Florida Law Revision Council, Reporter's Draft No. 2, with commentary, Nov. 30, 1973) *in* 4 PRELIMINARY MATERIALS DEALING WITH THE FLORIDA ADMINISTRATIVE PROCEDURE ACT 11 (available at the Florida Supreme Court Library and the Florida State University College of Law Library) [hereinafter cited as Reporter's Draft No. 2]; ADMINISTRATIVE PROCEDURE ACT § 0120.4(3) (Florida Law Revision Council Reporter's Draft No.3, with commentary, Jan. 5, 1974) *in* 5 PRELIMINARY MATERIALS DEALING WITH THE FLORIDA ADMINISTRATIVE PROCEDURE ACT 11 (available at the Florida Supreme Court Library and the Florida State University College of Law Library) [hereinafter cited as Reporter's Draft No. 3]; ADMINISTRATIVE PROCEDURE ACT § 0120.4(3) (Florida Law Revision Council, Reporter's Final Draft, Mar. 1, 1974) *in* 6 PRELIMINARY MATERIALS DEALING WITH THE FLORIDA ADMINISTRATIVE PROCEDURE ACT 5 (available at the Florida Supreme Court Library and the Florida State University College of Law Library) [hereinafter cited as Reporter's Final Draft].

108. Fla. HB 2672 (1974), Fla. CS for HB 2672, 2434 and 2583 (1974), and Fla. SB 892 (1974), all used the same phrasing: "[a]ny person regulated by an agency or any person representing a class of persons having a substantial interest in an agency rule."

109. Compare Fla. CS for SB 892, sec. 4 (1974) (proposed amendment to FLA. STAT. § 120.041(3)(1973)).

sion. Thirty-nine states and the District of Columbia have initiative provisions in their administrative procedure acts. A majority of them<sup>110</sup> has essentially adopted the language of the 1961 *Revised Model State Administrative Procedure Act* (RMA) which provides: "An interested person may petition an agency requesting the promulgation, amendment, or repeal of a rule. Each agency shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition . . . ."<sup>111</sup> Following the same basic approach, the 1981 *Model State Administrative Procedure Act* (MSAPA) and North Carolina extend the opportunity to "any person,"<sup>112</sup> whereas the Alabama statute leaves the question entirely for agency determination by rule.<sup>113</sup> Several state statutes make no provision for agencies to provide by rule for the filing and disposition of initiative petitions. Of these, six permit "interested persons" to petition;<sup>114</sup> another six permit "any person" to petition;<sup>115</sup> Alaska and California extend the right to an "interested person" except when another statute restricts access to a designated group.<sup>116</sup> The Wisconsin approach (which, although highly commended, has been followed only by Tennessee)<sup>117</sup> extends the right to petition, unless otherwise restricted, to any "municipality, corporation or any 5 or more persons having an interest in a rule."<sup>118</sup> Although its statute does not contain an initiative

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110. CONN. GEN. STAT. ANN. § 4-174 (West Supp. 1985); D.C. CODE ANN. § 1-1506(b) (1981); GA. CODE ANN. § 50-13-9 (1982); HAWAII REV. STAT. § 91-6 (1976); IDAHO CODE § 67-5206 (1980); ILL. ANN. STAT. ch. 127, § 1008(b) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 17A.7 (West 1978); LA. REV. STAT. ANN. § 49:953(C) (West Supp. 1985); MD. STATE GOV'T CODE ANN. § 10-123 (1984); MASS. GEN. LAWS ANN. ch. 30A, § 4 (West 1979); MONT. CODE ANN. § 2-4-315 (1983); NEB. REV. STAT. § 84-910 (1981); NEV. REV. STAT. § 233B.100(1) (1981); N.J. STAT. ANN. § 52:14B-4(f) (West Supp. 1984-1985); OKLA. STAT. ANN. tit. 75, § 305 (West 1976); OR. REV. STAT. § 183.390 (1981); R.I. GEN. LAWS § 42-35-6 (1977); TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1985); UTAH CODE ANN. § 63-46-8 (1978); WASH. REV. CODE ANN. § 34.04.060 (Supp. 1985); WYO. STAT. § 16-3-106 (1982).

111. 1961 MODEL ACT, *supra* note 93, § 6, at 400.

112. MODEL STATE ADMINISTRATIVE PROCEDURE ACT OF 1981, § 3-117, 14 U.L.A. 113-14 (Supp. 1985) [hereinafter cited a 1981 MODEL ACT]; N.C. GEN. STAT. § 150 A-16 (1983).

113. ALA. CODE § 41-22-8 (1982).

114. COLO. REV. STAT. § 24-4-103(7) (1982); MINN. STAT. ANN. § 14.09 (West Supp. 1985); N.H. REV. STAT. ANN. § 541-A:6 (Supp. 1983); N.M. STAT. ANN. § 12-8-7 (1978); S.C. CODE ANN. § 1-23-126 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-13 (1980).

115. ARK. STAT. ANN. § 5-703(c) (1976); DEL. CODE ANN. tit. 29, § 10114 (1983); ME. REV. STAT. ANN. tit. 5, § 8055(1) (1979); MICH. COMP. LAWS ANN. § 24-238 (1981); MO. ANN. STAT. § 536.041 (Vernon Supp. 1984); VT. STAT. ANN. tit. 3, § 806 (Supp. 1984).

116. ALASKA STAT. § 44.62.220 (1984); CAL. GOV'T CODE § 11347 (West 1980).

117. 1 F. COOPER, STATE ADMINISTRATIVE LAW 204-05 (1965).

118. TENN. CODE ANN. § 4-5-201(a) (Supp. 1984); WIS. STAT. ANN. § 227.015(1) (West 1982).

provision, North Dakota permits "any person substantially interested in the effect of a rule"<sup>119</sup> already adopted to petition the agency for reconsideration, amendment, or repeal. Nevertheless, Florida *alone* requires that, in order to petition for the adoption, amendment, or repeal of any agency rule, a person must either be regulated by that agency or have a substantial interest in the rule. Yet, the essential similarity between the language of the North Dakota reconsideration provision and the Florida initiative provision would invite reference to North Dakota case law for aid in defining the meaning of the phrase "substantially interested." Unfortunately, the North Dakota courts apparently have not yet had occasion to construe the provision.

### 3. *Functional Analysis*

The Florida initiative provision was designed to provide a "mechanism for periodic review of agency policies and procedures, with a requirement that the reasons for old rules be re-articulated if continued."<sup>120</sup> The initiative concept has been described aptly by Professor Bonfield as a means of implementing the "ideal of participatory democracy."<sup>121</sup> In his view, it establishes a procedure which

allows the public to prod an agency to action in a way that seeks to ensure that those satisfied with the status quo are forced to reexamine their positions in light of new views and changed conditions. In doing so, . . . [it] clearly benefits those subject to an agency's authority. The provision also benefits the agency and the public-at-large because it ensures wiser and sounder government by directing the agency's attention to situations in which the issuance, amendment, or repeal of rules may be desirable.<sup>122</sup>

The purposes underlying the initiative process argue in favor of broad access rules. Persons whose conduct is subject to agency direction or control certainly are in a position to proffer new ideas, different approaches, and better alternatives based on their experi-

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119. N.D. CENT. CODE § 28-32-04 (Supp. 1983).

120. Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, March 9, 1974, at 16, reprinted in 3 A. ENGLAND & L. LEVINSON, *FLORIDA ADMINISTRATIVE PRACTICE MANUAL* 16 (1979) [hereinafter cited as Reporter's Comments].

121. Bonfield, *The Iowa Administrative Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 *IOWA L. REV.* 731, 892 (1975).

122. *Id.*

ence under existing rules. Surely there are also persons who, though not directly and personally involved in a particular regulatory scheme, are thoughtful observers. Whether qualified by education, experience, position, or concern, these persons, too, are in a position to suggest a reexamination of current policy and to tender alternatives.<sup>123</sup> Neither a regulated person nor a substantially interested person will necessarily prevail on the merits because that decision is a matter of agency discretion. The essential point is that the policy foundations supporting the initiative provision are served when both have the right to require an agency to reexamine its position.

The structure of Florida's initiative provision is such that no agency need be concerned about a flood of "unfounded and 'pestiferous' petitions" if access is widely available.<sup>124</sup> The provision requires the petition to "specify the proposed rule and action requested."<sup>125</sup> A petition proposing the repeal of an existing rule on the theory that no rule on the subject is necessary would be fairly easily drawn. But a petition proposing the repeal of an existing rule and offering an alternative rule, or a petition proposing an amendment to an existing rule, or one proposing a wholly new rule on a subject, requires the petitioner to draft the language that will accomplish the desired end. By requiring that an idea not merely be proposed but be developed in writing, the provision subjects initiative petitioners to a discipline likely to discourage frivolous use even though access to the process is easily available. Any person who undertakes to do an agency's work for it by drafting a proposed rule is necessarily a person having a substantial interest in that rule.

Nor will broad access rules cause an agency to lose control over

123. The so-called "Gordon Rule," FLA. ADMIN. CODE R. 6A-10.30 (1982), requiring state university and community college students to meet certain communication and computation skills requirements as prerequisites for graduation, resulted from an initiative petition submitted to the State Board of Education by State Sen. Gordon. Gordon established his substantial interest in the rule he proposed by showing his interest in education: He was a member of the Dade County School Board from 1960 to 1968; as a state senator, he had served on the Senate Comm. on Educ. for six years, during two of which he was the vice-chairman; he had sponsored numerous bills affecting higher education in Florida; he had been a strong advocate of quality improvements in higher education; he served on the Joint Legislative and Executive Committee on Post-Secondary Education in Florida as well as several national panels concerned with education; and he had received formal recognition from various groups associated with the education community in Florida. *In re Petition for Rulemaking 1-2*, Board of Education Docket No. E-905-81.

124. F. COOPER, *supra* note 117, at 204 (discussing Wisconsin's initiative method).

125. FLA. STAT. § 120.54(5) (1985).

its agenda or the direction or development of its policy. The initiative provision does require an agency response to a petition no later than thirty calendar days after its submission. The agency may respond by giving notice of rulemaking proceedings in accordance with chapter 120 if it determines that the proposed rule is worth pursuing. Or the agency may deny the petition so long as it gives the petitioner a written statement explaining the reasons for the denial.<sup>126</sup> Agency denial of an initiative petition is subject to judicial review but, with one exception, the scope of review is extremely narrow. Ordinarily it must be shown that an agency abused its discretion in denying the petition.<sup>127</sup> The exception occurs when the initiative petition sought the adoption of a rule the agency was required by statute to adopt.<sup>128</sup> In that situation, it would be wholly inappropriate for an agency to deny the initiative petition. But if it did, a reviewing court would reverse and direct the agency to proceed with rulemaking proceedings.

In the initiative context, any person whose conduct is controlled by an agency or any person who is required to tailor his conduct to comply with agency directives, or any person who demonstrates a substantial interest in a rule through education, experience, position, or concern has a right to petition an agency for the adoption, amendment, or repeal of a rule. Whether the petitioner prevails on the merits is entirely within the sound discretion of the agency. Initiative petitions, if they are to be denied, should be denied on their merits with an explanation of the reasons supporting the agency decision. Except in extraordinary circumstances, these petitions should not be denied on grounds of insufficient interest on the petitioner's part.

### B. *The Information Gathering Hearing*

Rulemaking proceedings, whether in response to an initiative petition or on an agency's own motion, are begun by the agency giving public notice in compliance with section 120.54(1). If the proposed rule is not one relating exclusively to organization, practice, or procedure, "the agency shall, on the request of *any affected person* . . . , give *affected persons* an opportunity to present evidence

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126. *Id.*

127. *Citizens of Florida v. Mayo*, 357 So. 2d 731, 733 (Fla. 1978); *Freeman v. Department of Health & Rehab. Servs.*, 436 So. 2d 964, 965 (Fla. 3d DCA 1983).

128. *See, e.g., Florida Institutional Legal Servs., Inc. v. Florida Parole & Probation Comm'n*, 391 So. 2d 247, 249 (Fla. 1st DCA 1980).



and argument on all issues under consideration appropriate to inform it of their contentions."<sup>129</sup>

This provision recognizes two categories of persons. Certain defined persons may request an opportunity to inform the agency of their positions regarding the proposed rule. There is another perhaps overlapping category of persons to whom this informing opportunity must be extended once it has been appropriately requested. While it would not be unusual to require that a person who initiates a proceeding have a greater interest in the proposed rule than persons who are allowed to participate in the proceeding once the machinery is in motion, the language in the Florida provision does not make that distinction. Both groups, requesters and participants, must in some way be "affected" by the rule under consideration. It is clear from the language that the effect on these persons need not necessarily be adverse. However, some interest of the persons in both categories must be acted on or changed by the proposed rule for "affected person" status to be afforded.

### 1. *History of the Information Gathering Hearing*

The history of this provision is somewhat more instructive of the legislative intent than is the history of the initiative provision. The first two Law Revision Council drafts provided an opportunity for a public hearing at the request of "any interested person"; the public hearing was to be one appropriate to allow "interested persons" to inform the agency.<sup>130</sup> Beginning with the third draft and continuing through the final draft, the Law Revision Council set forth a different formulation: the opportunity for public hearing was to be at the request of "any person" and "interested persons" were to be given an opportunity to inform the agency.<sup>131</sup> It was during the House Administrative Procedure Subcommittee's review of the Law Revision Council's third draft and the House bill (which reflected the Council's second draft on this point) that dissatisfaction with both formulations was expressed. The Subcom-

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129. FLA. STAT. § 120.54(3)(a) (1985) (emphasis added).

130. Reporter's Draft No. 1, *supra* note 107, § 0120.4(3), at 8; Reporter's Draft No. 2, *supra* note 107, § 0120.4(2), at 10.

131. Reporter's Draft No. 3, *supra* note 107, § 0120.4(2), at 10; ADMINISTRATIVE PROCEDURE ACT § 0120.4(2) (Florida Law Revision Council, Reporter's Draft No. 4, with commentary, Feb. 4, 1974) in 6 PRELIMINARY MATERIALS DEALING WITH THE FLORIDA ADMINISTRATIVE PROCEDURE ACT 11 (available at the Florida Supreme Court Library and the Florida State University College of Law Library) [hereinafter cited as Reporter's Draft No. 4]; Reporter's Final Draft, *supra* note 107, § 0.120.4(2), at 5.

mittee informally agreed to amend the House bill to bring it into compliance with draft three from the Law Revision Council. This dialogue then took place:

DEPARTMENT OF CITRUS GENERAL COUNSEL: You're not relating it to any affected or interested person? For instance, speaking as general counsel for the Department of Citrus now, and it adopts a rule pertaining to processors of citrus fruit. You mean by that that a sweet corn grower in South Florida can come in and request a public hearing on the rule and be granted a public hearing?

REPRESENTATIVE HECTOR: Well, what should we add to take care of that problem?

DEPARTMENT OF CITRUS GENERAL COUNSEL: Well, in your proposal [HB 2672], you say interested person and I'm not sure that that's the right word. It might be any affected person.

WADE HOPPING: The word affected, you'll find the definition in the other statutes. You'll find it at least used in [chapter] 403, and you'll find it used in [chapter] 380. And maybe that's a good observation.<sup>132</sup>

ROBERT RHODES: It narrows your standing.

WADE HOPPING: It narrows standing, but it allows anybody who can show standing to get in and it's not that tough.<sup>133</sup>

The Subcommittee then amended the House bill to provide that any "affected person" could request an opportunity to inform the agency. Without further discussion and apparently in the interest of consistency,<sup>134</sup> the qualification of persons permitted to partici-

132. Examination of FLA. STAT., ch. 380 (1973), discloses no use of "affected." The word is used in FLA. STAT. §§ 403.051(1), 051(5), 412(2)(c) (1973), but is not defined and as of the date of Mr. Hopping's statement had not been construed in any case.

133. Fla. H.R., Comm. on Govtl. Ops., Subcomm. on Admin. Procedure, tape recording of proceedings (Apr. 4, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.). Rep. Hector was the Chairman of the Subcommittee. Wade Hopping was the Chairman of the Law Revision Council and Robert Rhodes was the Bureau Chief of the Fla. Div. of State Planning, Bureau of Land & Water Mgt.

134. *Id.*

REP. HECTOR: "How about the word 'interested' on line 29?" [Referring to the persons who could participate in the public hearing.]

WADE HOPPING: "Well, we need to keep the words alike. We could use the 'affected' there too, do we not?" [sic].

pate in the proceedings was changed from "interested" to "affected."<sup>135</sup>

The Senate bill, as introduced, used the same language as the committee substitute for the House bill.<sup>136</sup> The bill that passed the Senate, however, made no provision for requesting an information gathering hearing on a proposed rule.<sup>137</sup> The conference committee report approved by both chambers contained the language accepted by the House Subcommittee.<sup>138</sup>

The record of the House Subcommittee debate on the question is far from exhaustive, but it does support the construction tendered earlier. An advertent decision was made, at least with respect to the requester, that an opportunity to inform an agency about one's position on a proposed rule be extended only to a person who in some way is to be affected by that rule. For example, a sweet corn grower in South Florida may be interested in and concerned about rules regulating citrus processors, but the choice that was made demands more than interest or concern. Unless the rule directed at citrus processors will have some impact on the sweet corn grower, the grower is not an "affected person" for purposes of requesting or participating in any public hearing held on the rule.

## 2. *Information Gathering Hearings in Other States*

Substantially all state administrative procedure acts make provision for *interested persons* to submit their views to agencies prior to the adoption, amendment, or repeal of a rule. A majority of states<sup>139</sup> has adopted language modeled on the 1961 RMA, which

REP. HECTOR: "I think so."

135. Fla. CS for HB 2672, 2434, 2583, sec. 1 (1974) (proposed amendment to FLA. STAT. 120.54(2) (1974)).

136. Fla. SB 892, sec. 1 (1974) (proposed FLA. STAT. 120.54(2)).

137. Fla. CS for SB 892, sec. 1 (1974) (referring to proposed FLA. STAT. 120.54(2) (Supp. 1974)).

138. FLA. H.R. JOUR. 1328 (Reg. Sess. 1974); FLA. S. JOUR. 907 (Reg. Sess. 1974).

139. ALA. CODE § 41-22(5)(a)(2) (1982); ALASKA STAT. § 44.62.210(a) (1984); ARIZ. REV. STAT. ANN. § 41-1002(D) (1985); ARK. STAT. ANN. § 5-703(a)(2) (1976); CAL. GOV'T CODE § 11346.8(a) (West Supp. 1985); CONN. GEN. STAT. ANN. § 4-168(a)(3) (West Supp. 1985); D.C. CODE ANN. § 1-1506(a) (1981); GA. CODE ANN. § 50-13-4(a)(2) (Supp. 1985); HAWAII REV. STAT. § 91-3(a)(2) (Supp. 1984); IDAHO CODE § 67-5203(a)(3) (Supp. 1985); ILL. ANN. STAT. ch. 127, § 1005.01(a)(5) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 17A-4(1)(b) (West Supp. 1985); LA. REV. STAT. ANN. § 49:953A(2)(a) (West Supp. 1985); MASS. GEN. LAWS ANN. ch. 30A, § 3 (West Supp. 1985); MINN. STAT. ANN. § 14.10 (West Supp. 1985); MONT. CODE ANN. § 2-4-302(4) (1983); NEV. REV. STAT. § 233B.061 (1983); N.H. REV. STAT. ANN. § 541-A:3-c(I) (Supp. 1983); N.J. STAT. ANN. § 52:14B-4(a)(3) (West Supp. 1985); N.D. CENT. CODE § 28-32-02 (Supp. 1983); OKLA. STAT. ANN. tit. 75, § 303(A)(2) (West Supp. 1984-1985); OR. REV. STAT. § 183.335(3) (1981); R.I. GEN. LAWS § 42-35-3(a)(2) (1977); S.C. CODE ANN. § 1-23-

provides that prior to the adoption, amendment, or repeal of any rule, the agency shall "afford all *interested persons* reasonable opportunity to submit data, views, or arguments, orally or in writing."<sup>140</sup> The 1981 MSAPA<sup>141</sup> and several states<sup>142</sup> extend an opportunity to *all persons* to submit, in writing, argument, data, and views on proposed rules.

Some state statutes require a public hearing to be held before any rule may be adopted.<sup>143</sup> Still others impose a public hearing only if required by another statute.<sup>144</sup> California requires a public hearing if one is requested by an *interested person*.<sup>145</sup> A large number of states<sup>146</sup> essentially follows the approach of the 1961 RMA regarding public hearings on proposed rules. The RMA provides that "[i]n case of substantive rules, opportunity for oral hearing must be granted if requested by 25 persons, by a governmental subdivision or agency, or by an association having not less than 25 members."<sup>147</sup> Some state statutes make a public hearing available

110(b)(2) (Law. Co-op. Supp. 1983); TEX. REV. CIV. STAT. ANN. art. 6252-13a (Vernon Supp. 1985); UTAH CODE ANN. § 63-46-5(1)(b) (1978); VA. CODE § 9-6.14:7.1(B) (Supp. 1984); WASH. REV. ANN. CODE § 34.04.025(1)(b) (Supp. 1985); WIS. STAT. ANN. § 227.022(1) (West 1982); WYO. STAT. § 16-3-103(a)(ii) (Supp. 1985).

140. 1961 MODEL ACT, *supra* note 93, § 3(a)(2), at 387 (emphasis added).

141. 1981 MODEL ACT, *supra* note 112, § 3-104(a), at 98.

142. DEL. CODE ANN. tit. 29, § 10116 (1983); ME. REV. STAT. ANN. tit. 5, § 8053(3)(C) (Supp. 1984-1985); MISS. CODE ANN. § 25-43-17 (Supp. 1984); MO. ANN. STAT. § 536.021(2)(5) (Vernon Supp. 1984); N.Y. A.P.A. § 202(1)(a) McKinney (Supp. 1984-1985).

143. COLO. REV. STAT. § 24-4-103(4) (Supp. 1984); IND. CODE ANN. § 4-22-2-4 (Burns 1982); KAN. STAT. ANN. § 77-421(b) (1984); KY. REV. STAT. ANN. § 13A.270 (Michie 1985) (with provision for canceling the hearing if no written request to appear is received from any person desiring to be heard); MICH. COMP. LAWS ANN. § 24.241(1) (West Supp. 1985); MINN. STAT. ANN. § 14.14(1) (West Supp. 1985); NEB. REV. STAT. § 84-907 (1981); NEV. REV. STAT. § 233B.061 (1983) (limited to substantive rules with proviso that if no one appears who will be directly affected by the proposed rule, the agency may proceed to act upon any written comments received); N.M. STAT. ANN. § 12-8-4(A)(3) (1978) (with provision that if agency determines oral proceedings would be unnecessary or impracticable, it may require written submissions); N.C. GEN. STAT. § 150A-12(a) (1983); OHIO REV. CODE ANN. § 119.03(C) (Page Supp. 1984); S.D. CODIFIED LAWS § 1-26-4(4) (Supp. 1984); TENN. CODE ANN. § 4-5-204(a) (Supp. 1984).

144. DEL. CODE ANN. tit. 29, § 10117 (1983); ME. REV. STAT. ANN. tit. 5, § 8052(1) (1979) (with provision for hearing if requested by five interested persons); MASS. GEN. LAWS ANN. ch. 30A, § 2 (West 1979); MO. ANN. STAT. § 536.021(3) (Vernon Supp. 1984).

145. CAL. GOV'T CODE § 11346.8(a) (West Supp. 1985).

146. GA. CODE ANN. § 50-13-4(a)(2) (Supp. 1985); IDAHO CODE § 67-5203(a)(3) (Supp. 1984); LA. REV. STAT. ANN. § 49:953A(2)(a) (West Supp. 1985); MONT. CODE ANN. § 2-4-302(4) (1983); OKLA. STAT. ANN. tit. 75, § 303(a)(2) (West Supp. 1984-1985); R.I. GEN. LAWS § 42-35-3(a)(2) (1977); TEX. REV. CIV. STAT. ANN. art. 6252-13a, (Vernon Supp. 1985); UTAH CODE ANN. § 63-46-5(1)(b) (1978); WASH. REV. CODE § 34.04.025(1)(b) (West Supp. 1985); WYO. STAT. § 16-3-103(a)(ii) (Supp. 1985).

147. 1961 MODEL ACT, *supra* note 93, § 3(a)(2), at 387.

for all rules, not just substantive rules, at the request of a specific number of persons, a governmental subdivision or agency, or an association having no fewer than a specified number of members.<sup>148</sup> Several state statutes permit either the Governor or a legislative committee to request a public hearing.<sup>149</sup> New Jersey permits only a committee of the legislature or a governmental subdivision or agency to request a public hearing on a proposed rule, but agencies may use informal conferences to solicit the views of interested persons.<sup>150</sup> Montana and Wisconsin require a specified number of persons to request a public hearing and also require that those persons be affected by the proposed rule.<sup>151</sup> Ohio requires a public hearing prior to the adoption of any rule, but only persons affected by the rule may participate.<sup>152</sup> No state other than Florida permits a single "affected person" to require the convening of a public hearing on a proposed rule at which "affected persons" may submit their views to the agency.

### 3. *Functional Analysis*

An access standard that requires demonstration of some effect, while more limited than one that requires only a showing of interest or concern,<sup>153</sup> is not incompatible with the purposes of the information gathering proceeding. The purposes served in this setting are similar to those served by the initiative process. The information gathering proceeding is designed to enable the agency to become informed about its proposed rule and to implement the

148. CONN. GEN. STAT. ANN. § 4-168(a)(3) (West Supp. 1985); ILL. ANN. STAT. ch. 127, § 1005.01(a) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 17A.4(1)(b) (West Supp. 1985); N.H. REV. STAT. ANN. § 541-A:3-c(I) (Supp. 1983); OR. REV. STAT. § 183.335(3) (1981); S.C. CODE ANN. § 1-23-110(b)(2) (Law. Co-op. Supp. 1983); VT. STAT. ANN. tit. 3, § 840(a) (Supp. 1984); WIS. STAT. ANN. § 227.02(1)(e) (West 1982).

149. ILL. ANN. STAT. ch. 127, § 1005.01(a) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 17A-4(1)(b) (West Supp. 1985); LA. REV. STAT. ANN. § 49:953A(2)(a) (West Supp. 1985); MONT. CODE ANN. § 2-4-302(4) (1983); WASH. REV. CODE ANN. § 34.04.025(1)(b) (West Supp. 1985); see also 1981 MODEL ACT, *supra* note 112, § 3-104(b), at 98.

150. N.J. STAT. ANN. § 52:14B-4(a)(3) (West Supp. 1985).

151. MONT. CODE ANN. § 2-4-302(4) (1983); WIS. STAT. ANN. § 227.02(1)(e) (West 1982) (applies to substantive rules only).

152. OHIO REV. CODE ANN. § 119.03(C) (Page Supp. 1984).

153. Commenting on the Iowa statute's use of the word "interested" in connection with the opportunity it grants to submit written comments to agencies, Professor Bonfield said: "The term 'interested person' means quite literally anyone who cares enough to do so. There is no concept or requirement of standing. All citizens have an 'interest' in the making of sound law and, therefore, any person who wants to is given a right to comment in writing." Bonfield, *supra* note 121, at 852.

“ideal of participatory democracy.”<sup>154</sup> Both purposes are served by providing a formal mechanism for the presentation of views regarding proposed agency policy by persons who will be affected by that policy. The Law Revision Council viewed the opportunity of “interested persons” to be heard on proposed substantive rules as a matter of “fundamental fairness.”<sup>155</sup> But it cannot be said to be fundamentally unfair to require a person who puts the public hearing machinery in motion to show some impact on his interests caused by the proposed rule.

Requiring those who attend and wish to participate at the hearing to provide a showing of impact is more troublesome. Any person who cares enough about what government is doing, and who has something to offer which might be useful to the decisionmakers, ought to be heard. Untoward results which undermine the policy foundations of both the initiative and the information gathering hearing provisions could occur if only “affected persons” were allowed to participate in the public hearing. For example, it is conceivable that an initiative petitioner, who demonstrated substantial interest in a rule that he proposed but which would not affect him personally, would be unable to participate at the information gathering hearing held on his proposed rule. Happily, this problem seems more theoretical than real. There are no reported cases involving the question. It appears that common sense and good public relations instincts, if not the law, have inclined agencies in Florida to hear from those who wish to be heard.

The information gathering hearing provision is designed to accommodate agency interests in efficiency. An opportunity for a hearing need only be made available when the proposed rules are substantive. Rules relating exclusively to organization, practice, and procedure are viewed as matters of internal agency concern not requiring outside participation in their development.<sup>156</sup> An agency is not required to make available an opportunity for comment unless one is requested by an “affected person.” Thus, an agency is spared the time, expense, and delay of soliciting views on uncontroversial proposals.<sup>157</sup> Unless a public hearing at which oral presentation can be made is demanded, the opportunity to com-

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154. *Id.* at 892; see *Balino v. Department of Health & Rehab. Servs.*, 362 So. 2d 21 (Fla. 1st DCA 1978), *cert. denied*, 370 So. 2d 458, *appeal dismissed*, 370 So. 2d 462 (Fla. 1979).

155. Reporter's Comments, *supra* note 120, at 15.

156. FLA. STAT. § 120.54(3) (1985).

157. See *Dore, Rulemaking Innovations Under the New Administrative Procedure Act*, 3 FLA. ST. U.L. REV. 97, 98 (1975).

municate views can be limited to written submissions.<sup>158</sup> The statute does require that a record of the proceedings be kept<sup>159</sup> and that any pertinent information received at a public hearing or submitted to the agency in writing be made a part of that record.<sup>160</sup> The statute also requires that "affected persons" be given an adequate opportunity to present evidence and argument on all issues under consideration to inform the agency of their contentions.<sup>161</sup> The statute does not specify who must conduct the proceeding. Thus, except in cases involving particularly sensitive rules, an agency staff member rather than the agency head conducts the proceeding. Beyond these minimum statutory guidelines, the structure of the information gathering hearing is left to the agency.

The information gathering hearing has been likened to a fact gathering legislative hearing.<sup>162</sup> It is not intended to be adversarial. Agencies have been reminded by the courts that they have an "affirmative duty to inform [themselves] to the fullest extent possible of the interest[s] and problems of those who seek to present evidence and argument. . . . [They have] no right, as a litigant in an adversary proceeding might have, to protect [themselves] from evidence or argument that may be unfavorable."<sup>163</sup> Although a record must be kept of all evidence and argument, oral and written, submitted to the agency for its consideration, a proposed rule need not be supported by competent and substantial evidence in that record.<sup>164</sup> A party to an information gathering hearing who is adversely affected by the agency's decision to adopt a proposed rule may seek judicial review of that final agency action.<sup>165</sup> The constitutionality of the statute authorizing the rule,<sup>166</sup> the constitutionality of the rule,<sup>167</sup> the fairness of the rulemaking proceedings them-

158. *Id.* The provision was amended in 1978 to authorize the Department of Corrections to limit prisoner opportunity to comment on proposed rules to written submissions. Ch. 78-28, § 2, 1978 Fla. Laws 28, 29 (current version at FLA. STAT. § 120.54(3) (1985)).

159. FLA. STAT. § 120.54(6) (1985).

160. *Id.* § 120.54(3).

161. *Id.*

162. *Balino*, 362 So. 2d at 24 (citations omitted); see *Dore*, *supra* note 157, at 98.

163. *Balino*, 362 So. 2d at 24.

164. *General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984); *Polk v. School Bd. of Polk County*, 373 So. 2d 960, 962 (Fla. 2d DCA 1979).

165. FLA. STAT. § 120.68(1) (1985); see *City of Key West v. Askew*, 324 So. 2d 655, 658 (Fla. 1st DCA 1975).

166. See *Cross Key Waterways v. Askew*, 351 So. 2d 1062, 1063 (Fla. 1st DCA 1977), *aff'd*, 372 So. 2d 913 (Fla. 1978).

167. See *Rice v. Department of Health & Rehab. Servs.*, 386 So. 2d 844, 848-50 (Fla. 1st DCA 1980).

selves,<sup>168</sup> and the adequacy of the rule's economic impact statement<sup>169</sup> all may be raised on judicial review of the rule by an adversely affected party to the information gathering hearing. But the wisdom of the agency's policy choice, so long as it is within its statutory authority and not arbitrary or capricious, is not an appropriate matter for court review.<sup>170</sup>

The nature of this process and its practical operation in the overall scheme established by chapter 120 support the legislature's decision that a person who would require the agency to hold a public information gathering hearing at which it must receive all pertinent evidence and argument concerning the proposed rule in order to become better informed, must be a person whose interests are in some fashion affected by the proposed rule. The legislative decision that only "affected persons" may participate in the public information gathering hearing once it has been initiated is less clearly supported. A process intended to foster communication between the government and the people would better achieve that goal if any interested or concerned person were given the opportunity to participate in the dialogue. The legislature's decision to restrict the opportunity to "affected persons" was not reached after thoughtful debate, but in response to an offhand remark that the words need to be kept alike.<sup>171</sup> The legislature ought to revisit the information gathering hearing provision and amend it to extend the right of participation to any interested person. The right to trigger a hearing ought to remain only with an "affected person." Consistency of language here is not valuable.

### C. *The Drawout Provision*

Ordinarily, agency rulemaking is governed by section 120.54. As discussed above, this means that a person affected by the proposed rule can compel the convening of a legislative type information gathering hearing at which all affected persons may make their views about the rule under consideration known to the agency.

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168. See *Balino*, 362 So. 2d at 26.

169. See *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944 (Fla. 1979); *Cortese v. School Bd. of Palm Beach County*, 425 So. 2d 554, 557-58 (Fla. 4th DCA 1982), *petition for review denied*, 436 So. 2d 98 (Fla. 1983); *Polk v. School Bd. of Polk County*, 373 So. 2d 960 (Fla. 2d DCA 1979).

170. FLA. STAT. § 120.68(9), (12)(a) (1985); see *Citizens of Fla. v. Mayo*, 357 So. 2d 731, 733 (Fla. 1978); *Cortese*, 425 So. 2d 554; *Plantation Residents' Ass'n, Inc. v. School Bd. of Broward County*, 424 So. 2d 879, 881 (Fla. 1st DCA 1982), *petition for review denied*, 436 So. 2d 100 (1983).

171. See *supra* note 134 and accompanying text.



However, section 120.54(17), the so-called drawout provision, provides a means for a person to trigger an adjudicatory proceeding pursuant to section 120.57. Drawout from a section 120.54(3) information gathering proceeding into a section 120.57 adjudicatory proceeding is available to a person who "timely asserts that *his substantial interests will be affected* in the proceeding and affirmatively demonstrates to the agency that the [120.54(3)] proceeding does not provide adequate opportunity to protect those interests."<sup>172</sup> If the agency agrees that the information gathering hearing procedures will not provide adequate protection, the agency must suspend that proceeding and convene a separate proceeding under the provisions of section 120.57. Similarly situated persons may intervene. At the conclusion of the adjudicatory proceeding, the information gathering hearing is resumed.

The right to request a drawout is not available to all "affected persons" participating in an information gathering hearing. The statutory requirement that "his substantial interests will be affected" requires showing more than mere effect. The use of the personal pronoun suggests legislative intent that the drawout petitioner's own interests must be at stake. The use of the adjective "substantial" suggests that the interests affected must be important or significant personal interests. The use of the noun "interests" rather than "rights," "privileges," or "immunities" suggests that the drawout petitioner's "substantial interests" do not have to rise to the level of legally recognized and protected rights, privileges, or immunities. Rather, any important or significant concern personal to the petitioner is sufficient. The final requirement, that these substantial interests "will be affected in the proceeding," is curious. After all, the proceeding referred to is an information gathering hearing at which "affected persons" talk and agency representatives listen; the hearing is nonadversarial; no one's interests are adjudicated. The required showing of effect actually goes to the product of the proceeding rather than to the proceeding itself.<sup>173</sup> That is, if the agency adopts as a rule the proposal under consideration at the information gathering hearing, some important or significant interest of the drawout petitioner will be affected.

### 1. *History of the Drawout Provision*

The history of the drawout provision shows that it evolved as

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172. FLA. STAT. § 120.54(17) (1985) (emphasis added).

173. Levinson, *supra* note 96, at 77.

part of the adjudicatory hearing provision. There was no access requirement as such in any of the preliminary Law Revision Council drafts. The first three drafts called for adjudicatory procedures to be instituted "whenever proposed agency action involves a disputed issue of material fact, of policy, or of the interpretation of a provision having the effect of law, or whenever a statute other than this act requires a hearing."<sup>174</sup> In the fourth draft, adjudicatory procedures were to apply "in all contested cases" which involved disputed material facts, policy, or interpretations of provisions having the effect of law.<sup>175</sup> The turn away from "proposed agency action" involving disputed issues of fact or policy to "contested cases" involving such disputes would seem to have precluded the provision's application to agency rulemaking. The reporter's comment continued to maintain, however, that the provision was applicable whether the matter was "adjudicatory in nature, or a rulemaking proceeding."<sup>176</sup>

The requirement that one's "substantial interests will be affected in the proceeding" first appeared in the Law Revision Council's final draft.<sup>177</sup> The bill debated and approved by the House contained the "substantial interest" requirement as formulated in the Law Revision Council's final draft.<sup>178</sup> The bill passed by the Senate did not address administrative adjudication, and consequently it did not provide for the drawout.<sup>179</sup> The conference committee report passed by both houses contained the House language on the drawout.<sup>180</sup> There is no record available of the Law Revision Council or the House committee discussions concerning the decision to make the drawout opportunity available to a person who asserts that "his substantial interests will be affected" in the information gathering proceeding. However, Professor Harold Levinson,

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174. Reporter's Draft No. 2, *supra* note 107, § 0120.6, at 16; Reporter's Draft No. 3, *supra* note 107, § 0120.6, at 16; *see* Reporter's Draft No. 1, *supra* note 107, § 0120.6, at 14 (stating that "[w]henever the action of an agency involves a disputed issue of material fact, of policy, or of the interpretation of a provision having the effect of law, the provisions of this section shall apply").

175. Reporter's Draft No. 4, *supra* note 131, § 0120.6, at 16.

176. *Id.* at 17 (Reporter's Comment).

177. Reporter's Final Draft, *supra* note 107, § 0120.6, at 16.

178. Fla. CS for HB 2672, 2434, 2583, sec. 1 (1974) (proposed FLA. STAT. § 120.57).

179. Fla. CS for SB 892 (1974). Fla. SB 892, sec. 1 (1974) (proposed FLA. STAT. § 120.57), as introduced, did contain the same drawout language as in the approved House bill.

180. FLA. H.R. JOUR. 1330 (Reg. Sess. 1974) (referring to proposed FLA. STAT. § 120.57); FLA. S. JOUR. 909 (Reg. Sess. 1974) (same). The drawout provision was subsequently relocated to § 120.54(15) in 1976; *see* Ch. 76-131, § 3, 1976 Fla. Laws 216, 221 (current version at FLA. STAT. § 120.54(17) (1985)).

who chaired the administrative law committee which was primarily responsible for the development of the Law Revision Council's proposal, subsequently explained that the phrase "substantial interests" was chosen deliberately by the Council to expand the "right to a hearing—whether formal or informal—beyond that which was recognized under prior law."<sup>181</sup>

## 2. Drawout Provisions in Other States

The drawout provision is one of the major innovations brought about with the 1974 revision of chapter 120. Neither the 1961 RMA nor the 1981 MSAPA contains a similar provision. No other state administrative procedure statute has a drawout provision. The Florida statute is unique in this regard.

## 3. Functional Analysis

Florida's drawout provision represents a rejection of "unthinking adherence to 'rule-making' and 'adjudication' procedures, as if the two were wholly distinct and distinguishable."<sup>182</sup> By expressly recognizing that "agency proceedings frequently affect individual rights and create general policy at the same time, so that they partake of adjudication and rule-making at the same time,"<sup>183</sup> the provision encourages welcome flexibility in the administrative process. Procedural rights no longer depend on a rigid adherence to an anachronistic bright line distinction between adjudication and rulemaking.<sup>184</sup> Rather, the provision is designed to increase administrative fairness "by focusing attention on the rights affected rather than the labels given a particular process."<sup>185</sup> Thus, the purpose of the drawout provision is to enable a person whose "substantial interests will be affected in the proceeding" to insist on the procedural safeguards necessary to protect those interests whether or not those procedural protections are usually associated with the information gathering hearing held in connection with rulemaking.

The access requirement drawn from the plain meaning of the provision's language above fully comports with the sparse available evidence of the drafters' intent, as well as with the policy consider-

181. Levinson, *supra* note 96, at 77.

182. Reporter's Comments, *supra* note 120, at 6.

183. *Id.*

184. *Id.* at 6-7; see also Kennedy, *A National Perspective of Administrative Law and the Florida Administrative Procedure Act*, 3 FLA. ST. U.L. REV. 65, 69 (1975).

185. Reporter's Comments, *supra* note 120, at 6.

ations underlying the drawout provision. Any affected participant in an information gathering hearing who claims his important or significant concerns will be affected if the agency adopts the proposed rule under consideration satisfies the statutory prerequisite necessary to proceed to the next step in accomplishing the desired drawout.

Having established the requisite effect on important or significant personal concerns, the drawout petitioner must next "affirmatively demonstrate to the agency that the proceeding does not provide adequate opportunity to protect those interests."<sup>186</sup> It is only if the petitioner successfully carries this burden of persuasion that the information gathering hearing must be suspended and a separate adjudicatory proceeding convened. It is incumbent on the petitioner to request the specific procedural protections he thinks are necessary to protect his substantial interests. For example, the petitioner may assert a need to examine or cross-examine certain named witnesses under oath, or to subpoena named reluctant witnesses. Whatever the nature of the asserted need, it must be accompanied by a specific proffer of the facts to be adduced through each witness, and an explanation of why the evidence sought to be elicited through examination or cross-examination of these witnesses is necessary to protect his substantial interests.<sup>187</sup>

The agency for its part must exercise the discretion vested in it by section 120.54(17).<sup>188</sup> It must determine which, if any, of the requested procedures are necessary to protect the petitioner's substantial interests. The agency may then either extend the necessary procedural protections to the petitioner in the information gathering hearing, or if that response is inconvenient or inappropriate, suspend the proceeding and convene an adjudicatory proceeding. The reported cases concerning the availability of the drawout disclose a fundamental misperception about the provision on the part of petitioners.<sup>189</sup> They assert an entitlement to a section 120.57 proceeding, but the provision does not entitle a petitioner to a section 120.57 adjudicatory proceeding. The petitioner is only entitled to those procedural protections that he can affirma-

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186. FLA. STAT. § 120.54(17) (1985).

187. *Balino*, 362 So. 2d at 26.

188. *Corn v. Department of Legal Affairs*, 368 So. 2d 591, 592-93 (Fla. 1979); see *Bert Rogers Schools of Real Estate v. Florida Real Estate Comm'n*, 339 So. 2d 226 (Fla. 4th DCA 1976), *cert. denied*, 348 So. 2d 947 (Fla. 1977).

189. See *Cortese v. School Bd. of Palm Beach County*, 425 So. 2d 554, 555-56; *Bert Rogers Schools of Real Estate*, 339 So. 2d at 227-28.

tively demonstrate are necessary to protect his substantial interests. Only if he succeeds in this and then only if the agency decides not to make the necessary procedures available at the information gathering hearing is the petitioner entitled to a section 120.57 proceeding.

As a practical matter, an agency will be more inclined to transform the information gathering hearing to accommodate specifically requested and adequately supported procedural protections than it will be to grant a request for an adjudicatory hearing. As discussed above, the information gathering hearing is subject to few statutory requirements. No statutory prohibitions preclude an agency from providing procedural protections necessary to safeguard someone's substantial interests. By responding to a petition in this fashion, the agency maintains the relative informality of the rulemaking process, retains control over the development of its policy, and saves time. At the same time, a petitioner is accorded the procedural protections that are adequate to protect his substantial interests.

On the other hand, the agency may respond, of course, by suspending the information gathering proceeding and convening a proceeding under section 120.57. If there are disputed issues of material fact between the agency and the drawout petitioner, the separate proceeding will be a formal one conducted pursuant to section 120.57(1). If there are no disputed material facts, the separate proceeding may be an informal one conducted under section 120.57(2).<sup>190</sup> In either event, substantial delay in the adoption of the rule will result.

An agency that agrees to convene the separate proceeding obviously has accepted the consequential delay in the rule adoption process. But if time is an important consideration to an agency, the delay inherent in granting a drawout petition works as an incentive to the agency to deny the petition. Thus, a drawout petitioner is more likely to obtain agency procedural concessions, if they are specific and supported, in the information gathering hearing than he is to persuade an agency to convene the separate proceeding.

The drawout provision properly understood, then, does not portend costly interruptions and inordinate delays for agency rulemaking if the access rule suggested is used. The process will

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190. For a rather unorthodox view of the relationship between the information gathering hearing and the adjudicatory proceeding brought about through a successful drawout petition, see Waas, *The Limits Upon the Administrative Procedure Act's Drawout Remedy*, 52 FLA. B.J. 815, 815-18 (1978).

work as it was intended to work if any affected person participating in an information gathering hearing whose important or significant concerns will be affected if the agency adopts the rule under consideration is given the opportunity to request with specificity those procedures he thinks are necessary to protect his interests. Whether he is entitled to those procedures will depend on the merits of his assertions and the persuasiveness of the reasons proffered in their support. The power to decide whether requested procedural protections are to be extended at the information gathering hearing or whether a separate adjudicatory proceeding is to be convened is vested in agency discretion. Drawout petitions should not be denied for lack of sufficient interest if the petitioner satisfies the minimal statutory access requirements. If the drawout petition is to be denied, it should be on the merits. That is, a petition which fails to request specific procedural protections or which fails to support the asserted needs with specific proffers that demonstrate the necessity of those procedures to protect the petitioner's substantial interests ought to be denied for substantive inadequacy.

#### *D. The Administrative Challenge to the Validity of Proposed Rules*

When an agency publishes notice of its intention to adopt any rule, procedural or substantive, the validity of the proposed rule may be challenged before a DOAH hearing officer. Section 120.54(4) authorizes “[a]ny substantially affected person [to] seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.”<sup>191</sup> The validity challenge petition must be in writing and must be filed with the DOAH within 14 days after publication of notice to adopt the proposed rule.<sup>192</sup> The petition “must state with particularity the provisions of the rule or economic impact statement alleged to be invalid and must do so with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging the proposed rule would be substantially affected by it.”<sup>193</sup> If the

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191. FLA. STAT. § 120.54(4) (1985) (emphasis added).

192. The 14-day period was held jurisdictional in *Department of Health & Rehab. Servs. v. Alice P.*, 367 So. 2d 1045, 1053 (Fla. 1st DCA 1979).

193. FLA. STAT. § 120.54(4)(b) (1985) (emphasis added). The unemphasized language was added to the subsection in 1984. Ch. 84-203, § 2, 1984 Fla. Laws 611, 612.

DOAH director is satisfied that the petition meets these requirements, she assigns a hearing officer to conduct a hearing within thirty days of the assignment.<sup>194</sup> The hearing is conducted in accordance with the adjudicatory procedures of section 120.57. However, in an administrative validity challenge proceeding, the hearing officer's decision is final agency action, not the recommended order that usually results when hearing officers conduct proceedings pursuant to section 120.57(1).<sup>195</sup> An agency may not adopt a proposed rule by filing it while a validity challenge is pending. If the hearing officer declares a proposed rule invalid, an agency cannot adopt it unless the hearing officer's decision is reversed by a reviewing court.<sup>196</sup> The statute specifically states that failure to challenge a proposed rule under this provision shall not constitute a failure to exhaust administrative remedies.<sup>197</sup>

As noted, the validity of any proposed rule may be challenged administratively by "any substantially affected person." The further requirement that the validity challenge petition must allege facts sufficient to show that the challenger "would be substantially affected" by the proposed rule is useful in formulating the appropriate access standard for this proceeding. The statutory language emphasizes the effect the proposed rule would have on the person seeking to challenge its validity. The provision does not require, for example, that a person allege that his substantial interests would be affected by the proposed rule in order to challenge it. Rather, the proceeding can be initiated by any person who would be affected in an important or significant way if the proposed rule were adopted by the agency. In other words, any person who alleges with specificity that his course of conduct would be acted on or changed in any important or significant fashion if the proposed rule were to become effective would be a "substantially affected person" for purposes of initiating an administrative validity challenge to that proposed rule.

### 1. *History of the Validity Challenge to Proposed Rules*

The history of the administrative validity challenge provision offers little insight into legislative intent. The provision was not included in any of the Law Revision Council's drafts. It was not in-

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194. FLA. STAT. § 120.54(4)(c) (1985).

195. *Id.* § 120.54(4)(d); compare *id.* § 120.57(1)(b)(9).

196. *Id.* § 120.54(4)(c).

197. *Id.* § 120.54(4)(d).

cluded in the House bill as introduced or as debated and approved. It was not included in the Senate bill as introduced. The validity challenge provision appeared for the first time in the Senate committee substitute bill sponsored by the Senate Committee on Rules and Calendar. This bill, as passed by the Senate, substituted the validity challenge provision for the information gathering hearing provision in the House bill.

Under the Senate scheme, agencies would file copies of all rules they proposed to adopt with the DOAH. No proceeding of any kind could be requested for proposed rules relating exclusively to organization, practice, or procedure. For proposed substantive rules, the following provision was made:

[O]n written request of any substantially affected person received within fourteen calendar days after the date of publication of notice the division director shall assign a hearing officer, with due regard for any technical expertise required, to hold a hearing on the issues under consideration . . . . The hearing officer may declare the proposed rule wholly or partly invalid.<sup>198</sup>

Thus, in this initial version of the validity challenge provision, no grounds for challenging the validity of proposed rules were specified and no requirement that the petition must allege facts sufficient to show that the challenger "would be substantially affected" by the proposed rule was imposed.

The conference committee report retained both the information gathering hearing provision from the House bill and the validity challenge provision from the Senate bill. The conference committee report also specified the grounds upon which a validity challenge could be based<sup>199</sup> and inserted the requirement that the petition must allege facts sufficient to demonstrate that the challenger "would be substantially affected" by the proposed rule.<sup>200</sup> Although there is no available record of the conference committee discussion on these points, it is likely that both features were

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198. Fla. CS for SB 892, sec. 4 (1974) (proposed FLA. STAT. § 120.041(2)).

199. As enacted in 1974, validity challenges under the statute could be based on either of two grounds: (1) the proposed rule was an invalid exercise of validly delegated legislative power, or (2) the proposed rule was an exercise of invalidly delegated legislative power. Ch. 74-310, § 1, 1974 Fla. Laws 952, 956 (codified at FLA. STAT. § 120.54(3) (Supp. 1974)). The second ground was deleted in 1976. Ch. 76-131, § 3, 1976 Fla. Laws 216, 219 (codified at FLA. STAT. § 120.54(3) (Supp. 1976)).

200. FLA. H.R. JOUR. 1328 (Reg. Sess. 1974) (referring to proposed FLA. STAT. § 120.54(3)); FLA. S. JOUR. 907 (Reg. Sess. 1974) (same).



added to conform the language of the provisions for challenge to proposed rules and the language of the challenge to adopted rules in section 120.56. Indeed, during the floor debate on the Senate bill, Senator Barron, who as chairman of the Committee on Rules and Calendar was the principal architect of both validity challenge provisions, seemed to indicate that both provisions were available only to challenge agency rulemaking that exceeded delegated statutory authority.<sup>201</sup>

In his explanation to the Senate of the operation of the validity challenge to proposed rules proceeding, Barron touched briefly on the interest necessary to initiate the challenge. He said:

[W]here a member of the public is *aggrieved* by a proposed rule within the twenty-one [sic] days that they have to become *aggrieved*, they may immediately go to the hearing officer and say, we contend that this proposed rule is outside of the authority of the agency that made it, and thereby avoid it ever becoming a rule.<sup>202</sup>

Barron's use of the word "aggrieved" in substitution for the phrase "substantially affected" is not particularly telling. To be aggrieved is to be injured, offended, or wronged in some way. The word "aggrieved" does not necessarily connote a significant or important injury, offense, or wrong, whereas the phrase "substantially affected" clearly does carry such a connotation. Barron's passing reference was the only comment made during the floor debate in either house bearing on the question of the interest a person must have to initiate a validity challenge to a proposed rule. As a consequence, the legislative history adds nothing to the meaning of the language used in the provision.

## 2. *Validity Challenges to Proposed Rules in Other States*

A statutory provision authorizing "any substantially affected person" to challenge the validity of a proposed rule before an independent administrative hearing officer who has the power to declare the proposed rule invalid after full hearing appears to be unique to Florida. Neither the 1961 RMA nor the 1981 MSAPA contains a similar provision. No other state administrative procedure statute contains a validity challenge provision comparable to

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201. Fla. S., tape recording of proceedings (May 14, 1974) (on file with Secretary).

202. *Id.* (emphasis added).

the Florida provision. Some states do require external review of proposed rules by the attorney general,<sup>203</sup> or by the Governor,<sup>204</sup> or by a legislative overview committee.<sup>205</sup> The 1981 MSAPA contains a provision permitting the Governor to "summarily terminate any pending rule-making proceeding."<sup>206</sup> None of these statutes is helpful in formulating an appropriate access standard for the Florida validity challenge provision, however, because none of these external review procedures is triggered by a private person as is the Florida provision.

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203. ARIZ. REV. STAT. ANN. § 41-1002.01 (1985); COLO. REV. STAT. § 24-4-103(8)(b) (1982); CONN. GEN. STAT. ANN. § 4-169 (West Supp. 1985); IND. CODE ANN. § 4-22-2-5 (Burns 1982); IOWA CODE ANN. § 17A.4(4)(a) (West Supp. 1985); KAN. STAT. ANN. § 77-420(b) (1984); ME. REV. STAT. ANN. tit. 5, § 8056(1)(A) (Supp. 1984-1985); MD. STATE GOV'T CODE ANN. § 10-107 (1984); MICH. COMP. LAWS ANN. § 24.245(1) (Supp. 1985); MINN. STAT. ANN. § 14.26 (West Supp. 1985); NEB. REV. STAT. § 84-905.01 (1981); N.D. CENT. CODE § 28-32-02 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-6.5 (1980); TENN. CODE ANN. § 4-5-211 (Supp. 1984); VA. CODE § 9-6.14:9.1 (Supp. 1984). In Alaska, proposed rules are reviewed by the Department of Law. ALASKA STAT. § 44.62.060 (1984). California requires the Office of Administrative Law to review proposed rules, with provision for gubernatorial override. CAL. GOV'T CODE § 11349.3, .5 (West Supp. 1985). In North Carolina the attorney general's acceptance of rules for filing constitutes prima facie evidence of compliance with the administrative procedure act. N.C. GEN. STAT. § 150A-59(b) (1983). Wyoming requires the attorney general to give advice and assistance to all agencies in preparing, revising, codifying, and editing of new and existing rules. WYO. STAT. § 16-3-104(d) (Supp. 1985).

204. HAWAII REV. STAT. § 91-3(c) (Supp. 1984); IND. CODE ANN. § 4-22-2-5 (Burns 1982); IOWA CODE ANN. § 17A.4(4)(a) (West Supp. 1985); NEB. REV. STAT. § 84-908 (1981); VA. CODE § 9-6.14:9.1 (Supp. 1984); WYO. STAT. § 16-3-103(d) (Supp. 1985). In Louisiana, the Governor may veto a legislative objection to a proposed rule. LA. REV. STAT. ANN. § 49:968(G) (West Supp. 1985). In Vermont, proposed rules are reviewed by an interagency committee on administrative rules appointed by the Governor. VT. STAT. ANN. tit. 3, § 820 (Supp. 1984).

205. ALA. CODE § 41-22-23 (1982); COLO. REV. STAT. § 24-4-103 (8)(d) (1982); CONN. GEN. STAT. ANN. § 4-170 (West Supp. 1985); FLA. STAT. § 120.545 (1985); GA. CODE ANN. § 50-13-4(e), (f) (Supp. 1985); IDAHO CODE § 67-5203(2) (Supp. 1985); ILL. ANN. STAT. ch. 127, §§ 1005.01(b), 1007.06(a) (Smith-Hurd Supp. 1985); IOWA CODE ANN. § 17A.8 (West 1978 & Supp. 1985); KY. REV. STAT. ANN. §§ 13A.020, .030 (Michie 1985); LA. REV. STAT. ANN. § 49:968 (West Supp. 1985); MICH. COMP. LAWS ANN. § 24.245 (West Supp. 1985); MONT. CODE ANN. § 2-4-402 (1983); N.H. REV. STAT. ANN. § 541-A:3-e (Supp. 1983); N.J. STAT. ANN. § 52:14B-4.1 to .3 (West Supp. 1985) (held unconstitutional in General Assembly of N.J. v. Byrne, 448 A.2d 438 (N.J. 1982)); OHIO REV. CODE ANN. § 119.03(I) (Page Supp. 1984); OR. REV. STAT. § 183.710 to .725 (1983); S.C. CODE ANN. § 1-23-120 to -125 (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-1.2 (1980); TEX. REV. CIV. STAT. ANN. art. 6252-13a, (Vernon Supp. 1985) (opined unconstitutional in Tex. Atty. Gen. Op., MW-460 (March 23, 1982)); UTAH CODE ANN. § 63-46-5.5 (Supp. 1984); VT. STAT. ANN. tit. 3, §§ 817(c), 842 (Supp. 1984); VA. CODE § 9-6.14:9.2 (Supp. 1984); WASH. REV. CODE ANN. § 34.04.220 (West Supp. 1985); W. VA. CODE § 29A-3-11 (Supp. 1985) (held unconstitutional in State *ex rel.* Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981)); WIS. STAT. ANN. § 227.018 (West 1982); *see also* Levinson, *Legislative and Executive Veto of Rules of Administrative Agencies: Models and Alternatives*, 24 WM. & MARY L. REV. 79 (1982).

206. 1981 MODEL ACT, *supra* note 112, § 3-202(b), at 115.

### 3. Functional Analysis

An access standard that allows any person to initiate a validity challenge to a proposed rule if he alleges with specificity that adoption of the rule would change his course of conduct in any important or significant way is entirely compatible with the purposes underlying the provision. The provision was intended to create an opportunity for a citizen initiated check on rulemaking that exceeded delegated statutory authority.<sup>207</sup> It was designed to provide an inexpensive and effective way for persons who would be substantially affected by a proposed rule to prevent that rule from ever going into effect if an independent hearing officer found that the proposed rule went beyond the agency's statutory authority.<sup>208</sup> Like the initiative and information gathering hearing provisions discussed above, the validity challenge to proposed rules provision

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207. In addition to the citizen initiated check on agency rulemaking authority provided for in FLA. STAT. § 120.54(4) (1985), there is also a legislative check. *Id.* § 11.60 creates the Joint Administrative Procedures Committee (JAPC), composed of six persons, three members of the House of Representatives appointed by the Speaker, and three members of the Senate appointed by the President. The JAPC is charged with the responsibility of reviewing proposed rules as a "legislative check on legislatively created authority." *Id.* § 120.545(1). If the JAPC objects to a proposed agency rule and the agency refuses to modify or to withdraw it, the Committee's objection is filed with the Department of State and published in the *Florida Administrative Weekly*. A permanent historical note to the rule when it is published in the Florida Administrative Code must include a reference to the Joint Committee's objection and to the issue of *Florida Administrative Weekly* in which the full text of the objection appeared. FLA. STAT. § 120.545(8) (1985). The JAPC also has standing under certain conditions to seek judicial review of the validity of any proposed rule to which it objected and which the adopting agency refused to modify or withdraw. *Id.* § 11.60(2)(j).

208. Sen. Barron made the following remarks to the Senate when he explained the Senate bill during debate:

Under the present law, which is not working, if you are aggrieved by an administrative rule, you can either go back to the agency that made it, or you can go to the court. If you go back to the agency that made it, we felt that you wouldn't have a very good opportunity to get a fair hearing. . . . Now, under the Senate bill that you have before you, you see that when a rule is made and the public is aggrieved, either at the time it is made or at some subsequent time, that you may go directly to the independent hearing officer, and his decision is final unless appealed to the District Court of Appeals [sic] in Tallahassee.

Now, we feel that the bill well addresses itself to the problem that I think bothers most Floridians. We found that administrative agencies were making three to five rules a day. Oftentimes without notice, certainly without the public being aware, and yet as far as the public was concerned, it was the law. And it was affecting the lives of all the people of Florida . . . . I think if we pass this bill, that we'll provide that all rules will go to a committee of the legislature before they're adopted, and also provide a cheaper manner for the public to be heard before an independent hearing officer, we will have made a step in the right direction.

Fla. S., tape recording of proceedings (May 14, 1974) (on file with the Secretary).

also implements the "ideal of participatory democracy."<sup>209</sup> Persons who feel in a substantial way the effect of the policy proposed by an agency are not required to wait until that policy has been formalized into a rule having the force of law before they challenge the agency's authority to act in the first place; nor are they required to depend on the action of public officials to rescue them from the effects of unauthorized agency rulemaking. The ability to challenge rulemaking believed to be unauthorized, while the rulemaking process is still in progress, is placed in the hands of the very people who will be affected by the agency action in some important or significant way.

Commentators have long recognized the desirability of some type of external review of agency rulemaking to protect the public from unauthorized agency action.<sup>210</sup> But the most commonly used approaches—review by the attorney general or review by a legislative committee—have been found wanting. For example, when proposed rules must be reviewed by the attorney general, that review is *ex parte* and without the benefit of argument in opposition to the rule's validity.<sup>211</sup> The review may be little more than a formality because "[c]ounsel for the agency who drafted the rule is likely to be himself an assistant attorney general; and in practice the requirement is likely to amount to little more than one assistant attorney general obtaining the assent of another to the filing of the work-product of the first."<sup>212</sup> On the other hand, if the review is more than perfunctory, there is a danger that the rule will be rejected "on grounds of impropriety rather than illegality."<sup>213</sup>

When the only external review of proposed rules is by a legislative overview committee there may be both constitutional and political complications. Interestingly, state constitutional problems with legislative participation in agency rulemaking surfaced in the state courts even before the United States Supreme Court held the legislative veto violative of the Federal Constitution in *Immigration & Naturalization Service v. Chadha*.<sup>214</sup> Courts in Kentucky, New Hampshire, and West Virginia found statutes which required legislative committee approval before a proposed agency rule could become effective violative of the principle of separation of pow-

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209. Bonfield, *supra* note 121, at 892.

210. F. COOPER, *supra* note 117, at 220; Bonfield, *supra* note 121, at 896-97.

211. F. COOPER, *supra* note 117, at 220.

212. *Id.*

213. *Id.* at 221.

214. 462 U.S. 919 (1983).

ers.<sup>215</sup> The attorneys general of Tennessee and Texas issued formal opinions to the same effect.<sup>216</sup> Even if the legislative committee is advisory only, and thus most probably constitutional,<sup>217</sup> there may be undesirable political complications resulting from even this limited participation. Partisan battles fought over the policy of the statute may be renewed and may influence legislators' judgments on the legality of an agency rule implementing that legislative policy.<sup>218</sup> Some agencies may have their rules subjected to stricter standards than other agencies "merely because the legislators involved may have a greater distrust of some agencies than of others, or a greater interest in the work of some agencies than of others."<sup>219</sup>

The Florida response to the problem of checking the exercise of unauthorized agency rulemaking is apparently unique and avoids the major objections raised against external review by the attorney general or by a legislative committee. The decision on the validity of a challenged proposed rule is made by an independent hearing officer after full hearing at which the challenger and the affected agency are adverse parties.<sup>220</sup> Thus, the issue can be fully aired before a hearing officer who is not beholden to either party.<sup>221</sup> The statute specifies the sole ground for invalidating a proposed rule: that the rule is an invalid exercise of delegated legislative authority.<sup>222</sup> That statutory standard is not foolproof. It does not guarantee that proposed rules will not be invalidated because of impropriety rather than illegality. Reasonable hearing officers and judges may disagree on the authority delegated to an agency by the legislature in individual cases.<sup>223</sup> However, a system designed to

215. *Legislative Research Comm'n v. Brown*, 664 S.W.2d 907 (Ky. 1984); *Opinion of the Justices*, 431 A.2d 783 (N.H. 1981); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622 (W. Va. 1981).

216. *Tenn. Atty. Gen. Op.* 82-115 (March 11, 1982); *Tex. Atty. Gen. Op.* MW-460 (March 23, 1982).

217. Levinson, *supra* note 205, at 98-99.

218. Bonfield, *supra* note 121, at 897.

219. *Id.* at 898.

220. *FLA. STAT. § 120.54(4)(d)* (1985).

221. Although hearing officers often come to the DOAH after spending several years as attorneys with state agencies, it has been the Division's policy not to assign hearing officers to cases involving his or her former agency for a period of at least five years. Remarks of Chris Bentley, former DOAH director, First Annual Administrative Law Conference, Tallahassee, Fla., (Feb. 18-19, 1983).

222. *FLA. STAT. § 120.54(4)(a)* (1985).

223. For a thoughtful elaboration of this point, see *Department of Ins. v. Insurance Servs. Office*, 434 So. 2d 908, 914-29 (Fla. 1st DCA 1983) (R. Smith J., dissenting), *petition for review denied*, 444 So. 2d 416 (Fla. 1984).

check agency excesses by decision of a politically insulated hearing officer, only after an opportunity is given to both sides fully to ventilate the issues, is a system likely to generate correct results, or at least nonpolitically motivated results. That may be the best that can be hoped for.

The validity challenge to proposed rules provision is essentially an intrabranched dispute resolution mechanism. That is, whenever a qualified member of the public believes an executive branch agency has exceeded its statutory authority, that person may have the matter resolved by a specially created and insulated executive branch agency: the DOAH. The legislature could have vested this authority in the attorney general, or in the Governor, or in the Governor and the Cabinet, either *sua sponte* or on motion of a person substantially affected. That decision could have been made final and not subject to judicial review. The legislature could have chosen to vest this authority in the circuit courts or in the district courts of appeal. Or the legislature could have decided that the only check on agency rulemaking would be the Joint Administrative Procedures Committee's review of proposed rules. What the legislature chose to do instead was to create, within the executive branch, a pool of independent hearing officers and to invest in them the authority to determine, subject to judicial review, whether other executive branch agencies' rules were within the authority delegated by the legislature.

Had the legislature chosen to vest this authority in the courts, and had it chosen to remain silent on the nature of the injury necessary to invoke the courts' jurisdiction, it would have been entirely proper for the courts to require a would be plaintiff to satisfy judicially developed standing requirements before the merits of the matter were addressed. Because the legislature instead chose to vest this authority in a specialized *executive branch agency*, judicially developed standing requirements have no relevance. If a DOAH hearing officer determines that a challenger is indeed a person who would be affected in an important or significant way were the proposed rule to become effective, that access decision ought to stand, even though persons granted such access might not be able to satisfy standing requirements to institute a law suit. The legislature did not intend access requirements to initiate a validity challenge to proposed rules and standing requirements to institute suit to be synonymous; if it had it could have said so. Only when a hearing officer denies access by applying a standard *more* demanding than the statutory provision requires should a reviewing court

intervene. Even then the question for the court is not whether the person seeking access to the administrative proceeding would have standing in a court. The question is whether the person seeking to initiate a validity challenge to a proposed rule has alleged sufficient facts to show that if the proposed rule were to become effective he would be affected in an important or significant way.

#### 4. *Analysis of Cases Concerning Access to Validity Challenge to Proposed Rule Proceedings*

There are three cases involving access to challenge the validity of proposed rules which deserve discussion. In *Department of Health and Rehabilitative Services v. Alice P.*,<sup>224</sup> the reviewing court reversed the hearing officer's ruling that the challenger had the requisite interest to maintain the action. In *Florida Medical Association v. Department of Professional Regulation*,<sup>225</sup> the reviewing court reversed the hearing officer's determination that certain challengers did not have the necessary interest to challenge a proposed rule. In *Montgomery v. Department of Health and Rehabilitative Services*,<sup>226</sup> the reviewing court reversed the hearing officer's ruling that the challengers did not have the necessary interest to challenge a proposed rule but affirmed the dismissal of the challenge on mootness grounds. In all three cases the court analyzed the questions in terms of federal judicial requirements.

When federal Medicaid funds for elective nontherapeutic abortions were discontinued, the Department of Health and Rehabilitative Services adopted emergency rules and published notice of its intent to adopt permanent rules to discontinue the disbursement of state Medicaid funds for elective nontherapeutic abortions. Alice P. and Susan A., individually and as representatives of a class,<sup>227</sup> filed a challenge to the validity of the proposed permanent rules alleging that they constituted an impoundment of legislatively appropriated funds and that the economic impact statement was erroneous or incorrect. Neither woman was pregnant at the

224. 367 So. 2d 1045 (Fla. 1st DCA 1979).

225. 426 So. 2d 1112 (Fla. 1st DCA 1983).

226. 468 So. 2d 1014 (Fla. 1st DCA 1985).

227. The court ruled that a proceeding challenging the validity of a proposed rule was not a proper one for a class action because a single successful challenge can prevent the proposed rule from becoming "operational as to any other person similarly situated." 367 So. 2d at 1050. Actually, a single successful challenge can prevent a proposed rule from becoming operational at all. A proposed rule held invalid by a hearing officer cannot be adopted by an agency. FLA. STAT. § 120.54(4)(c) (1985).

time the challenge was filed.<sup>228</sup> The Department's motion to dismiss for lack of "standing" was denied; in his final order, the hearing officer ruled "that all women of childbearing age who are Medicaid recipients are substantially affected by the proposed rule and have adequate standing to challenge it pursuant to Chapter 120, F.S.'"<sup>229</sup>

The Department appealed and the court reversed saying that "[c]learly under the rationale of the *Jerry* case the hearing officer's holding . . . is much too broad to countenance our approval."<sup>230</sup> The court rejected the argument that a less demanding standard ought to operate for challenging proposed rules than for challenging rules already in effect. In the court's view, "[t]here is no difference between the immediacy and reality necessary to confer standing whether the proceeding is to challenge an existing rule or a proposed rule."<sup>231</sup> In either event the rule announced in *Jerry* must be satisfied. Because Susan A. was not pregnant at the time she filed the petition challenging the proposed rule, she did not meet the *Jerry* standard.<sup>232</sup> However, the court found that the *Jerry* standard was satisfied by two other later appearing women and a doctor. The women testified that they were Medicaid recipients, that they were pregnant, that they wished to terminate their pregnancies, and that they were unable to do so without financial assistance from Medicaid. Dr. Samuel Barr, the director of an abortion clinic, testified that he had been a Medicaid provider for five years, that approximately thirteen percent of the abortions performed at his clinic during the preceding four and one-half years had been funded by Medicaid, and that since the Medicaid funding had been discontinued there was a significant decrease in the number of Medicaid eligible women seeking the clinic's services.<sup>233</sup>

But none of the three petitioners meeting the *Jerry* test filed the petition challenging the proposed rule. Each of them sought to

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228. Alice P. was dismissed as a party by the hearing officer and that decision was not challenged in the district court of appeal. 367 So. 2d at 1052.

229. 367 So. 2d at 1051.

230. *Id.*

231. *Id.* at 1052.

232. *Id.* The court also observed that because Susan A. was not pregnant, she did not meet the standard of *Roe v. Wade*, 410 U.S. 113 (1973), because *Roe* was pregnant at the time the law suit was filed. 367 So. 2d at 1052 at n.1. There is at least the suggestion that the *Jerry* standard and the *Roe v. Wade* standard are different. They are in fact precisely the same.

233. 367 So. 2d at 1052.



enter the proceeding well after the time the proceeding was required to be initiated.<sup>234</sup> Because the women who did file the petition were not pregnant at the time of filing, the court ruled there was no valid proceeding to which the three substantially affected persons could become parties or intervenors. Therefore, the court ruled that the motion to dismiss the petition should have been granted by the hearing officer.<sup>235</sup>

It is evident from the court's unquestioning acceptance of the *Jerry* decision<sup>236</sup> and its painstaking recitation of the interests of the three petitioners found to have satisfied the access threshold that the proposed rule only could be challenged administratively by someone who could also maintain a lawsuit in federal court against the rule once it became effective. To require either provable pregnancy or actual economic loss at the time the petition is filed imposes a far too stringent and inappropriate standard for access to an administrative proceeding designed to operate as a preenforcement check on executive branch rulemaking. There must be some "difference between the immediacy and reality necessary" to challenge a proposed rule and an existing rule because under usual circumstances a proposed rule does not and cannot change the status quo until it becomes an effective rule. The circumstances in *Alice P.* were not usual because the Department had adopted an emergency rule which did immediately, although only for a ninety day period, what the proposed rule was intended to do permanently. Because of the emergency rule, the two pregnant women desiring abortions at the time they entered the proceeding could establish an immediate and real impact on their interests; because of the emergency rule, Dr. Barr could testify to the actual and real decrease in his income. Without the emergency rule and until the proposed rule became effective, even the women and the doctor would have been unable to establish the "immediacy and reality" apparently required by the court. If the court meant what it said, the access barrier to proposed rule validity challenge proceedings would be impossible to scale unless an emergency rule

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234. Petitions challenging the validity of proposed rules must be filed within 14 days after publication of notice of intention to adopt the proposed rule. FLA. STAT. § 120.54(4)(b) (1985). The court held the 14 day rule was jurisdictional. 367 So. 2d at 1053. The petition in this case was timely filed on October 28, 1977. *Id.* at 1048. One pregnant woman and Dr. Barr sought access to the proceeding on November 18, 1977; the other pregnant woman sought to intervene on November 23, 1977. *Id.* at 1053.

235. 367 So. 2d at 1053.

236. *See supra* note 9.

were in effect at the time the challenge was filed. An access barrier that high would render the proceeding largely useless and cannot be squared with the section's language.

To challenge the validity of a proposed rule a person is only required to show that he *would be* affected in an important or significant way if the proposed rule were to become effective. Surely a doctor who testified that he was a Medicaid provider, that he performed elective nontherapeutic abortions, and that a part of his income was derived from Medicaid reimbursement for this service would establish that he would be affected in an important way—the loss of income—if the proposed rule discontinuing Medicaid funding for elective nontherapeutic abortions were to become effective. Similarly, the hearing officer's determination that any Medicaid recipient of childbearing age would be substantially affected by the proposed rule withstands analysis under this standard.

Before the rule change was proposed, all Medicaid recipients of childbearing age had an inchoate claim to funds appropriated by the legislature to pay for whatever medical needs arose during the fiscal year, including elective nontherapeutic abortions. Only two months into the fiscal year, the Department decided on its own, without legislative directive or federal coercion, to propose a rule that would withhold appropriated funds for a medical procedure available only to women of childbearing age. Were the proposed rule to become effective, it would extinguish their inchoate claim to appropriated funds to pay for a medical procedure for which reimbursement had been approved by the legislature. As a consequence, every woman in the affected group would lose an economic entitlement she might need to claim at some point during the fiscal year.

The fact that there is some uncertainty as to actual need ought not preclude ability to challenge the legality of the proposed agency action, anymore than the uncertainty of the real extent of Dr. Barr's economic loss would preclude his challenge.<sup>237</sup> Indeed, the very uncertainty of their situation suggests other ways in which all women in the affected group would be substantially affected if the proposed rule went into effect. Medicaid eligible women of

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237. Even in a § 120.56 challenge to the validity of an existing rule, when arguably it makes sense to require a showing of the immediacy of the rule's effect, at least one court has not permitted an element of uncertainty to defeat access. See *Cox v. South Fla. Water Management Dist.*, 450 So. 2d 288, 289 (Fla. 4th DCA 1984), *petition for review denied mem.*, 459 So. 2d 1041 (Fla. 1984); see also *infra* pp. 1043-45.

childbearing age would suffer a loss of freedom they otherwise had to control the use of their bodies. They alone, among all women in that age group, would be denied the security of knowing that an unwanted pregnancy did not have to be carried to term. The threatened loss of an economic entitlement and the physical and emotional security that go with it are adequate to meet the validity challenge access standard. The hearing officer's access determination should not have been repudiated by the court and the court should not have imposed the *Jerry* standard on this proceeding.

One round of the seemingly endless fight<sup>238</sup> between ophthalmologists and optometrists over the right of optometrists to prescribe drugs in their practice was fought in a validity challenge proceeding. At the end of the round, the dispute remained unresolved but the federal "zone of interest" standing test had become part of Florida administrative law. The Board of Optometry proposed a rule setting standards for prescribing certain drugs by optometrists and providing criteria for determining the competence of optometrists to prescribe drugs. The proposed rule was administratively challenged by an ophthalmologist, the Florida Medical Association, the Florida Society of Ophthalmology, a pharmacist, and an optometric patient. The ophthalmologist alleged that the proposed rule unlawfully interfered with his right to practice medicine and with his professional duty to protect the public from harmful medical practices. The medical associations alleged they represented Florida physicians and ophthalmologists, all of whom would suffer economic injury if the proposed rule went into effect. The pharmacist alleged that the proposed rule would present him with a Hobson's choice—follow the Board of Pharmacy's direction not to fill prescriptions written by optometrists and lose customers, or keep the customers and subject himself to discipline by the Board. The optometric patient alleged that the proposed rule would force him to choose between never seeing an optometrist again or risking injury

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238. Florida Optometric Ass'n v. Firestone, 465 So. 2d 1319 (Fla. 1st DCA 1985), *rev'd sub. nom.* Florida Society of Ophthalmology v. Florida Optometric Ass'n, 11 Fla. L.W. 177 (Fla. Apr. 17, 1986; Board of Optometry v. Florida Medical Ass'n, 463 So. 2d 1213 (Fla. 1st DCA 1985); Florida Medical Ass'n v. Department of Professional Reg., 426 So. 2d 1112 (Fla. 1st DCA 1983); Department of Professional Reg. v. Hall, 398 So. 2d 978 (Fla. 1st DCA 1981); Florida Optometric Ass'n v. Department of Professional Reg. 399 So. 2d 6 (Fla. 1st DCA 1981); Miami-Dade Optical Dispensary, Inc. v. Florida State Bd. of Optometry, 349 So. 2d 753 (Fla. 3d DCA 1977), *cert. denied mem.*, 366 So. 2d 883 (Fla. 1978); Florida Ass'n of Dispensing Opticians v. Florida State Bd. of Optometry, 239 So. 2d 520 (Fla. 3d DCA 1970); Florida Ass'n of Dispensing Opticians v. Florida State Bd. of Optometry, 227 So. 2d 736 (Fla. 3d DCA 1969), *aff'd in part, quashed in part*, 238 So. 2d 839 (Fla. 1970).

through the optometrist's illegal use of drugs.<sup>239</sup>

The hearing officer ruled that none of the petitioners had the requisite interest to challenge the proposed rule and dismissed the petition. The pharmacist and the optometric patient were excluded because they failed to show any "injury in fact."<sup>240</sup> The ophthalmologist and the medical associations were excluded because, although they did establish "injury in fact," they failed to show that the " 'zone of interest' they asserted was within the 'zone of interests' protected by the statute being implemented by the rule."<sup>241</sup> On appeal, the court agreed with the hearing officer that the pharmacist and the optometric patient failed to establish the requisite interest to challenge the proposed rule. But the court ruled that the allegations advanced in the petition were sufficient to satisfy the "zone of interest" test as to the ophthalmologist and the medical organizations and reversed the dismissal of their petition.<sup>242</sup>

The court recognized that the "zone of interest" was a federal standing test,<sup>243</sup> that even in that context its continuing vitality was questionable,<sup>244</sup> that it had been rejected by another state's supreme court in a case involving similar facts,<sup>245</sup> and that it had been much maligned by some commentators.<sup>246</sup> Nevertheless, the

239. Florida Medical Ass'n v. Department of Professional Reg., 426 So. 2d at 1113 n.3.

240. *Id.* at 1114 n.4.

241. *Id.* at 1114.

242. The court rejected the contention that the asserted injury must be within the zone of interest protected by the statute being implemented by the rule. The court ruled that the effect of other statutes must be considered to determine whether the agency exceeded its statutory authority in proposing the rule. The court reasoned that

[b]oth Chapters 463 [the Physicians' Practice Act] and 458 [the Optometrists' Practice Act] are concerned with the protection of the public by insuring that persons engaged in the various health care professions are qualified to do so. These and other statutes pertaining to the health care field . . . also serve the purpose of delineating, to a great extent, the relative rights and privileges of health care professionals. It necessarily follows that an agency's determination of what forms of treatment are permissible or prohibited within each health care profession is within the "zone of interest" protected by the statutes.

*Id.* at 1117 (footnote omitted).

243. *Id.* at 1115-16.

244. *Id.* at 1116.

245. *Id.* at n.9; see Rhode Island Ophthalmological Soc'y v. Cannon, 317 A.2d 124 (R.I. 1974). The court characterized the Rhode Island case as being "remarkably similar in all respects to the [case] before us." 426 So. 2d at 1116 n.9. A striking but unappreciated difference between the cases was the forum to which access was being sought. The Rhode Island Ophthalmological Society asserted an economic injury as a basis for standing in court to challenge legislation permitting optometrists to prescribe drugs. The case before the Florida court, of course, involved an administrative, not a judicial, challenge.

246. 426 So. 2d at 1116 n.9. The court even quoted Professor Kenneth Davis' acerbic comment about the "zone of interest" test, namely, "Is the 'zone' test the law? The best

court ignored all the red flags and sanctioned the use of the "zone of interest" test for determining access to the validity challenge proceeding.

The two-part "injury in fact"—"zone of interest" test was fashioned by the United States Supreme Court to liberalize standing requirements for federal court review of federal administrative action under the Federal APA.<sup>247</sup> Whatever value it may still have as an interpretative aid for that statute, there is no justification for using the "zone of interest" test to interpret state statutory language that only requires a person to show that he would be substantially affected by a proposed rule. The expressions "adversely affected" or "aggrieved" within the meaning of a relevant statute might have different consequences. Nothing in the language or in the legislative history of this section remotely suggests that federal notions of "injury in fact" or "zone of interest" should operate to determine whether a person would be substantially affected by a proposed rule. These federal notions are ill suited to monitor access to validity challenge proceedings, or for that matter any other state administrative proceeding, and they should be abandoned.<sup>248</sup>

Had the court analyzed the allegations made on behalf of each petitioner to see whether there would be a substantial effect on him if the proposed rule became effective, it might have reached a slightly different conclusion. Under the suggested analysis, the optometric patient, the pharmacist, and the two medical associations would have been denied access to challenge the validity of the proposed rule; the ophthalmologist would have been granted access.

The allegations made on behalf of the optometric patient did not establish that he would be substantially affected. If the proposed rule became effective, he could continue to use the services of his optometrist without risk of injury from the illegal use of drugs simply by refusing the treatment and requesting a referral to an ophthalmologist.<sup>249</sup> The patient's course of conduct, therefore, would not be affected in any important or significant way if the proposed rule became effective.

answer is: Sometimes it is, but most of the time it is not, and a criterion for determining when it is the law is completely absent." K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 347 (1982 Supp.).

247. *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972).

248. See *supra* notes 13-19 and accompanying text.

249. The hearing officer reached the same conclusion although he characterized it not as a failure to show substantial effect but as a failure to show "injury in fact." 426 So. 2d at 1114 n.4. The court found the hearing officer's reasoning persuasive. *Id.* at 1118.

The pharmacist's allegations were similarly deficient. His admission that he was bound to follow the Board of Pharmacy's prohibition against filling prescriptions written by optometrists made his threatened economic loss allegation very tenuous. His refusal to fill optometrists' prescriptions would not result in the loss of customers to other pharmacists because they, too, presumably were bound by the prohibition.<sup>250</sup>

The suggested analysis would have precluded access to the Florida Medical Association and to the Florida Society of Ophthalmology. The allegations on their behalf were tailored to fit the federal associational standing rule approved by the Florida Supreme Court in the *Florida Home Builders* case. The district court of appeal had little choice but to accept them as proper petitioners. This federal judicial standing rule, like the others of similar ilk, has no place in determining access to administrative proceedings under chapter 120. It must be rejected because it provides access to professional associations not countenanced by the language of the statute. A validity challenge petitioner is required to "state with particularity . . . facts sufficient to show that *the person challenging the proposed rule would be substantially affected by it.*" That language requires a showing of personal effect. The medical associations sought access as representatives of their members' interests, not to vindicate any interest personal to them as associations. Because they failed to demonstrate how they would be affected in an important or significant way by the proposed rule if it became effective, they should not have been permitted to challenge its validity.

The allegations in the ophthalmologist's petition established that he would be substantially affected. Without the rule, only ophthalmologists among eye care professionals could use and prescribe drugs in their practice. With the rule, optometrists who satisfied the rule's competency criteria also could use and prescribe drugs in their practice. Optometric patients requiring drug therapy would no longer have to be referred to an ophthalmologist because the drugs could now be prescribed by the optometrist. As a result, the ophthalmologist could expect to be injured economically

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250. The hearing officer viewed the pharmacist's allegations as showing only "doubt or uncertainty concerning the eventual impact of a rule" which could not satisfy the "injury in fact" standard he employed. *Id.* at 1114 n.4. Citing *Jerry*, the court said the pharmacist had "not demonstrated an injury except in the abstract or speculative sense, which is not sufficient." *Id.* at 1118. The court agreed with the hearing officer that the appropriate remedy for the pharmacist to pursue was a declaratory statement from the Board of Pharmacy. *Id.*

through the loss of patient referrals from optometrists.<sup>251</sup> It was this prospective economic loss that really was at the heart of the ophthalmologist's claim that the proposed rule unlawfully interfered with his right to practice medicine. The proposed rule would have diminished the value of the exclusive property right medical doctors in general and ophthalmologists in particular had to practice medicine, including the exclusive right to prescribe drugs.<sup>252</sup> The ophthalmologist's allegations of economic loss adequately established that he was a person who would be affected in an important or significant way if the proposed rule became effective and he, therefore, was properly granted access to challenge the validity of it.<sup>253</sup>

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251. There was no suggestion in the court's opinion that the *Alice P.* "immediacy and reality" standard was met or that it was even appropriate to require a proposed rule validity challenger to prove real and actual out-of-pocket loss at the time the petition is filed.

252. The court struggled with the worthiness of this economic interest primarily because some earlier cases denied persons asserting injury to a competitive interest the right to initiate adjudicatory proceedings under section 120.57. See *infra* notes 462-93 and accompanying text. Ultimately, the court distinguished those cases because they did not involve alleged illegality on the agencies' parts. Thus, at least for validity challenge purposes, threatened economic injury may be sufficient to satisfy the "substantially affected" requirement.

253. On remand to the DOAH, the Board of Optometry and the Florida Optometric Association continued to resist the right of the medical associations and the ophthalmologists to challenge the validity of the proposed rule. Their theory was that the court's opinion in *Florida Medical Ass'n v. Department of Professional Reg.*, 426 So. 2d 1112 (Fla. 1st DCA 1983) provided only that the challengers could proceed if they established the injury alleged and the rule's illegality by competent and substantial evidence. Initial Joint Brief of Appellants at 42-46, *Florida Medical Ass'n v. Department of Professional Reg.*, 426 So. 2d 1112 (Fla. 1st DCA 1983). The hearing officer's final order simply states as a conclusion of law that the challengers have standing with citation to the *Florida Medical Ass'n* case. *Florida Medical Ass'n v. Department of Professional Reg.*, 7 Fla. Admin. L. Rep. 339, 354 (1985). On review, the court summarily rejected appellants' position, stating that its earlier decision held that the medical associations and the ophthalmologists had "standing" to pursue the validity challenge. *Board of Optometry v. Florida Medical Ass'n*, 463 So. 2d 1213, 1216 (Fla. 1st DCA 1985). Unfortunately, the way the court described the appellants' argument and the way the court responded to it suggest that a person's right to initiate a validity challenge is somehow tied to that person's ultimate success on the merits. The court said that the appellants' reading of the *Florida Medical Ass'n* case was that it granted "only conditional standing which hinged on the correctness of their challenge." 463 So. 2d at 1216. The court responded to that characterization of the argument by saying: "In any event, if appellees' standing did hinge on the correctness of their position, then by our opinion today the correctness of their position is established and we approve the hearing officer's conclusion that appellees had standing." *Id.* Because the court's opinion ruled that the hearing officer correctly determined the proposed rule was invalid, the "correctness of their position" language can be read as suggesting a circular access standard. A person would be substantially affected by a proposed rule if his allegations that the proposed rule is an invalid exercise of delegated legislative authority were accepted; a person would not be substantially affected by a proposed rule if his allegations were not accepted. It would be curious logic indeed that suggests the answer to the threshold question—does this person have the right to challenge

In the 1984 General Appropriations Act, the legislature appropriated money to the Department of Health and Rehabilitative Services to fund a workfare program in two counties.<sup>254</sup> On July 27, 1984, the Department published notice of its intent to adopt a rule establishing the conditions under which food stamp recipients would be required to participate in the workfare program. By its terms, the proposed rule purported to apply statewide.<sup>255</sup> On August 10, 1984, two residents of Orange County, who were food stamp recipients and heads of households, filed a petition challenging the validity of the proposed workfare rule.<sup>256</sup> At the time the petition was filed, it was not known whether Orange County would be one of the two counties participating in the program. Indeed, because the Department set a September 1, 1984 deadline for counties to express their interest in the program, it was not known at the time the Department published the notice of intent to adopt the proposed rule or at the time when a validity challenge petition had to be filed to be timely, which, if any, counties would volunteer for the pilot program.<sup>257</sup> Nevertheless, the hearing officer concluded that the challengers did not have "standing" to challenge the validity of the proposed rule and dismissed the petition.<sup>258</sup>

On review, the court said the challengers had to satisfy the *Jerry* standard by showing "an injury which is both real and immediate, not conjectural or hypothetical."<sup>259</sup> When the validity challenge was filed it appeared that the Department was proposing a rule that would apply statewide to food stamp recipients. Therefore, at the time of filing, the injury alleged by these challengers was real, not hypothetical, and the petition should not have been dismissed for lack of "standing."<sup>260</sup> Instead of remanding the matter to the

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this proposed rule?—is found in the answer to the ultimate question — is this proposed rule invalid? An access standard that says if you win, you had the right to challenge; if you lose, you didn't, is meaningless, of course, and the court could not have intended to suggest otherwise.

254. Ch. 84-220, 1984 Fla. Laws 724, 845 (line item 764).

255. The summary of the economic impact of the rule published in the *Florida Administrative Weekly* did indicate the cost of implementing the program in two counties. 10 Fla. Admin. W. 2323 (July 27, 1984).

256. *Montgomery v. Department of Health & Rehab. Servs.*, 468 So. 2d 1014, 1015 (Fla. 1st DCA 1985).

257. *Id.*

258. *Id.*

259. *Id.* at 1016. See *infra* notes 308-20 and accompanying text for a discussion of the *Jerry* "immediacy and reality" standard.

260. 468 So. 2d at 1016. The court relied on *Professional Firefighters of Fla., Inc. v. Department of Health & Rehab. Servs.*, 396 So. 2d 1194 (Fla. 1st DCA 1981) as authority for its holding. That case, like *Jerry*, involved the right to challenge rules already adopted pur-



hearing officer for further proceedings, however, the court decided that was unnecessary because the case was now moot. Even though the proposed rule appeared to be applicable statewide, the court refused "to close [its] eyes to the fact that in actual effect, only a pilot program has been implemented by legislative appropriation of start-up funds, and that food stamp recipients in Orange County . . . will not be subject to the pilot program."<sup>261</sup> Because it was now clear the proposed rule would not apply to these challengers, the court affirmed the dismissal of the petition on the ground of mootness.

The opinion is peppered with references to federal law authorities and commentary and to the role mootness plays in the judicial arena.<sup>262</sup> For example, the court said:

A case becomes moot, for purposes of appeal, where, by a change of circumstances prior to the appellate decision, an intervening event makes it impossible for the court to grant a party any effectual relief. Mootness can be raised by the appellate court on its own motion. The rule discouraging review of moot cases is derived from the requirement of the United States Constitution, Article III, under which the existence of judicial power depends upon the existence of a case or controversy. It is the function of a judicial tribunal to decide actual controversies by a judgment which can be carried into effect, and not to give opinions on moot questions, or to declare principles or rules of law which cannot affect the matter in issue.<sup>263</sup>

What is not apparent is what all this has to do with the case. It seems the court lost sight of what was before it. Given the procedural posture of the case, the only question requiring judicial resolution was whether the hearing officer erred when he granted the motion to dismiss the petition for lack of "standing." That was not a moot issue and the court ruled it was error to dismiss on that ground. The question of the proposed rule's validity was never reached by the hearing officer. Consequently, the court was not being asked to render a judgment on the merits by persons who, be-

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suant to FLA. STAT. § 120.56 (1983). See *infra* notes 312-18 and accompanying text.

261. 468 So. 2d at 1016.

262. *Id.* at 1016-17; see *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Craig v. Boren*, 429 U.S. 190 (1976); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Powell v. McCormack*, 395 U.S. 486 (1969); *Liner v. Jafco, Inc.*, 375 U.S. 301 (1964); Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363 (1973).

263. 468 So. 2d at 1016-17 (citations omitted).

cause of an intervening event, would not be subject to the proposed rule were it to become effective.

The court's mootness discussion makes no sense at all unless the court was really saying that it was imposing this judicial rule of self-restraint on the executive branch DOAH. If that is the case, then the court should have at least made an effort to explain why a rule derived from the Federal Constitution to limit the authority of federal courts and a similar rule developed at common law to restrict state courts should be used to restrict a legislatively created state executive agency.

The matter should have been remanded to the hearing officer for him to decide in the first instance whether a person must satisfy the 120.54(4) access standard not only at the time of filing the petition but throughout that administrative proceeding and whether the peculiar circumstances of this case justified an exception to any general rule of continuing effect. It was the Department after all that was playing the shell game here. The Department chose to propose a rule of purported statewide application even though it knew it had funds and legislative authorization for only a two-county program. The Department chose to begin the rule adoption process before the two participating counties were identified. In these circumstances, the Department should not benefit from its sleight of hand. Either the proposed rule was what it purported to be and thus was subject to challenge by any state resident who was a food stamp recipient and head of a household, or it was not what it pretended to be, in which case, the notice was inadequate and the proposed rule should have been withdrawn and notice published again when the correct information regarding the two participating counties was known.

When the statutory language, the underlying purposes, and the executive forum in which validity challenges to proposed rules are brought are considered, access to this proceeding ought to be granted to any person who alleges with sufficient particularity that his course of conduct will be acted on or changed in some important or significant way if the proposed rule becomes effective. Some degree of uncertainty as to the effect of the proposed rule must be tolerated if the proceeding is to be available as a pre-enforcement check on agency rulemaking.

DOAH hearing officers should not dismiss validity challenge petitions if the challenger satisfies the minimum statutory standard of being a person "substantially affected" if the proposed rule were adopted. Reviewing courts for their part should not second guess a

hearing officer's determination that the statutory access standards have been met unless there is no proof in the record of important or significant potential effect on the challenger. On the other hand, reviewing courts should intervene to protect the integrity of the process when a hearing officer uses access standards more stringent than the statute contemplates and denies access to a person who would be affected in an important or significant way were the rule to become effective. The statutory standard for access to this executive proceeding, in either event, should not be infused with judicially formulated requirements for standing to invoke the judicial process.

## V. ACCESS TO OTHER ADMINISTRATIVE PROCEEDINGS

In addition to the four opportunities to participate in the rulemaking process, chapter 120 creates three other administrative proceedings that are available to persons dealing with agencies in nonrulemaking circumstances. There is an opportunity to challenge administratively the validity of adopted rules. There is an opportunity to obtain a declaratory statement from an agency regarding the applicability of agency enforced law to a particular set of facts. There is an opportunity to have a formal or informal adjudicatory hearing before an agency determines the substantial interests of a party. Each of these proceedings has its own access requirements. Consequently, each statutory provision must be examined separately to determine the nature of the interest a person must possess in order to invoke each process.

### A. *Administrative Challenges to the Validity of Adopted Rules*

Even after an agency adopts a rule, its validity may be administratively challenged before a DOAH hearing officer. Section 120.56(1) authorizes “[a]ny person substantially affected by a rule [to] seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.” The validity challenge petition must be in writing and must “state with particularity facts sufficient to show the person seeking relief is substantially affected by the rule and facts sufficient to show the invalidity of the rule.”<sup>264</sup> If the DOAH director is satisfied that the petition meets these two requirements, she assigns a hearing officer to conduct a hearing on the petition

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264. FLA. STAT. § 120.56(2) (1985) (emphasis added).

within thirty days of the assignment,<sup>265</sup> unless the rule being challenged is an emergency rule, in which case the hearing must be conducted within fourteen days of the assignment.<sup>266</sup> The hearing is conducted in accordance with the adjudicatory procedures of section 120.57. As in the case of a validity challenge to a proposed rule, the hearing officer's order is final agency action.<sup>267</sup> The hearing officer may declare a rule invalid in whole or in part. A rule declared invalid by a hearing officer becomes void thirty days after the decision is rendered or at a later time if specified in the decision. An agency whose rule has been declared invalid must give notice of the decision in the *Florida Administrative Weekly*.<sup>268</sup> Failure to challenge a rule under this provision does not constitute a failure to exhaust administrative remedies.<sup>269</sup>

The statutory language concerning access to initiate a validity challenge to an adopted rule is virtually identical to that concerning access to initiate a challenge to the validity of a proposed rule discussed above. The minor language differences between the two provisions appear to be grammatical accommodations reflecting the difference in effect between a proposed rule and one already adopted.<sup>270</sup> To initiate a validity challenge to an adopted rule a person must be "substantially affected" by the rule and allege facts sufficient to show that substantial effect. The access standard suggested by this statutory language is, therefore, essentially the standard derived from the language of the challenge to the validity of proposed rules provision namely, any person whose course of conduct has been acted on or changed in any important or significant way by the rule is a "person substantially affected" by the rule and may initiate a challenge to its validity.

### 1. *History of Validity Challenges to Adopted Rules*

The legislative history of the validity challenge to adopted rules is quite similar to the history of the validity challenge to proposed rules provision. Like it, the validity challenge to adopted rules was not included in any of the Law Revision Council drafts; it was not included in the House bill as introduced or as passed; it was not

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265. *Id.*

266. *Id.* § 120.56(4).

267. *Id.* § 120.56(5).

268. FLA. STAT. § 120.56(3) (1985).

269. FLA. STAT. § 120.56(5) (1985).

270. This is the conclusion reached by the court in *Department of Health & Rehab. Servs. v. Alice P.*, 367 So. 2d at 1052.

included in the Senate bill as introduced. The provision first appeared in the committee substitute sponsored by the Senate Committee on Rules and Calendar.

As introduced, the House bill provided for a declaratory judgment action to be brought in the circuit courts to test the validity or applicability of a rule by a plaintiff who alleged that "the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the *legal rights or privileges of the plaintiff*."<sup>271</sup> This House bill also included a provision authorizing agency declaratory rulings on the applicability of statutory provisions, agency rules, or agency orders.<sup>272</sup> The provision for declaratory judgment actions was deleted in the House committee substitute bill, but the agency declaratory rulings provision was retained.<sup>273</sup>

The Senate bill as introduced did not provide for declaratory judgment actions, but did authorize agency declaratory rulings.<sup>274</sup> The Senate Rules and Calendar Committee substitute bill did not provide for agency declaratory rulings. In its place, the committee substitute bill provided for the administrative validity challenge to adopted rules at the behest of "[a]ny person substantially affected by a rule."<sup>275</sup> The conference committee report retained the House provision for agency declaratory rulings<sup>276</sup> and the Senate provision for validity challenges to adopted rules.<sup>277</sup>

Several conclusions can be drawn from this history. First, although the 1961 Florida Administrative Procedure Act contained a provision permitting declaratory judgment actions in the circuit courts to test the validity of agency rules,<sup>278</sup> there appears to have been little support among those involved in the development of the 1974 Act for continuing that practice. The Law Revision Council intended to eliminate declaratory judgment actions in the circuit courts<sup>279</sup> by providing for judicial review of final agency action, whether rule or order, in the district courts of appeal or, when re-

271. Fla. HB 2672, sec. 1 (1974) (proposed FLA. STAT. § 120.6) (emphasis added).

272. *Id.* (proposed FLA. STAT. § 120.7).

273. Fla. CS for HB 2672, 2434 and 2583, sec. 1 (1974) (proposed FLA. STAT. § 120.56).

274. Fla. SB 892, sec. 1 (1974) (proposed FLA. STAT. § 120.56).

275. Fla. CS for SB 892, sec. 7 (1974) (proposed FLA. STAT. § 120.29).

276. FLA. H.R. JOUR. 1329 (Reg. Sess. 1974) (referring to proposed FLA. STAT. § 120.56(1)); FLA. S. JOUR. 909 (Reg. Sess. 1974) (same).

277. FLA. H.R. JOUR. 1329 (Reg. Sess. 1974) (referring to proposed FLA. STAT. § 120.56(2)); FLA. S. JOUR. 909 (Reg. Sess. 1974) (same).

278. FLA. STAT. § 120.30 (1973).

279. Reporter's Comments, *supra* note 120, at 26.

quired by law, in the supreme court.<sup>280</sup> Neither the Senate bill as introduced nor the committee substitute that passed the Senate provided for declaratory judgment actions. Only the House bill as introduced contained a declaratory judgment provision; it was based on the RMA.<sup>281</sup> The declaratory judgment provision did not survive the committee process, however, because no declaratory judgment provision was contained in the House committee substitute bill debated and passed by the House.

Second, the administrative challenge to the validity of adopted rules was not offered as an alternative to circuit court declaratory judgment actions. Rather, it was an alternative to the agency declaratory rulings provision in both the House committee substitute bill and the Senate bill as introduced.<sup>282</sup> Third, because the administrative validity challenge to adopted rules provision was not an alternative to circuit court declaratory judgment actions, any attempted comparison between the standing requirement in the 1961 Act and the language used to identify the interest required to initiate the administrative challenge to the validity of adopted rules under the 1974 Act is unwarranted.<sup>283</sup> The legislative history does not support any comparison between standards because the two processes were not compared to each other by the legislature.

Senator Barron substituted the word "aggrieved" for the phrase "substantially affected" in his explanation of the validity challenge to adopted rules to the Senate,<sup>284</sup> just as he did in discussing the

280. Reporter's Final Draft, *supra* note 107, § 0120.17(2).

281. See *supra* text accompanying note 271.

282. This conclusion is supported by Sen. Barron's remarks during the Senate debate. He said:

Under the House bill, however, as it came over, if you were aggrieved by a rule, you had the option to go back to the agency that made the rule. If you were dissatisfied there, you would go to the independent hearing officer. All he could do would be to advise the agency. Now, under the Senate bill that you have before you [CS for SB 892], you see that when a rule is made and the public is aggrieved, either at the time it is made or some subsequent time, that you may go directly to the independent hearing officer . . . .

Fla. S., tape recording of proceedings (May 14, 1974) (on file with Secretary).

283. In *Department of Offender Rehab. v. Jerry*, 353 So. 2d at 1232, the court compared the language of FLA. STAT. § 120.30 (1973), permitting any "affected person" to bring a declaratory judgment action to test the validity of a rule, with the language of *id.* §§ 120.54(4), .56 (1977), permitting any "substantially affected" person to initiate administrative validity challenge proceedings to proposed and adopted rules. The court concluded that "[t]he legislature in enacting Sections 120.54(4)(a) and 120.56, employed more restrictive language, 'substantially affected,' than it did in enacting Section 120.30."

284. See *supra* note 282.

validity challenge to proposed rules.<sup>285</sup> The word "aggrieved" does not emphasize the effect of the agency rule on the person seeking to challenge it in the way the statutory phrase "substantially affected" does. Barron's use of "aggrieved" probably was not meant to be descriptive of the injury necessary to invoke the validity challenge proceeding. It is likely that he used the word "aggrieved" to indicate generally to the Senate that a challenger would have to be affected in some way, without belaboring the floor debate with the details of that effect.

The legislative history of this provision does support the view that standing requirements under the 1961 Act's declaratory judgment section are not an appropriate guide for determining access standards for this wholly new administrative proceeding in the 1974 Act. Beyond that, however, the legislative history offers little insight into what the appropriate access standard should be.

## 2. *Validity Challenges to Adopted Rules in Other States*

Missouri and Florida appear to be the only states which authorize administrative challenges to the validity of adopted rules. The Missouri administrative procedure statute permits an administrative determination of the validity or applicability of any "rule, regulation, resolution, announced policy, applied policy, or any similar official or unofficial interpretation or implementation of state agency authority, other than in a contested case or in a law enforcement proceeding."<sup>286</sup> A complaint may be filed with the administrative hearing commission<sup>287</sup> by "any interested person, or duly constituted entity who is affected by such interpretation or implementation in a manner or to a degree distinct and different from other members of the general public."<sup>288</sup>

The Missouri provision is not helpful in formulating an appropriate access standard for the Florida validity challenge to adopted rules provision because the Missouri triggering language is very different from Florida's "any person substantially affected by a rule" language. The Missouri provision is essentially a codification

285. See *supra* text accompanying note 202.

286. MO. ANN. STAT. § 536.050(2) (Vernon Supp. 1985).

287. The Administrative Hearing Commission may consist of no more than three commissioners who are appointed by the Governor with the advice and consent of the Senate. *Id.* § 621.015. Each commissioner has authority to exercise all powers granted to the administrative hearing commission without the concurrence of any other commissioner, except for rulemaking powers in which case all commissioners must concur. *Id.* § 621.035.

288. *Id.* § 536.050(2).

of the common law "special injury" standard. While "special injury" generally is required to institute a law suit in Florida, the Florida legislature, unlike the Missouri legislature, did not choose to make the showing of "special injury" necessary to challenge administratively the validity of adopted rules.

Most state administrative procedure acts make some provision for challenging the validity of agency rules in the courts through an action for declaratory judgment. A majority of these state acts is patterned on the RMA provision which authorizes any person whose legal rights or privileges are impaired or interfered with by an agency rule to seek declaratory relief in the courts.<sup>289</sup> The Arizona statute permits an "affected person" to bring a declaratory judgment action;<sup>290</sup> the Maine statute extends the right to any "aggrieved person";<sup>291</sup> Alaska, California, and Hawaii extend the right to any "interested person";<sup>292</sup> Arkansas permits any person who suffers injury to his person, property, or business to seek declaratory relief;<sup>293</sup> and the Louisiana, Massachusetts, Missouri, New York, and Wisconsin statutes do not specify the nature of the interest a person must have in order to seek declaratory relief.<sup>294</sup> The MSAPA, the District of Columbia, and sixteen states make no provision for declaratory judgment actions to test the validity of agency rules.<sup>295</sup>

289. 1961 MODEL ACT, *supra* note 93, § 7, at 400; ALA. CODE § 41-22-10 (1982); CONN. GEN. STAT. ANN. § 4-175 (West Supp. 1985); GA. CODE ANN. § 50-13-10(a) (1982); IDAHO CODE § 67-5207 (1980); MD. STATE GOV'T CODE ANN. § 10-125(b) (1984); MICH. COMP. LAWS ANN. § 24.264 (1981); MINN. STAT. ANN. § 14.44 (West Supp. 1985); MONT. CODE ANN. § 2-4-506(1) (1983); NEB. REV. STAT. § 84.911(1) (1981); NEV. REV. STAT. § 233B.110(1) (1981) (with provision for an agency to institute a declaratory judgment action to establish the validity of any rule); N.H. REV. STAT. ANN. § 541-A:7 (1974); N.M. STAT. ANN. § 12-8-8(A) (1978) (with provision for any representative association to file the action if one or more of its members could qualify as a plaintiff); OKLA. STAT. ANN. tit. 75, § 306 (West Supp. 1984-1985); R.I. GEN. LAWS § 42-35-7(1977); S.C. CODE ANN. § 1-23-150(b) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-14 (1980); TENN. CODE ANN. § 4-5-224(a) (Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 12 (Vernon Supp. 1985); UTAH CODE ANN. § 63-46-9 (1978); VT. STAT. ANN. tit. 3, § 807 (1972); WASH. REV. CODE § 34.04.070(1) (Supp. 1985); W. VA. CODE § 29A-4-2(a) (Supp. 1984). The same language appeared in Fla. HB 2672, sec. 1 (1974) (proposed FLA. STAT. § 120.6). See *supra* text accompanying note 271.

290. ARIZ. REV. STAT. ANN. § 41-1007(A) (1985).

291. ME. REV. STAT. ANN. tit. 5, § 8058(1) (Supp. 1984-1985).

292. ALASKA STAT. § 44.62.300 (1984); CAL. GOV'T CODE § 11350(a) (West Supp. 1985); HAWAII REV. STAT. § 91-7 (1976).

293. ARK. STAT. ANN. § 5-705 (1976).

294. LA. REV. STAT. ANN. § 49:963 (West Supp. 1985); MASS. GEN. LAWS ANN. ch. 30A, § 7 (West 1979); MO. ANN. STAT. § 536.050(1) (Vernon Supp. 1985); N.Y. A.P.A. § 205 (McKinney 1984); WIS. STAT. ANN. § 227.05 (West Supp. 1984-85).

295. The sixteen states are Colorado, Delaware, Florida, Illinois, Indiana, Iowa, Ken-



### 3. *Functional Analysis*

Much of what was said in the preceding section about the compatibility of the access standard proffered with the purposes underlying the validity challenge to proposed rules provision also applies here. The administrative challenge to the validity of adopted rules was also intended to create an opportunity for a citizen initiated check on agency rulemaking that exceeded delegated statutory authority.<sup>296</sup> It, too, was designed to provide an inexpensive yet effective way for a person to obtain relief if an independent hearing officer found that the rule went beyond the agency's statutory authority. These purposes are served by an access standard that permits any person whose course of conduct is acted on or changed in any significant or important way by an adopted rule to initiate a challenge to the rule's validity.

The administrative challenge to adopted rules, like the validity challenge to proposed rules, is an intrabranched dispute resolution mechanism. Questions concerning whether any executive branch agency exceeded its statutory authority when it adopted a rule are resolved by another executive branch agency—the DOAH. The legislature could have followed the approach suggested by the Law Revision Council and made the validity of rules exclusively a matter for judicial determination on review of final agency action. The legislature could have chosen to follow the House approach and made the question of a rule's validity one for the agency's initial determination subject to judicial review. Or the legislature could have decided to vest sole authority to monitor validity of rules in the Joint Administrative Procedures Committee. As was the case with the possible alternatives for checking agency authority to issue proposed rules, these options were rejected in favor of vesting authority in the executive branch DOAH to determine whether a rule was within an agency's delegated authority.

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tucky, Mississippi, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Virginia, and Wyoming.

296. See *supra* note 208. In addition to its mandate to review all proposed rules, the Joint Administrative Procedures Committee may review adopted rules as well. FLA. STAT. § 120.545(1) (1985). If the Joint Committee objects to an existing rule and the agency refuses to amend or to repeal the rule, the Joint Committee's objection is filed with the Department of State and published in the *Florida Administrative Weekly*. A permanent history note to the rule when published in the Florida Administrative Code must include a reference to the Joint Committee's objection and to the issue of the *Weekly* in which the full text of the objection appeared. FLA. STAT. § 120.545(8) (1985). The Joint Committee also has standing under certain conditions to seek judicial review of the validity of any existing rule to which it objected and which the agency refused to amend or repeal. *Id.* § 11.60(2)(j).

Because the legislature chose to vest the authority to determine a rule's validity in a specialized *executive branch agency*, rather than in the courts, and because it chose not to require "special injury" to initiate the proceeding, judicial standing requirements are not appropriate for determining access to this proceeding. The respective responsibilities of the DOAH hearing officers and the reviewing courts in this context are the same as they are in the context of the validity challenge to proposed rules discussed above.<sup>297</sup> A DOAH hearing officer's determination that a person is affected in an important or significant way by a rule should not be disturbed by a reviewing court unless it is unsupported by the record. If a DOAH hearing officer uses an access standard more demanding than the statutory language requires and improperly denies access, a reviewing court should reverse and remand if the record supports the challenger's position that he is affected by the rule in an important or significant way. In either case, the appropriate access standard for determining ability to initiate this executive branch proceeding should not be confused with judicially developed rules for standing to institute a law suit.

#### *4. Analysis of Cases Concerning Access to Validity Challenge to Adopted Rule Proceedings*

The cases concerning access to the validity challenge proceeding have tended to implicate judicial concepts of standing and ripeness. Three issues have surfaced which relate to the appropriate access standard for this proceeding. First, the right of associations to challenge rules which do not affect them but which do substantially affect their members. Second, the extent to which the certainty of the rule's effect on the challenger must be established. And third, whether a legally protected right must be infringed for a challenger to show substantial effect.

Initially, associations were not permitted to challenge the validity of adopted rules solely as representatives of their members' interests. Unless at least one member was also a party to the proceeding, petitions filed by associations were dismissed for failure to show that a "party [had] sustained or [was] in immediate danger of sustaining some direct injury as a result of the challenged rule."<sup>298</sup> The Florida Supreme Court disapproved this approach in

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297. See *supra* pp. 1017-18.

298. Florida Dep't of Education v. Florida Education Ass'n United, 378 So. 2d 893, 894 (Fla. 1st DCA 1979), *vacated in* Florida Homebuilders Ass'n v. Department of Labor &

its *Florida Home Builders* decision saying the "restriction on the standing of associations is an excessively narrow construction of section 120.56(1) and results in restricted public access to the administrative processes established in the Florida Administrative Procedure Act."<sup>299</sup> The court noted that greater public access to executive branch agencies was a principal goal of the revisers of chapter 120<sup>300</sup> and concluded from this that

the refusal to allow this builders' association, or any similarly situated association, the opportunity to represent the interests of its injured members in a rule challenge proceeding defeats this purpose by significantly limiting the public's ability to contest the validity of agency rules. While it is true that the "substantially affected" members of the builders' association could individually seek determinations of rule invalidity, the cost of instituting and maintaining a rule challenge proceeding may be prohibitive for small builders. Such a restriction would also needlessly tax the ability of the Division of Administrative Hearings to dispose of multiple challenges based upon identical or similar allegations of unlawful agency action.<sup>301</sup>

Satisfied that this rather brief review of the history and purpose of chapter 120 supported its view, the court went on to devise a standard permitting associations to challenge the validity of rules acting solely as representatives of their members' interests.<sup>302</sup>

At first glance, the court's decision seems correct. Greater public

Employment, 412 So. 2d 351, 354 (1982); Department of Labor & Employment Sec. v. Florida Home Builders Ass'n, 392 So. 2d 21, 22 (Fla. 1st DCA 1980), *rev'd sub nom.* Florida Home Builders Ass'n v. Department of Labor & Employment, 412 So. 2d 351, 352 (1982). Both courts quoted the language of the *Jerry* opinion.

299. 412 So. 2d at 352.

300. The court cited these remarks from the Reporter's Comments: "The principle purpose for the adoption of a wholly-revised administrative procedure act for Florida is to remedy massive definitional, procedural and substantive deficiencies in existing law . . . (v) by broadening public access to the precedents and activities of agencies . . ." *Id.* at 353 n.2. The validity challenge proceeding, however, was not included in the Law Revision Council's proposal to which the Reporter's Comments were addressed.

301. *Id.* at 353.

302. The standard, derived from *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977), permits an association to initiate a validity challenge if it demonstrates that

a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.

412 So. 2d at 353-54.

access to the workings of the executive branch agencies was indeed a major goal of the revisers of chapter 120. The federal associational standing rule urged on the court by the Home Builders was more in keeping with that general goal than was the special injury rule urged by the agency.<sup>303</sup> But neither standing rule, federal or state, was appropriate and, while the court is to be applauded for considering history and purpose when faced with an access question, it would have been better served if it had focused on the language of the validity challenge section rather than on the general history and purpose of the statute as a whole.

The access language used in section 120.56 does not support the court's decision to permit associations to challenge the validity of rules which do not affect them. Section 120.56(1) authorizes "[a]ny person substantially affected by a rule" to initiate a validity challenge. The suggestion is that the challenger must be affected personally by the rule. Ambiguity about the personal effect requirement is removed by the section 120.56(2) directive that the petition "*shall state with particularity facts sufficient to show the person seeking relief is substantially affected by the rule.*" A trade or professional association, acting solely as a representative of its members' interests, cannot satisfy that directive. The court's associational standing rule, however ameliorative its intent, ignores unambiguous statutory language requiring demonstrable personal effect and thus permits validity challenges to be brought by persons not intended by the legislature to have access to this proceeding.

Nor do the court's concerns about the financial burden that would be imposed on individual association members and the strain that would be put on DOAH resources if associations were not permitted to challenge rules on their members' behalf justify the violence done to the plain meaning of the section's language. The court assumes that without the associational standing rule the burden of challenging the validity of the rule would fall upon a so-called small builder at a cost that may be prohibitive. Even if those assumptions are correct, the court fails to explain why persons who happen to be members of trade or professional associations warrant consideration not extended to unorganized individuals who must shoulder the same burden and costs to challenge invalid agency rules. If the costs of maintaining a rule challenge are too high, they are too high for everyone, not just members of trade or

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303. *Florida Homebuilders Ass'n*, 352 So. 2d at 352.

professional associations. In any event, if the cost of waging validity challenges to adopted rules is indeed a problem, it would seem to be one which the legislature is more institutionally competent to address than are the courts.

The court's concern about the inefficient use of DOAH resources is equally unavailing. While the court legitimately should be concerned about the impact judge-fashioned rules have on the efficient use of judicial resources, it acts improperly when it supervises resource allocation at the DOAH. The legislature by statute and the DOAH by practice have addressed the problem of multiplicity. Section 120.56(5) provides an opportunity for other persons substantially affected by a rule to join a validity challenge as parties or intervenors.<sup>304</sup> If separate petitions challenging the validity of the same rule are filed, the DOAH director assigns all the petitions to the same hearing officer who in turn consolidates them for hearing and decision.<sup>305</sup> Presumably, in the appropriate case the validity of an adopted rule could be challenged by a person substantially affected by it as a representative of all other similarly affected persons.<sup>306</sup> In sum, the court's associational standing rule is not supported by the language of the section nor by the court's rationale.

The case that introduced federal judicial ripeness notions to the validity challenge proceeding access standard was *Jerry*. Relying exclusively on federal case law, the court denied access to challenge the validity of a procedural rule to a prison inmate because he failed to establish that, at the time of the challenge, he was suffering any present adverse effect of the rule. His status as a prison inmate who had been subjected to the rule in the past and who might be subjected to it again at any time was accepted by the hearing officer as sufficient demonstration of substantial affect.<sup>307</sup> The court disagreed and concluded that

Jerry's prospects of future injury rest on the likelihood that he

304. FLA. STAT. § 120.56(5) (1985) has been construed to permit intervention either on behalf of a petitioner or a respondent. *Florida Elec. Power Coordinating Group, Inc. v. County of Manatee*, 417 So. 2d 752 (Fla. 1st DCA 1982).

305. Telephone conversation with Sharyn Smith, Director, Fla. Div. of Admin. Hearings (Aug. 15, 1984); see also FLA. ADMIN. CODE R. 22I-6.11 (Feb. 1985 Supp.).

306. *But see* *Department of Health and Rehab. Servs. v. Alice P.*, 367 So. 2d 1045 (Fla. 1st DCA 1979) (holding that a § 120.54(4) validity challenge proceeding is not appropriate for a class action); *Medley Investors, Ltd. v. Lewis*, 465 So. 2d 1305 (Fla. 1st DCA 1985) (holding that a § 120.57 adjudicatory proceeding is not appropriate for a class action).

307. 353 So. 2d at 1232.

will again be subjected to disciplinary confinement because of possible future infractions of [the rule he sought to challenge]. Whether this will occur, however, is a matter of speculation and conjecture and we will not presume that Jerry, having once committed an assault while in custody, will do so again. To so presume would result only in illusory speculation which is hardly supportive of issues of "sufficient immediacy and reality" necessary to confer standing.<sup>308</sup>

The concluding phrase—" 'sufficient immediacy and reality' necessary to confer standing"—was taken from United States Supreme Court cases concerned with whether federal constitutional challenges to government conduct were sufficiently ripe to require adjudication of the constitutional issue.<sup>309</sup> Because federal courts are inclined to avoid unnecessary constitutional adjudication,<sup>310</sup> plaintiffs are required to demonstrate the necessity for judicial intervention by showing immediate and real injury or the threat of immediate and real injury to have standing in these circumstances.

What is not apparent and what the *Jerry* court does not explain, is why a federal judicial avoidance device should be used by a state executive agency. Nothing in section 120.56's language, history, or purpose suggests that the DOAH should decline to exercise its legislatively granted power to determine the validity of adopted rules. There is no need to worry about unnecessary constitutional adjudication because the DOAH cannot resolve constitutional challenges to adopted rules;<sup>311</sup> its authority is limited to determining whether the rule was properly adopted in accordance with the procedural requirements of section 120.54 and whether the rule is within the

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308. *Id.* at 1236. In *Department of Commerce v. Matthews Corp.*, 358 So. 2d 256 (Fla. 1st DCA 1978), an unsuccessful bidder on a public works contract was permitted to challenge the validity of wage rate guidelines even though it was not the lowest bidder and had not been awarded the contract. The court distinguished the bidder's situation from *Jerry* by stating but for the wage rate guidelines "Matthews would be in better competitive position to bid on public works projects." *Id.* at 257 n.1. Apparently, the court was willing to presume that Matthews Corporation would bid for public works contracts in the future. The court did not explain why that presumption did not result in illusory speculation.

309. *O'Shea v. Littleton*, 414 U.S. 488, 493-94 (1974); *Golden v. Zwickler*, 394 U.S. 103 (1969).

310. *See, e.g., Valley Forge College v. Americans United for Separation of Church and State*, 454 U.S. 464, 488-90 (1982); *Poe v. Ullman*, 367 U.S. 497, 502-09 (1961); *Rescue Army v. Municipal Court*, 331 U.S. 549, 568 (1947); *Ashwander v. TVA*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring).

311. *Department of Envtl. Reg. v. Leon County*, 344 So. 2d 297, 298 (Fla. 1st DCA 1977); *Department of Admin., Div. of Personnel v. Department of Admin., Div. of Admin. Hearings*, 326 So. 2d 187, 189 (Fla. 1st DCA 1976).

agency's delegated authority. The *Jerry* "sufficient immediacy and reality" standard, drawn as it was from federal justiciability concepts and not supported by the language, history, or purpose of section 120.56, should be abandoned.

*Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services*<sup>312</sup> and to a greater extent *Cox v. South Florida Water Management District*<sup>313</sup> suggest some movement away from strict adherence to the *Jerry* "immediacy and reality" standard. In *Professional Firefighters*, a hearing officer dismissed a petition challenging the validity of rules concerning the licensing of paramedics which was filed by an association and individual members who performed paramedic services in the course of their employment with a local fire department. The hearing officer concluded that the requisite "sufficient immediacy and reality" to challenge the rules was not satisfied because the individuals had not applied for and been denied certification under the challenged rules.<sup>314</sup> The reviewing court reversed, observing that the hearing officer's order "would preclude a challenge by anyone who had not first complied with a rule and suffered injury, no matter how clear the rule's applicability to, or substantial its effects on, the challenger."<sup>315</sup> The court found that the individuals were presently affected by the rules because they were currently employed in the field regulated by the rules and went on to hold:

When an agency sets up a new licensing or certification requirement for an occupation or profession not previously subject to state-wide regulation or licensing, persons engaged in that occupation or profession have standing to challenge the proposed regulation. This is true regardless of whether submission to certification or licensing is termed "voluntary" or not. There is a clear, direct effect on those concerned individuals being able to continue to earn their livelihood. The test of "substantially affected" as to the two individual appellants is met . . . .<sup>316</sup>

Although the court said *Jerry* was distinguishable,<sup>317</sup> it is clear

312. 396 So. 2d 1194 (Fla. 1st DCA 1981).

313. 450 So. 2d 288 (Fla. 4th DCA 1984), *petition for review denied mem.*, 459 So. 2d 1041 (Fla. 1984).

314. 396 So. 2d at 1195.

315. *Id.*

316. *Id.* at 1196.

317. The court said that both *Jerry* and *Alice P.* involved challengers who were not subject to the rule or immediately affected by it when the petitions were filed and they were unlikely to be affected by the rule in the future. The firefighters, on the other hand, were

that the firefighters were not required to satisfy—nor could they have satisfied—the “immediacy and reality” standard as it was articulated in *Jerry*. At the time they filed their petition, the firefighters were members of the class subject to the certification rules, but they could not demonstrate “injury which [was] accompanied by any continuing, present adverse effects” resulting from the rules as required by *Jerry*.<sup>318</sup> They were not then applicants whose certification had been denied pursuant to the rules. Indeed, the hearing officer specifically found that they neither “alleged [n]or established that anything in the challenged rules would disqualify them from certification.”<sup>319</sup> Nevertheless, by using a more relaxed standard—one not requiring a demonstration of injury accompanied by present adverse effects—the court concluded that the firefighters were substantially affected by the certification rules because if they wished to continue to perform paramedic services they would have to be state certified and that required that they submit themselves to the process embodied in the rules.

In *Cox*, the hearing officer dismissed a petition challenging the validity of certain water use restriction rules adopted by a water management district for future implementation in times of drought. The challenger, a landowner who also operated a nursery and landscape business, claimed he would be adversely affected by the water use restrictions. The hearing officer ruled that the requisite “immediacy and reality” were lacking because at the time the motion to dismiss was heard, there was no drought. The reviewing court reversed in a terse opinion that took judicial notice of the fact that the state’s “never ending preoccupation with the delicate balance of its water supply is more than mere speculation. Droughts and floods are to Florida what sand is to the Sahara Desert—inevitable.”<sup>320</sup> The court made no effort to distinguish *Jerry* and it certainly did not apply *Jerry*’s stringent “immediacy and reality” standard. The court was satisfied that a person who would be subject to the rule when the inevitable event occurred was presently substantially affected by that rule for purposes of challenging its validity.

In none of the three cases was the impact of the language of section 120.56(2) considered. That section requires the validity

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said to be presently affected by the certification rules because they work in the field regulated by those rules. *Id.*

318. 353 So. 2d at 1235.

319. 396 So. 2d at 1195.

320. *Id.*



challenge petition to recite "facts sufficient to show the person seeking relief *is* substantially affected by the rule." Just as that language inexorably leads to the conclusion that the challenger's personal interests must be substantially affected, so too, it makes inescapable the conclusion that the substantial effect must be presently felt by the challenger. The use of the present verb tense demands that the challenger demonstrate some present effect which is substantial. Viewed from this perspective, *Jerry and Professional Firefighters* reached the correct conclusion; *Cox* did not.

As an inmate in a state prison when he filed the rule challenge, Jerry was a member of the class of persons subject to the rule. But the challenged rule was a procedural one—it defined the disciplinary process used when an inmate was accused of violating prison rules. As a consequence, the mere existence of the rule did not affect Jerry in any way. Only if Jerry conducted himself in such a way as to be accused of a substantive rule violation would the procedural rule be invoked and substantially affect him.

The paramedic certification rule, on the other hand, did have a present effect on the firefighters. The rule required the firefighters to do something not required of them before. They had to make application for state certification. The mere requirement that they submit themselves to the certification process contained in the rule was adequate to establish that the rule presently affected them in a substantial manner. Section 120.56's access language does not require adverse effect or injury. So the fact that none of the challengers submitted to the process and failed to qualify for certification is immaterial.

*Cox* is closer to *Jerry* than it is to *Professional Firefighters* even though the rule was substantive not procedural. *Cox* was a member of the class subject to the water use restriction rule. But the mere existence of the rule did not have a present effect on *Cox*. *Cox* was not required to change his conduct in any way by the rule. Only if natural elements combined to cause a drought in the future would the rule require *Cox* to alter his behavior. However likely the chances the rule would be invoked at some time, *Cox* could not satisfy the requirement of present effect when he filed his validity challenge petition.

The suggestion that unless a legally recognized right is interfered with by a rule, a person is not substantially affected for purposes of pursuing a validity challenge came in *School Board of Orange*

*County v. Blackford*.<sup>321</sup> The school board, responding to a United States district court's desegregation order, adopted rules which closed a high school, transferred those students to other schools in the district, designated a junior high school as an exceptional education facility, and established new attendance zones for some of the remaining junior high schools in the district. The rules were challenged by the parents of two junior high school students who were transferred pursuant to the rules. The hearing officer ruled that the parents' "interest in maintaining for their children an educational program which is not unnecessarily disrupted by changing schools, and realigning friendships, is a substantial one."<sup>322</sup> He held the school board's rules invalid because they were not adopted in accordance with section 120.54 rulemaking procedures.<sup>323</sup> The school board appealed and the court reversed. While it recognized that parents have an interest in their children's education, including an interest that its progress not be unnecessarily disrupted, the court concluded that these parental concerns were not sufficient to entitle them to challenge the validity of the rules. With a curious citation to *Jerry* as support for the proposition, the court said "[t]o walk a little bit further, or to have the chance to make new friends does not offer entitlement to complain."<sup>324</sup> The holding was announced in these words:

We hold that while these children have a *legal right* to receive from the School Board equal opportunities for the obtaining of a free education, they do not have a *right* to be seated at a particular desk in a particular room at a particular school in order to receive such educational exposure. To uphold the order entered striking down the orders of the School Board herein referred to would require first that common sense and logic take a holiday.<sup>325</sup>

The court's emphasis on the importance of the interest asserted was misplaced and is quite troublesome. Section 120.56 requires a challenger to show that he is substantially affected by a rule. It does not require that a challenger's substantial interests are affected by the rule. The statutory language focuses the inquiry on the effect the rule has on a challenger. The question, therefore, is whether he is affected in some important or significant way by the

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321. 369 So. 2d 689 (Fla. 1st DCA 1979).

322. *Id.* at 691.

323. *Id.* at 690.

324. *Id.* at 691.

325. *Id.* (emphasis added).

rule. The question is not whether some important or significant interest of a challenger is affected by the rule. And the question certainly is not whether a challenger has a "legal right" which is interfered with or denied by the rule. The court asked the wrong question and predictably it got the wrong answer.

A rule which reassigns junior and senior high school students certainly does have an effect on those students and their parents which is more than trivial.<sup>326</sup> The court's refusal to recognize the magnitude of the rule's effect on the challengers appears to have been influenced by its view that the content of the attendance zone rule effectively was immune from successful challenge because its terms were dictated by the federal district court's desegregation order. Even if the school board were now required to start over and to follow the rule adoption procedures of section 120.54, the substance of the attendance zone rule would not change. But the fact that the school board had no discretion with respect to the content of the attendance zone rule ought to have no bearing on whether the school board had to comply with the procedural requirements for rule adoption. In the circumstances of this case, the court might have concluded that the school board's failure to follow prescribed procedure was harmless error.<sup>327</sup> Instead, the court trivialized the effect of the rule on the challengers with its talk of walking a little bit farther and making new friends. It manipulated the access requirement with its suggestion that interference with a legal right was necessary to challenge the rule administratively. The court was wrong on both counts.

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326. See *School Bd. of Leon County v. Ehrlich*, 421 So. 2d 18 (Fla. 1st DCA 1982) (affirming in part and reversing in part a hearing officer's final order concerning proposed amendments to an attendance zone rule; the challenge was filed under § 120.54(4) by parents of children affected by the proposed rule); see also *Cortese v. School Bd. of Palm Beach County*, 425 So. 2d 554, 555 (Fla. 4th DCA 1982), *petition for review denied mem.*, 436 So. 2d 98 (Fla. 1983); *Polk v. School Bd. of Polk County*, 373 So. 2d 960 (Fla. 2d DCA 1979); *School Bd. of Broward County v. Constant*, 363 So. 2d 859 (Fla. 4th DCA 1978).

327. FLA. STAT. § 120.68(8) (1985). Several cases have excused agency failure to comply with some requirements of the rule making process, notably the failure to provide the economic impact statement required by *id.* § 120.54(2) by finding that the failure did not impair the fairness of the proceeding or the correctness of the action. See *Florida-Texas Freight, Inc. v. Hawkins*, 379 So. 2d 944, 946 (Fla. 1979); *Publix Supermarkets, Inc. v. Florida Comm'n on Human Relations*, 470 So. 2d 754 (Fla. 1st DCA 1985); *Department of Professional Reg. v. Durrani*, 455 So. 2d 515, 519 (Fla. 1st DCA 1984); *Cortese v. School Bd. of Palm Beach County*, 425 So. 2d 554, 558 n.12 (Fla. 4th DCA 1982); *Plantation Residents' Ass'n, v. School Bd. of Broward County*, 424 So. 2d 879, 881 (Fla. 1st DCA 1982), *petition for review denied mem.*, 436 So. 2d 100 (Fla. 1983); *School Bd. of Broward County v. Gramith*, 375 So. 2d 340, 340-41 (Fla. 1st DCA 1979); *Polk v. School Bd. of Polk County*, 373 So.2d 960, 962-63 (Fla. 2d DCA 1979).

### B. Agency Declaratory Statements

Section 120.565 directs “[e]ach agency . . . [to] provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements.” Through a declaratory statement, an agency articulates its opinion concerning the applicability of a statutory provision, agency rule, or agency order to the particular circumstances presented in the petition. Notice of the receipt of a petition and its subsequent disposition must be published by the agency in the *Florida Administrative Weekly*. A copy of both the petition and the disposition must be sent to the Joint Administrative Procedures Committee. Agency disposition of a petition for a declaratory statement is final agency action subject to judicial review.<sup>328</sup>

The agency declaratory statement provision contains no legislatively dictated standard for determining the interest a person must have to request a declaratory statement from an agency. On its face, the provision appears to delegate to each agency the discretion to determine by rule the nature of the interest petitioners must possess to avail themselves of this process. That broad discretion, however, is curtailed somewhat by the requirement that agency rules adopted to comply with section 120.565 must be in substantial compliance with the model rules of procedure adopted by the Administration Commission.<sup>329</sup>

The model rules state that “[a]ny person may seek a declaratory statement as to the applicability of a specific statutory provision or of any rule or order of the Agency as it applies to the Petitioner in his particular set of circumstances only.”<sup>330</sup> Further, the model rules direct that petitions must be in writing and must contain, among other things, a “[d]escription of how this rule, order or statute may or does affect the petitioner in his/her particular set of circumstances only.”<sup>331</sup> The purpose of the declaratory statement is to provide a “means for resolving a controversy or answering

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328. FLA. STAT. § 120.565 (1985).

329. *Id.* § 120.54(10) requires the Governor and Cabinet, acting as the Administration Commission, to promulgate one or more sets of model rules of procedure. The model rules are the rules of procedure for each agency to the extent that it does not have a specific rule covering the subject matter of the applicable model rule. This section was amended in 1975 to require substantial compliance with the model rules when agencies adopted rules mandated by *id.* §§ 120.53 and 120.565. Ch. 75-191, § 3, 1975 Fla. Laws 368, 370 (codified at FLA. STAT. § 120.54(10) (1985)).

330. FLA. ADMIN. CODE R. 28-4.01(1) (1983).

331. *Id.* R. 28-4.01(2)(e).

questions or doubts concerning the applicability of any statutory provision, rule or order as it does, or may, apply to petitioner . . . ."<sup>332</sup> Therefore, "[t]he potential impact upon petitioner's interests must be alleged in order for petitioner to show the existence of a controversy, question or doubt."<sup>333</sup>

The guidelines contained in the model rules indicate that agency rules implementing the declaratory statement provision may require some showing of effect on the petitioner's interests that is caused by the statutory provision, agency rule, or order about whose applicability there is doubt.<sup>334</sup> The model rules do not suggest that either the effect or the petitioner's interests must be "substantial."<sup>335</sup> It is only required that the interests be personal to the petitioner and that there is or may be some effect on those interests.<sup>336</sup> Agency opinion may only be sought on the applicability of a statutory provision, agency rule, or order "*as it applies to the petitioner in his particular set of circumstances only.*"<sup>337</sup> Thus, it is evident that the declaratory statement proceeding is not available to one who seeks an agency's opinion on a purely hypothetical question unrelated to his personal situation.

### 1. History of the Declaratory Statement Provision

The declaratory statement provision was not recommended by the Law Revision Council. It originated in the House bill as introduced<sup>338</sup> and, with slight modification, was contained in the com-

332. *Id.* R. 28-4.05.

333. *Id.*

334. *Id.*

335. In *Sarasota County v. Department of Admin.*, 350 So. 2d 802, 804 (Fla. 2d DCA 1977), the court concluded that FLA. ADMIN. CODE R. 28-4.05 supported its view that a "preliminary test of *substantial interest* is proper" before an agency issues a requested declaratory statement. (Emphasis added).

336. See *Florida Optometric Ass'n v. Department of Professional Reg.*, 399 So. 2d 6, 6 (Fla. 1st DCA 1981), in which the court held that associations were not entitled to the declaratory ruling they received from the agency because their petition failed to allege that the rule had any potential effect on the associations' interests. Individual members of the associations who may have been affected by the rule were not parties to the petition and the court ruled that the associations were not proper parties to obtain a declaratory statement on behalf of their individual members.

337. FLA. STAT. § 120.565 (1985) (emphasis added).

338. Fla. HB 2672, sec. 1 (1974) (proposed FLA. STAT. § 120.7). The provision read: Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions have the same status as agency decisions or orders in contested cases.

This language was taken from the 1961 MODEL ACT, *supra* note 93, § 8, at 402.

mittee substitute bill that passed the House.<sup>339</sup> The Senate bill as introduced contained the declaratory statement provision as passed by the House.<sup>340</sup> The Senate committee substitute bill did not have any provision for declaratory statements. The conference committee report contained the House provision with some further language refinements.<sup>341</sup> The only available record of legislative discussion about this provision is the Senate floor debate, during which it was unfavorably compared with the Senate preferred validity challenge to adopted rules provision,<sup>342</sup> and the staff explanation to the House Committee on Governmental Operations.<sup>343</sup>

## 2. Declaratory Statement Provisions in Other States

Thirty-two states and the District of Columbia have a declaratory statement provision in their administrative procedure statutes. Sixteen of these states, including Florida, have provisions modeled on the RMA in which the statutory provision itself does not specify any particular interest necessary to invoke the process. Each agency is authorized to establish the appropriate interest by rule.<sup>344</sup> Eight states and the District of Columbia confer the right

339. Fla. CS for HB 2672, 2434, and 2583, sec. 1 (1974) (proposed FLA. STAT. 120.56).

340. Fla. SB 892, sec. 7 (1974) (proposed FLA. STAT. § 120.56).

341. FLA. H.R. JOUR. 1326, 1329 (Reg. Sess. 1974) (referring to proposed FLA. STAT. § 120.56(1)); FLA. S. JOUR. 906, 909 (Reg. Sess. 1974) (same). As enacted, the provision read:

Each agency shall provide by rule the procedure for the filing and prompt disposition of petitions for declaratory statements as to the applicability of any statutory provision or of any rule or order of the agency. Agency disposition of petitions shall be final agency action.

342. See *supra* notes 208, 282.

343. The staff explanation was given by Phillip Parsons, a lawyer assigned by the Speaker to the Committee. He said:

Section 120.56 . . . provides a remedy that is not available to a citizen at this time. It requires that each agency adopt by rule, a procedure for a declaratory judgment, so that a party can go before the agency and for a determination of whether a rule affects his course of conduct, his business, or his interests. In other words, prior to any agency action that might affect that party, and he's worried about the applicability of the rule, he can go to the agency and ask for a ruling: Is my conduct within the meaning of this rule or not? So then his rights are settled and he's allowed to proceed. There is no similar provision by statute at this time. It's a remedy that we don't have.

Fla. H.R., Comm. on Govtl. Ops., tape recording of proceedings (Apr. 11, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.).

344. 1961 MODEL ACT, *supra* note 93, § 8, at 402; ARK. STAT. ANN. § 5-706 (1976); CONN. GEN. STAT. ANN. § 4-176 (West Supp. 1985); FLA. STAT. § 120.565 (1985); GA. CODE ANN. § 50-13-11 (Michie 1982); IDAHO CODE § 67-5208 (1980); IOWA CODE ANN. § 17A.9 (West 1978); LA. REV. STAT. ANN. § 49:962 (West Supp. 1985); MONT. CODE ANN. § 2-4-501 (1983); NEV. REV. STAT. § 233B.120 (1983); N.Y. A.P.A. § 204 (1984); OKLA. STAT. ANN. tit. 75, § 307 (West 1976); R.I. GEN. LAWS § 42-35-8 (1977); S.D. CODIFIED LAWS § 1-26-15 (1980); UTAH CODE

to request a declaratory statement, on "interested persons," while also authorizing agencies to provide by rule the procedure for their submission.<sup>345</sup> The Massachusetts, New Jersey, and Wisconsin statutes also permit "interested persons" to request a declaratory statement, but they do not provide for agency rules to regulate the procedure for submission.<sup>346</sup> The South Carolina statute does not specify any particular interest necessary to request a declaratory statement, nor does it authorize agency rules to regulate the procedure for submission.<sup>347</sup> The remaining four state statutes all specify a different interest necessary to petition for a declaratory statement and authorize agency rules to regulate the procedure for submission: North Carolina extends the right to "aggrieved persons";<sup>348</sup> Tennessee to "affected persons";<sup>349</sup> Alabama to "any person substantially affected by a rule";<sup>350</sup> New Mexico to one whose "interests, rights or privileges are immediately at stake."<sup>351</sup>

### 3. *Functional Analysis*

Because the Florida declaratory statement provision is modeled on the RMA, the purposes and goals sought to be achieved by the drafters of the RMA provision should be considered when developing an appropriate access standard for the Florida provision. The original Model State Act, proposed in response to a call for the procedure made by the 1941 Attorney General's Committee on Ad-

ANN. § 63-46-10 (1978); VT. STAT. ANN. tit. 3, § 808 (Supp. 1984).

345. D.C. CODE ANN. § 1-1508 (1981); HAWAII REV. STAT. § 91-8 (1976); ME. REV. STAT. ANN. tit. 5, § 9001 (1979); MD. STATE GOV'T CODE ANN. § 10-304(a) (1984); MICH. COMP. LAWS ANN. § 24.263 (1981); NEB. REV. STAT. § 84-912 (1981); OR. REV. STAT. § 183.410 (1981) (with provision that the attorney general shall prescribe by rule the procedures for their submission, consideration and disposition); WASH. REV. CODE ANN. § 34.04.080 (West 1965); W. VA. CODE § 29A-4-1 (1980).

346. MASS. GEN. LAWS ANN. ch. 30A, § 8 (West 1979); N.J. STAT. ANN. § 52:14B-8 (West 1970); WIS. STAT. ANN. § 227.06(1) (West 1982).

347. S.C. CODE § 1-23-150(a) (Law. Co-op. Supp. 1983).

348. N.C. GEN. STAT. § 150A-17 (1978).

349. TENN. CODE ANN. § 4-5-223 (Supp. 1984) (declaratory order).

350. ALA. CODE § 41-22-11(a) (1982). The provision also requires the petition to "state with particularity facts sufficient to show the person seeking relief is substantially affected by the rule." The official commentary on this provision states that both the "any person substantially affected by a rule" language and the required statement of facts showing the substantial effect of the rule were taken from FLA. STAT. § 120.56(1), (2) (1977), the validity challenge to adopted rules provision. The Florida language was adopted to protect agency and public interest "from the issuance of unwarranted declaratory rulings by the requirement that the petition document the substantial interest of the petitioner." Commentary at 398.

351. N.M. STAT. ANN. § 12-8-9 (1983).

ministrative Procedure,<sup>352</sup> merely authorized agencies to issue declaratory rulings.<sup>353</sup> Experience in several states that adopted this approach showed great reluctance on the part of agencies to issue formal declaratory rulings.<sup>354</sup> The drafters of the RMA "sought to devise an amendment which would lead to the fuller utilization of this beneficial procedure."<sup>355</sup> Accordingly, the drafters decided that

agencies should be required to rule upon each request for a declaratory ruling, but that they would be permitted to make their ruling that of declining to resolve the particular question. Whatever ruling the agency made, however, (even a ruling declining to rule upon a particular question), would have the same status as any other final order of the agency. This would mean that, in appropriate cases, the refusal of the agency to make a ruling could be appealed to the courts. In other cases, the denial of the request would make it a matter of formal record that (for example) the agency was not prepared to say that a particular course of conduct was prohibited by the rule in question.<sup>356</sup>

To achieve these ends, the RMA declaratory ruling provision was amended to add: "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory rulings as to the applicability of any statutory provision or of any rule or order

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352. F. COOPER, *supra* note 117, at 240-41. The Attorney General's Committee stated: In recent years, in the Federal and state courts, the device of the declaratory judgment has been provided to furnish guidance and certainty in many private relationships where previously parties proceeded at their own risk. . . . The time is ripe for introducing into administration itself an instrument similarly devised, to achieve similar results in the administrative field. The perils of unanticipated sanctions and liabilities may be as great in the one area as in the other. They should be denied or eliminated. A major step in that direction would be the establishment of procedures by which an individual who proposed to pursue a course which might involve him in dispute with an administrative agency, might obtain from that agency, in the latter's discretion, a binding declaration concerning the consequences of his proposed action.

ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 30-33 (1941), *reprinted in* F. COOPER, *supra* note 117, at 240.

353. 1946 MODEL STATE ADMINISTRATIVE PROCEDURE ACT, § 7, *cited in* F. COOPER, *supra* note 117, at 241. As promulgated, the provision provided:

On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court.

354. F. COOPER, *supra* note 117, at 242.

355. *Id.*

356. *Id.* at 243.



of the agency."<sup>357</sup>

The purposes of the declaratory statement procedure are "to enable members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs"<sup>358</sup> and "to enable the public to secure definitive binding advice as to the applicability of agency-enforced law to a particular set of facts."<sup>359</sup> While a declaratory judgment action in a court is one way to resolve ambiguities in the law and to obtain a definitive ruling as to the law's application to a particular set of facts, it is not the only way and it is not the way selected by the Florida Legislature. The legislature chose instead to require executive branch agencies to issue definitive rulings to clarify ambiguous provisions of law. This approach is characterized by Professor Bonfield as "a more desirable method of achieving clarity."<sup>360</sup> Agency declaratory statement procedures are considered more desirable than judicial declaratory judgment actions for several reasons. They are less costly, less time consuming, less complicated, and less uncertain.<sup>361</sup> Bonfield has written that much of the uncertainty in declaratory judgment actions results from "the many limitations with which the judicial process has cloaked itself."<sup>362</sup> Among the limitations he notes are the following:

a reluctance, even on the state level, to answer suppositive questions whose resolution is unnecessary to resolve a demonstrably active contest of rights between parties. That is, there is a natural reluctance to determine rights in a judicial proceeding on the basis of facts which may be no more than hypothetical because the person seeking such a determination may only want to know them for planning purposes. There is also a general reluctance on the part of the courts to issue a declaratory decree regarding the applicability of law enforced by an agency without first giving the agency an opportunity to utilize its expertness in determining the appropriate result. Declaratory relief also may be unavailable absent a showing of substantial need. What is required, therefore, is a relatively cheap, simple, expeditious and widely available substitute.<sup>363</sup>

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357. 1961 MODEL ACT, *supra* note 93, § 8, at 402.

358. Bonfield, *supra* note 121, at 820.

359. *Id.* at 822-23.

360. *Id.* at 805.

361. *Id.*

362. *Id.*

363. *Id.* at 805-06 (footnotes omitted).

The declaratory statement provision is an executive branch substitute for the declaratory judgment action. It is intended, however, that the administrative substitute be more widely available than the judicial remedy and that its use not be unduly restricted by artificial access barriers that would frustrate its primary purposes. These purposes are implemented by the access standard, drawn from the language of the model rules, articulated above. That is, any person who is in doubt about the applicability of a statutory provision, agency rule, or order to described conduct that he is or may be engaged in, is entitled to an agency ruling on the question if the unclear provision of law has some effect or impact on his conduct. Further, any person who is in doubt about the applicability of a statutory provision, agency rule, or order to the described conduct of others that does or may affect the personal interests of the petitioner, is entitled to an agency ruling on the question, if the unclear provision of law would protect the petitioner's personal interests from an undesired effect.

This access standard makes agency declaratory statements available to some persons who would not have standing to institute a declaratory judgment action. That is as it should be and as was intended. The procedure was developed to meet the perceived inadequacies of declaratory judgment actions. It was developed to provide a less costly, less lengthy, less complicated, and less technical nonjudicial mechanism for members of the public to secure "binding advice where it is necessary or helpful for them to conduct their affairs in accordance with law."<sup>364</sup> For this executive branch alternative to work properly, great care must be exercised by both agencies and courts to understand it for what it is and not to treat it as a masquerading declaratory judgment action.

#### *4. Analysis of Cases Concerning Access to Declaratory Statements*

Unfortunately, Florida courts have already begun to view the declaratory statement provision as if it were a judicial proceeding. Judicial principles have been imposed on this executive process in three cases: one involving a request for a declaratory statement which was denied by an agency, another involving an agency refusal to dismiss a request for a declaratory statement, and one concerning judicial review of a statement issued by an agency to a pe-

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364. *Id.* at 812.

tioner who the court decided was not entitled to request the answer received.

In *Couch v. State*,<sup>365</sup> an action was filed in circuit court concerning parents' rights to visitation with their child who had been adjudicated a dependent child and placed in foster care. While this action was pending in the circuit court, the parents filed a declaratory statement petition asking the Department of Health and Rehabilitative Services whether the foster care program administered by it was governed by certain agency rules and federal statutes. The Department refused to answer the questions posed, citing the fact that the issues presented by the petition were pending before the circuit court. The parents appealed. In upholding the Department's action, the district court of appeal opined that the similarity between the declaratory statement proceeding and the declaratory judgment action justified its reliance on court decisions construing the declaratory judgment statute when it was called on to determine the "availability and scope of the remedies" under the declaratory statement provision. The principle borrowed from declaratory judgment case law and applied to the declaratory statement process was that "an actual, present and practical need for a declaratory judgment must be shown."<sup>366</sup>

The court's decision to make the availability of a declaratory statement dependent on whether a declaratory judgment action could be maintained under the same circumstances completely undermines primary goals sought to be achieved by the legislature through the declaratory statement device. Binding agency advice was intended to be more widely available than judicial declarations. Clarification of ambiguities present in agency enforced law was intended to be encouraged and facilitated by the use of the declaratory statement. By requiring that an "actual, present, and practical need" must be shown in order to be entitled to a declaratory statement, the court has transferred the judicial reluctance to respond to suppositive questions to an executive proceeding that was designed to do just that so that persons would have the benefit of agency thinking for planning purposes. Indeed, the court's requirement that an actual, present, and practical need must be shown is a deviation from the model rules' statement of the purpose of the declaratory statement, namely, it is a "means for resolving a controversy or answering questions or doubts concern-

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365. 377 So. 2d 32 (Fla. 1st DCA 1979).

366. *Id.* at 33.

ing the applicability of any statutory provision, rule or order as it does or may, apply" to the petitioner.<sup>367</sup>

In *Lawyers Professional Liability Insurance Company v. Shand, Morahan & Company, Inc.*,<sup>368</sup> litigation between the parties was pending before a United States district court when Shand filed a petition for a declaratory statement asking the Department of Insurance to answer questions which were in issue in the lawsuit. Lawyers Professional Liability filed a motion to abate or dismiss the petition for declaratory statement. The Department denied the motion and Lawyers Professional Liability appealed. The district court of appeal ruled that the Department had abused its discretion by refusing to suspend its proceedings on the declaratory statement pending the outcome of the federal court litigation. Following *Couch*, the court found case law dealing with concurrent jurisdiction between state and federal courts instructive. The principle borrowed from this case law and applied to the declaratory statement process was that an "action for declaratory relief, initiated when a suit is already pending which involves the same issues and which would afford full, adequate and complete relief, will not be permitted to proceed."<sup>369</sup>

The results reached in *Couch* and *Lawyers Professional Liability* are undoubtedly correct, but not for the reasons given by the courts. In fact, these two cases illustrate a fundamental inadequacy in the model rules controlling declaratory statements. Section 120.565 directs agencies to provide rules "for the filing and prompt disposition" of petitions for declaratory statements. The model rules, with which all agency rules must be in substantial compliance, make adequate provision for the filing of the petitions; but apart from authorizing agencies, in their discretion, to hold hearings on an expedited basis to dispose of a petition, no provision is made for prompt disposition.<sup>370</sup> Significantly, the model rules are silent on the circumstances in which an agency may decline to issue a requested declaratory statement. The statutory phraseology "[e]ach agency shall provide by rule the procedure for the filing and prompt disposition" of petitions is similar to the RMA provision.<sup>371</sup> The drafters of that language intended it to require agen-

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367. FLA. ADMIN. CODE R. 28-4.05 (1983) (emphasis added).

368. 394 So. 2d 238 (Fla. 1st DCA 1981).

369. *Id.* at 240.

370. FLA. ADMIN. CODE R. 28-4.07 (1983).

371. Compare FLA. STAT. § 120.565 (1985) with 1961 MODEL ACT, *supra* note 93, § 8, at 402.

cies to rule on all petitions submitted but to permit a ruling that declined to answer the question asked.

The circumstances in which an agency will decline to resolve a question presented to it by a petition for a declaratory statement need to be specifically set forth in the model rules and in the rules of the agencies. There are numerous legitimate reasons why agencies would be justified in declining to issue a requested declaratory statement.<sup>372</sup> Certainly one of those circumstances is when the petitioner is involved in litigation in either state or federal court and the question raised by the petition is pending before the court. It would be entirely appropriate and consistent with statutory authority for the model rules and the agencies' rules to specify that agencies will decline to respond to petitions filed to achieve some advantage in pending litigation. It is incumbent on agencies to address this matter and it is imperative that they do so. Their failure to fill the existing vacuum with rules of their own which meet their own peculiar executive needs only encourages the courts to fill the vacuum with common law rules which satisfy needs peculiar to the

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372. Professor Bonfield has suggested several grounds that would support an agency decision to decline to issue a declaratory statement. He has written:

Action of this sort would certainly be justified where it is necessary to assure an adequate allocation of the agency resources available for the issuance of rulings to petitions raising questions of wider public impact or of greater urgency. An agency refusal to rule would also be supportable where regulated parties seek to obtain permission to engage in activities that are so borderline as to be of very questionable legality, though marginally proper. Agency abstention would also be justifiable in order to postpone decisions on difficult questions where the agency has had insufficient time or resources to develop a "fully matured opinion." Other valid reasons to abstain from ruling on the merits of a particular petition include the fact that the issue raised has been definitively settled by a change in circumstances or other means so that the need for a ruling has terminated, or the fact that the questions posed or facts presented are insufficiently specific, or overbroad, or otherwise inappropriate as a basis upon which to decide. In addition, an agency may properly wish to decline to rule where the party seeking the ruling has no interest beyond mere curiosity in obtaining it, where the issue involved turns on peculiar facts which cannot be predicted or adequately described in advance, or where an answer to the question requires an analysis of so many complex factors that it becomes practically unmanageable outside of an actual full scale formal adjudication. An agency may also reasonably refuse to rule where the same or a similar course of action is under investigation for purposes of formal full scale adjudication, or where the petition filed is improper because it does not meet the procedural requirements imposed by the agency for such petitions. Similarly, a refusal to rule would be justified where the ruling, though technically binding only on the agency and petitioner, would *necessarily* determine the legal rights of other parties who have not filed such a petition, and who are opposed to the resolution of the issue by declaratory ruling procedures . . . .

Bonfield, *supra* note 121, at 818-19 (emphasis in original) (footnotes omitted).

judiciary.

A third case involves a judicial imposition not excusable by any failure on the part of the executive branch. In *Florida Optometric Association v. Department of Professional Regulation*,<sup>373</sup> two associations, the Society of Ophthalmic Dispensers and Optical Dispensers of North Florida, requested and received a declaratory statement from the Board of Opticianry.<sup>374</sup> Judicial review of the Board's statement was sought by the Florida Optometric Association, an intervenor in the proceedings before the Board, and by the Department of Professional Regulation, an observer of but not an intervenor in the Board's proceedings. The district court of appeal reversed the Board's action on the ground that the two petitioning associations were not proper parties to request the declaratory statement in the first place. The court found that the requested declaratory statement related to the applicability of an agency rule to a hypothetical set of facts which were alleged to exist as to some association members but not as to the associations themselves. Relying on cases decided prior to *Florida Home Builders* that denied associations access to proceedings to challenge the validity of adopted rules when individual association members were not

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373. 399 So. 2d 6 (Fla. 1st DCA 1981).

374. Doubt as to the meaning of the Board of Opticianry's rule concerning the fitting of contact lenses was the basis for the declaratory statement. The rule provided that:

The fitting of contact lenses is embraced in the field of optical dispensing. An optician may properly fill a prescription for contact lenses only if it contains both the optical specifications and complete lens specification desired by the optometrist or physician prescribing the lenses. Having prepared the lenses in precise conformity with the prescription, the optician can proceed to fit and adapt the lenses under the supervision, control, and direction of the optometrist or physician so desires [sic].

FLA. ADMIN. CODE R. 21P-10.09 (1979). The associations' petition for a declaratory statement addressed the following questions to the Board concerning the meaning of the fitting of contact lenses rule:

- (1) May an optician fill a prescription for contact lenses which contains all the necessary refractive information and omits only the keratometer readings, when the prescribing doctor has specifically instructed the optician to take the keratometer readings?
- (2) When an optician has properly filled a written prescription for contact lenses in precise conformity with the prescription, may the optician then proceed to fit and adapt the lenses to the wearer when the prescribing doctor has specifically instructed the optician to take keratometer readings and fit the patient with contact lenses?

The Board answered both questions in the affirmative. The contact lens fitting rule was amended in 1981 to provide that "[T]he technical fitting of contact lenses is embraced in the field of optical dispensing. All fitting shall be done only under the supervision of either a licensed physician or licensed optometrist." FLA. ADMIN. CODE R. 21P-10.09 (Annual Supp. 1982).

joined as parties, the court held that the associations were not proper parties as contemplated by section 120.565 and the model rules to obtain a declaratory statement on behalf of their members.<sup>375</sup>

Both the reasoning and the result reached in *Florida Optometric Association* are incorrect. The only connection between the authority relied on by the court and the question before it was that associations were seeking relief for their members. The administrative proceedings to which access was in question were quite dissimilar. Furthermore, the access requirements to initiate a validity challenge to adopted rules are not even remotely similar to the requirements based on the model rules for determining access to the declaratory statement process.<sup>376</sup> The model rules' guidelines concerning those persons who are entitled to obtain a declaratory statement are not jurisdictional. That is, an agency may in its discretion give a declaratory statement to anyone who petitions. The model rules' guidelines set minimum standards. Anyone who satisfies those guidelines is entitled to a declaratory statement. But the model rules' guidelines do not establish boundaries beyond which an agency may not go. An agency may give a declaratory statement

375. *Florida Optometric Ass'n, v. Department of Professional Reg.*, 399 So. 2d at 6. Curiously, the court observed in a footnote that if the associations had the requisite interest for § 120.565 purposes, the case would then present an issue as to these unincorporated associations' legal capacity to institute such proceedings. See *Phillips & Co. v. Hall*, 128 So. 635 (1930); cf. *Walton-Okaloosa-Santa Rosa Medical Society v. Spires*, 153 So. 2d 325 (Fla. 1st DCA 1963)." 399 So. 2d at 6 n.1. The cited authorities both concerned the common law incapacity of unincorporated associations to sue or be sued in their common name. This common law incapacity has no relevance in the context of statutorily defined administrative proceedings.

376. See also *Federation of Mobile Home Owners of Fla. v. Department of Business Reg.*, 10 Fla. L.W., 2697 (Fla. 2d DCA Dec. 13, 1985), in which the court reversed the agency's dismissal of a petition for declaratory statement filed by an association so that it could advise its members how the agency interpreted certain undefined statutory terms. The agency dismissed the petition on the ground that the association "failed to demonstrate that [it] is affected." *Id.* In reversing the agency, the court specifically refused to follow *Florida Optometric Ass'n* because in the court's view that decision had been undermined by the Florida Supreme Court's decision in *Florida Home Builders*. The court held that the *Florida Home Builders* associational standing rule applied to requests for declaratory statements. *Id.* at 2698. The court recognized that *Florida Home Builders* involved access to challenge rules under § 120.56. *Id.* at 2697. Nevertheless, the court found "no reason to believe that there is any determinative difference between the . . . purpose of the rule challenge proceeding . . . and the purpose of this proceeding by an association under section 120.565, both proceedings having been initiated under the Administrative Procedure Act." *Id.* at 2698. Consequently, the court committed the same error made by the *Florida Optometric Ass'n* court. See also *Farmworker Rights Org. v. Department of Health & Rehab. Servs.*, 417 So. 2d 753, 754-55 (Fla. 1st DCA 1982) (extending the *Florida Home Builders* associational standing rule to proceedings under § 120.57).

to anyone in its discretion; an agency must give a declaratory statement to anyone who satisfies the model rules' requirements.<sup>377</sup>

The real question before the court was not whether the agency erred in giving the declaratory statement but whether either the Florida Optometric Association or the Department of Professional Regulation had standing to seek judicial review of the declaratory statement. Judicial review is available to a party who is adversely affected by final agency action.<sup>378</sup> The Florida Optometric Association was allowed to intervene in the Board's declaratory statement proceedings. It was, therefore, a party within the meaning of section 120.52(11)(c).<sup>379</sup> However, there is no indication that the Asso-

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377. *Florida S&L Servs., Inc. v. Department of Revenue*, 8 Fla. L.W. 2093 (Fla. 1st DCA Aug. 26, 1983), *opinion withdrawn and new opinion issued*, 443 So. 2d 120 (Fla. 1st DCA 1983) was another example of judicial overreaching in the declaratory statement area. Florida S&L Services provides computer information, which is transmitted over private telephone lines supplied by Southern Bell, to financial institutions around the state. Southern Bell asked the Department of Revenue whether the private line service it provided was subject to the state sales tax. The Department responded that it was and Southern Bell began adding the sales tax to its customers' bills. Florida S&L Services then sought a declaratory statement from the Department, questioning the imposition of the sales tax on the private line service. The Department issued a declaratory statement which expressed its view that the private line services were subject to the sales tax. Florida S&L Services appealed the declaratory statement.

The district court of appeal initially declined to reach the merits because it found that Florida S&L Services lacked "standing" to request the declaratory statement the Department had given it. The court's conclusion rested on its interpretation of the Department's declaratory statement rule which says: "Any person *substantially affected* by a Department rule or order or the applicability of a statutory provision may petition the Department for a declaratory statement; provided however, *only those persons whose rights, privileges and immunities are directly affected* may be considered 'substantially affected.'" FLA. ADMIN. CODE R. 12-2.10 (1980) (emphasis added). In the court's view, Florida S&L Services was not directly affected, as required by the rule, because even though it was required to pay the tax, the legal liability for the sales tax rested with the service provider—Southern Bell—not with the consumer—Florida S&L Services.

The court's decision was completely indefensible. The Department, presumably capable of understanding its declaratory statement rule, was quite willing to give Florida S&L Services its official position on the applicability of the statutory provision in question. Indeed, the Department did not resist Florida S&L Services' right to request the declaratory statement from it or its standing to seek judicial review. The court raised the question *sua sponte* without benefit of argument from counsel. Clearly, the Department's position on the applicability of the sales tax to the private line service caused Florida S&L Services a real and immediate pocketbook injury that would satisfy the federal judicial standing requirements. The interest was more than adequate to meet the minimum standards established by the model rules. Fortunately, the court granted the motion for rehearing, withdrew the original opinion, and without mentioning "standing," resolved the merits of the dispute in Florida S&L Services' favor. *Florida S&L Servs. v. Department of Revenue*, 443 So. 2d 120 (Fla. 1st DCA 1983).

378. FLA. STAT. § 120.68(1) (1985).

379. Record on Appeal at 57, *Florida Optometric Ass'n v. Department of Professional Reg.*, 399 So. 2d 6 (Fla. 1st DCA 1981).



ciation qua association was adversely affected by the Board's action. The Board's opinion with respect to opticians' responsibilities in the fitting of contact lenses had no adverse affect at all on the Florida Optometric Association. Thus, the Association's appeal should have been denied for lack of standing.<sup>380</sup>

The Department of Professional Regulation was not a party to or an intervenor in the Board's declaratory statement proceedings. Without party status, the Department failed to satisfy the first requirement for seeking judicial review under section 120.68(1), and its appeal should have been denied for lack of standing.<sup>381</sup> Rather than reversing the Board's merely advisory opinion, the court should have refused to hear the appeal because neither party seeking review was adversely affected by the Board's action.

This was the approach taken by the reviewing court in *Sarasota County v. Department of Administration*.<sup>382</sup> Sarasota County requested a declaratory statement from the Department questioning whether the construction of a crude oil splitter refining facility in neighboring Manatee County was a development of regional impact (DRI) subject to the DRI process incorporated in chapter 380, the Environmental Land and Water Management Act. The Department responded that in its view the project was not a DRI. Sarasota County then sought judicial review of the declaratory statement claiming that the negative response to the question it posed was " 'adverse effect' sufficient to clothe [the] court with ju-

380. As an unincorporated association itself, the Florida Optometric Association was vulnerable to the same challenge it advanced against the Society of Ophthalmic Dispensers and the Optical Dispensers of North Florida. It did not establish that the Board's declaratory statement had any adverse impact on the association's own interests as an association. But none of the briefs filed in the case challenged Florida Optometric Association's standing to seek judicial review of the Board's declaratory statement.

381. In its brief, the Department asserted its right to seek judicial review of the Board's action based on FLA. STAT. § 455.211 (1979). Appellant's Main Brief at 18, *Florida Optometric Ass'n v. Department of Professional Reg.*, 399 So. 2d 6 (Fla. 1st DCA 1981). This claim went unchallenged but it appears to be unsupported. The statutory provision declares that "[t]he secretary of the department shall have standing to challenge any rule or proposed rule of a board pursuant to ss. 120.54 and 120.56." FLA. STAT. § 455.211(1) (1979). Clearly this language confers on the Department the right to initiate a validity challenge proceeding under ss. 120.54(4) or 120.56; it does not confer standing to seek judicial review under s. 120.68(1). The only reference to standing for purposes of judicial review is in § 455.211(2) (1979), which provides that "either the secretary or the board shall be a substantially interested party for purposes of § 120.54(5). The board may, as an adversely affected party, initiate and maintain an action pursuant to § 120.68 challenging the final agency action." Neither § 455.211(1) nor (2) confers standing on the Department to seek judicial review of a board's declaratory statement.

382. 350 So. 2d 802 (Fla. 2d DCA 1977), *cert. denied mem.*, 362 So. 2d 1056 (Fla. 1978).

risdiction."<sup>383</sup> The Department defended on the ground that the county had no right to receive the declaratory statement the Department had given it. The court rejected both contentions. On the latter point, while the court seemed to agree with the Department's position, it considered the question moot because the Department had not made the determination when it had the power to do so.<sup>384</sup> Nevertheless, the mere fact that the Department had given an official opinion which the county probably was not entitled to receive did not compel the court either to reverse the purely advisory opinion or to review its merits. The court correctly examined the DRI process and determined that the legislative scheme contemplated a limited cast of players—the developer, the local governments with zoning authority over the project, the regional planning agency, and the state planning agency.<sup>385</sup> Sarasota County was none of these. As a stranger to the DRI process, Sarasota County had no statutory interests that could be adversely affected by the Department's position on the project, and, therefore, had no standing to involve the court in a purely hypothetical question. The court properly declined to review the merits of the declaratory statement.

The declaratory statement proceeding is an executive process that was designed to enable persons to secure binding agency advice about ambiguous provisions of agency enforced law. Agencies are required to give declaratory statements to persons who meet the minimum access standard required by the model rules, but agencies may in their discretion issue declaratory statements to persons who do not satisfy those access requirements. In either

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383. *Id.* at 805.

384. *Id.* at 805 n.4.

385. See Finnell, *Saving Paradise: The Florida Environmental Land and Water Management Act of 1972*, 1973 URBAN. L. ANN. 103. This case represents only one of several attempts to use the various chapter 120 proceedings to broaden the opportunity for participation in the DRI process beyond those entities identified specifically in FLA. STAT. § 380.07(2). All of these efforts have failed. See *infra* notes 567-73 and accompanying text; see also *Friends of the Everglades, Inc. v. Board of County Comm'rs of Monroe County*, 456 So. 2d 904, 910-12 (Fla. 1st DCA 1984), *petition for review denied mem.*, 462 So. 2d 1108 (Fla. 1985); *Windley Key, Ltd. v. Department of Community Affairs*, 456 So. 2d 489, 490 (Fla. 3d DCA 1984); *Londono v. City of Alachua*, 438 So. 2d 91, 92-93 (Fla. 1st DCA 1983); *Caloosa Property Owners Ass'n v. Palm Beach County Bd. of County Comm'rs*, 429 So. 2d 1260 (Fla. 1st DCA 1983), *petition review denied mem.*, 438 So. 2d 831 (Fla. 1983); *Suwanee River Area Council Boy Scouts of Am. v. Department of Community Affairs*, 384 So. 2d 1369, 1373 (Fla. 1st DCA 1980); *South Fla. Regional Planning Council v. Land and Water Adjudicatory Comm'n*, 372 So. 2d 159, 165-67 (Fla. 3d DCA 1979); *Sarasota County v. General Dev. Corp.*, 325 So. 2d 45, 47 (Fla. 2d DCA 1976); *Sarasota County v. Beker Phosphate Corp.*, 322 So. 2d 655, 658 (Fla. 1st DCA 1975).

event, it is not proper for a reviewing court to reverse an agency's statement on nonsubstantive, technical grounds. The technical niceties that constrain courts do not apply to executive agencies. The model rules and the rules of the agencies need to be revised to articulate the specific circumstances under which agencies may decline to rule on a particular question. The statutory language and the purposes of this process require the agencies to provide by rule for the filing and prompt disposition of petitions for declaratory statements. Their failure to act will only heighten the temptation to further judicialize this process. In the end, the reformists' goals will have been sabotaged through the combined forces of a passive executive branch and an active judiciary.

### C. *Decisions Determining Substantial Interests*

Chapter 120 provides for both a formal and an informal adjudicatory process. The procedures governing the formal adjudicatory proceeding apply when there are disputed issues of material fact.<sup>386</sup> The procedures governing the informal adjudicatory proceeding apply in all other cases.<sup>387</sup> In either event, section 120.57 procedures—formal or informal—“apply in all proceedings in which the *substantial interests of a party are determined by an agency.*”<sup>388</sup> Determining the appropriate access standard for these administrative proceedings requires a separate examination of the provision's three essential elements: “substantial interests,” “party,” and “are determined by an agency.”

The phrase “substantial interests” appears as part of the statutory access standard in two provisions: the section 120.54(17) drawout and here in the section 120.57 adjudicatory proceedings. Because the phrase is only one element of the access standard in each of these provisions, however, the same standard does not result for both proceedings. As in the drawout provision, the adjective “substantial” suggests important or significant and the noun “interests” signifies something less than legally recognized and protected rights, privileges, or immunities. But unlike in the drawout provision, the phrase “substantial interests” in the adjudicatory provision is not limited by a personal pronoun. So while access to the drawout proceeding is accorded when one demonstrates that the procedural protections available in the information gath-

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386. FLA. STAT. § 120.57(1) (1985).

387. *Id.* § 120.57(2).

388. *Id.* § 120.57 (emphasis added).

ering proceeding are not adequate to protect his important or significant personal concerns, access to an adjudicatory proceeding does not necessarily require demonstration of impact on one's personal interests. A person may trigger the adjudicatory process whether or not his own personal interests are at stake. It is the determination of the "substantial interests of a party," not the determination of the petitioner's own substantial interests, that makes the process available.<sup>389</sup> In most instances, the important or significant concerns determined by an agency will be those of the person who requests the adjudicatory proceeding. However, in some licensing and permitting situations, particularly when the agency intends to grant the requested license or permit, a third person may be sufficiently interested to request an adjudicatory proceeding.

The ability of a third person to initiate an adjudicatory proceeding depends on the definition of "party." As defined in section 120.52(11), the word "party" includes four different general categories of persons. Specific provision is also made for county consumer interest agencies and for prisoners and parolees.<sup>390</sup> Only the four

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389. *Gadsden State Bank v. Lewis*, 348 So. 2d 343, 346-47 (Fla. 1st DCA 1977) (emphasis in original).

390. FLA. STAT. § 120.52(11) (1985) defines "party" to mean:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

(d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.

According to a 1983 amendment to this definition, prisoners

may obtain or participate in proceedings under s. 120.54(3), (4), (5) or (9), or s. 120.56 and may be parties under s. 120.68 to seek judicial review of those proceedings. Prisoners shall not be considered parties in any other proceedings and may not seek judicial review under s. 120.68 of any other agency action. Parolees shall not be considered parties for purposes of agency action or judicial review when the

general categories require examination.

The first category includes those specifically named persons whose substantial interests are being determined in the proceeding. Included in this group are specifically identified persons whose own significant or important personal concerns will be determined by the agency action. For example, any person who applies for any type of license, any person subject to discipline by any regulatory agency, or any person on whom an agency seeks to impose some burden or restraint, would be a party within the meaning of this first provision.

In the second category are those who by right derived from the constitution, a statute, or an agency rule are entitled to participate as parties. Any person with a legally recognized and protected right, privilege, or immunity is entitled to party status under this provision.

The third category includes those persons whose substantial interests will be affected by the agency action and who make an appearance as a party. This category overlaps and includes the first two but goes beyond them. Any person whose important or significant personal concerns will be affected, but not necessarily determined, by the agency action in question is entitled to party status under this provision, if he makes an appearance as a party.

Finally, in the fourth category are those persons allowed by the agency to intervene or to participate in the proceeding as parties. This category is the broadest of all. No specific interest is statutorily mandated. An agency may, in its discretion, permit intervention or participation as a party by anyone.

The phrase "are determined by an agency" suggests that the important or significant concerns of a party must be decided, settled, or resolved conclusively or finally by the agency. The substantial interests of a party will not be determined by an agency, therefore, unless the agency action will finally decide, settle, or resolve those interests. Preliminary agency action or agency action that results in a recommendation rather than in a decision will not cause the substantial interests of a party to be determined by an agency.

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proceedings relate to the rescission or revocation of parole. Ch. 83-78, § 1, 1983 Fla. Laws 257, 258 (current version at FLA. STAT. § 120.52(11) (1985)). The effect of the 1983 amendment was to overrule a judicial decision that prisoners were parties for purposes of seeking judicial review of their presumptive parole release dates as set by the Parole and Probation Commission. See *Daniels v. Florida Parole & Probation Comm'n*, 401 So. 2d 1351, 1354 (Fla. 1st DCA 1981), approved in *Roberson v. Florida Parole & Probation Comm'n*, 444 So. 2d 917, 920 (Fla. 1984).

This examination of the essential elements of the statutory language yields several different standards governing access to the adjudicatory proceedings, largely because of the flexibility in the definition of "party." Each of the following persons, therefore, should be able to compel the commencement of the adjudicatory process: (1) any specifically named person whose important or significant concerns will be decided, settled, or resolved finally by an agency; (2) any person with a legally recognized or protected right, derived from the constitution, a statute, or an agency rule, to participate in a proceeding in which the substantial interests of a party are decided, settled, or resolved finally by an agency; (3) any person whose important or significant personal concerns will be acted on or changed in some way in a proceeding in which he makes an appearance and in which the substantial interests of a party are decided, settled, or resolved finally by an agency; and (4) any person allowed by an agency, in its discretion, to intervene or to participate in a proceeding in which the substantial interests of a party are determined by an agency. Because the meaning of the word "party" is such an important part of the statutory access language in the adjudicatory proceedings provision, the history of the definition of "party" as well as the history of the adjudicatory proceedings provision itself must be consulted for evidence of legislative intent about the appropriate access standards that should be used in this context.

### 1. *History of the Definition of "Party"*

The Law Revision Council began with the definition of "party" contained in the Massachusetts administrative procedure statute, but immediately expanded it. The first part of the Massachusetts definition includes "specifically named persons whose *legal rights, duties or privileges* are being determined in the proceeding."<sup>391</sup> The "legal rights, duties or privileges" phrase was replaced in Florida with the phrase "substantial interests."<sup>392</sup> This formulation of

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391. MASS. GEN. LAWS ANN. ch. 30A, § 1(3)(a) (West 1979) (emphasis added).

392. Reporter's Draft no. 1, *supra* note 107, § 0120.2(6), at 4. The decision to replace the phrase "legal rights, duties or privileges" with the phrase "substantial interests" appears to have been made as early as the September 28-30, 1973 meeting in Washington, D.C. of an ad hoc task force of prominent administrative law scholars and practitioners assembled by the American Bar Association's Center for Administrative Justice. 2 PRELIMINARY MATERIALS DEALING WITH THE FLORIDA ADMINISTRATIVE PROCEDURE ACT 39 (1973) (initial commentary). The working papers from this meeting show the striking of the typed phrase "legal rights, duties or privileges" and the handwritten insertion of the phrase "substantial interests" in its place. *Id.* at 91.

the first category of persons who are parties—"specifically named persons whose substantial interests are being determined in the proceeding"—remained constant through all five Law Revision Council drafts.<sup>393</sup>

The second part of the Massachusetts definition includes "any other person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding, and who upon notice . . . makes an appearance . . . ."<sup>394</sup> This provision also was expanded by the Law Revision Council to encompass "any other person who as a matter of constitutional right, provision of statute, or *provision of agency regulation* is entitled to participate in whole or part in the proceedings and who upon notice makes an appearance."<sup>395</sup> That formulation remained essentially unchanged through the five Council drafts.<sup>396</sup>

The third category of persons who are parties—those whose substantial interests will be affected—was not drawn from the Massachusetts provision. It first appeared in the Council's second draft in this form: "any other person who as a matter of constitutional right, provision of statute, or provision of agency regulation is entitled to participate in whole or in part in the proceeding or whose *substantial rights will be affected* by proposed agency action, and who makes an appearance . . . ."<sup>397</sup> "Substantial *rights*" was changed to "substantial *interests*" in the third draft.<sup>398</sup> As thus modified, the provision remained unchanged through the remaining drafts.<sup>399</sup>

The fourth category of persons who are parties—those allowed by the agency to intervene or participate—was taken from the Massachusetts statute, which permits intervention only by "any other person allowed by the agency to intervene as a party. Agencies may by regulation not inconsistent with this section further

393. Reporter's Draft No. 1, *supra* note 107, § 0120.2(6)(a), at 4; Reporter's Draft No. 2, *supra* note 107 § 0120.2(9)(a), at 6; Reporter's Draft No. 3, *supra* note 107, § 0120.2(9)(a), at 6; Reporter's Draft No. 4, *supra* note 131, § 0120.2(9)(a), at 6; Reporter's Final Draft, *supra* note 107, § 0120.2(9)(a), at 6.

394. MASS. GEN. LAWS ANN. ch. 30A, § 1(3)(b) (West 1979).

395. Reporter's Draft No. 1, *supra* note 107, § 0120.2(6)(b), at 4 (emphasis added).

396. *Id.*; Reporter's Draft No. 2, *supra* note 107, § 0120.2(9)(b), at 6; Reporter's Draft No. 3, *supra* note 107, § 0120.2(9)(b), at 6; Reporter's Draft No. 4, *supra* note 131, § 0120.2(9)(b), at 6; Reporter's Final Draft, *supra* note 107, § 0120.2(9)(b), at 3.

397. Reporter's Draft No. 2, *supra* note 107, § 0120.2(9)(b), at 6 (emphasis added).

398. Reporter's Draft No. 3, *supra* note 107, § 0120.2(9)(b), at 6 (emphasis added).

399. Reporter's Draft No. 4, *supra* note 131, § 0120.2(9)(b), at 6; Reporter's Final Draft, *supra* note 107, § 0120.2(9)(b), at 3.

define the classes of persons who may become parties."<sup>400</sup> In the first three Council drafts, the provision read the same as the first sentence in the Massachusetts statute. An agency was allowed to permit anyone to intervene.<sup>401</sup> In the fourth draft, the provision was expanded expressly to permit inclusion of agency staff and to allow an agency to permit anyone to participate as well as to intervene in the proceeding as a party.<sup>402</sup> That formulation remained essentially unchanged in the final draft.<sup>403</sup>

The House bill as introduced contained the RMA definition of party: "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."<sup>404</sup> During the House Administrative Procedure Subcommittee's review of this definition and the more encompassing definition in the Law Revision Council's third draft, the policy question of broad or narrow access was faced squarely and resolved in favor of the more limited access contemplated by the RMA definition.<sup>405</sup>

400. MASS. GEN. LAWS ANN. ch. 30A, § 1(3)(c) (West 1977).

401. Reporter's Draft No. 1, *supra* note 107, § 0120.2(6)(c), at 4; Reporter's Draft No. 2, *supra* note 107, § 0120.2(9)(c), at 6; Reporter's Draft No. 3, *supra* note 107, § 0120.2(9)(c), at 6.

402. Reporter's Draft No. 4, *supra* note 131, § 0120.2(9)(c), at 6. A second sentence was added to this provision permitting agencies to authorize by rule limited forms of participation for persons not eligible to become parties under the terms of the act.

403. Reporter's Final Draft, *supra* note 107, § 0120.2(9)(c), at 3.

404. Compare Fla. HB 2672, sec. 1 (1974) (proposed FLA. STAT. § 120.2(8)) with 1961 MODEL ACT, *supra* note 93, § 1(5), at 372.

405. The tape recording of the subcommittee meeting is flawed in two respects: There are several inaudible passages and a large gap in the middle of the staff explanation. Nevertheless, as much of the discussion as can be understood is set forth here in full because this is one of the few available records of any legislative debate on the access question.

CHAIRMAN HECTOR: Eight is "party." This differs from Council's draft number three. This language actually narrows [inaudible].

REP. KISER: It expands the present definition in the law, doesn't it?

CHAIRMAN HECTOR: If you look at "party" in the yellow [HB 2672] and you look at it there [Law Revision Council's third draft], you see different language.

STAFF: 2672 is more restrictive. That's broader.

CHAIRMAN HECTOR: That's much broader. They let . . . people, anybody. And this limits it to those persons or agencies admitted as a party or properly seeking and entitled as of right to being admitted as a party.

REP. KISER: This is draft number three, and this represents only draft number two?

CHAIRMAN HECTOR: That's correct. [inaudible] What we attempted to do was to eliminate the frivolous challenges. I think it's better language. I think we do want to limit it to those people [inaudible].

REP. KISER: Well, the only thing I was thinking of, you know as a policy decision you may want to do that, but, of course, it would knock out anyone who really was not an affected party but who wanted to be heard on [inaudible].

CHAIRMAN HECTOR: I think the language of the bill does include the [inaudible].



This decision was reconsidered and reversed by the Subcommittee at some point before the House committee substitute bill was reported to the floor. The House committee substitute contained the same definition of party as was recommended by the Law Revision Council's final draft.<sup>406</sup> There is, however, no available record of the legislative discussion which led to this change in approach.<sup>407</sup> The definition of party, as developed by the Law Revision Council, was approved by the House.

The Senate bill as introduced contained the same definition of party as was in the committee substitute bill approved by the House.<sup>408</sup> The Senate committee substitute as approved by the Senate did not contain a definition of party.<sup>409</sup> The conference committee report approved by both chambers contained the House definition of party.<sup>410</sup>

REP. KISER: You're talking about which one now, here or here?

CHAIRMAN HECTOR: I'm suggesting that we use the language here [HB 2672] rather than—

REP. KISER: Okay, all I was saying is that the policy decision has to be made how broad you want to make it because, as it's written here [HB 2672], no question about it, it's much more limited than here [Law Revision Council's third draft]. In this draft, virtually anyone could become a party, whereas in the yellow draft there would be instances of people who might want to be heard on something and couldn't be like a public group. For example, some of these environmental groups that have come in on [inaudible].

STAFF: They could be heard. See, what we've done is, the agency has discretion here, they can [lengthy gap in the recording] or admitted as a party the hearing examiner could admit somebody as a party if they wanted to. The agency could admit somebody as a party if they want to give standing to an environmental group if they wanted to, or, if you're entitled to it as a matter of right—constitutional, statute, or rule, you're admitted as a party. But still, anybody *can* get in, but not everybody has a *right* to get in. You're entitled to get in if . . . we're not leaving anybody out, you know, there's nobody that can't get in.

CHAIRMAN HECTOR: Okay, then we'll go with the language in 2672.

Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Admin. Procedure, tape recording of proceedings (Jan. 17, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.).

406. Compare Reporter's Final Draft, *supra* note 107, § 120.2(9), at 3 with Fla. CS for HB 2672, 2434 and 2583, sec. 1 (1974) (proposed FLA. STAT. § 120.52(12)).

407. Subcommittee meetings were scheduled for January 29, 1974, February 26, 1974, and April 4, 1974. Tape recordings are not available for the January and February meetings. The definition of party was not discussed at the April meeting. The committee substitute was heard by the House Committee on Governmental Operations on April 11, 1974. The staff summary of the definition of party clearly indicates that the language being explained was the Law Revision Council's recommended language. Fla. H.R., Comm. on Govtl. Ops. tape recording of proceedings (Apr. 11, 1974) (available at Fla. Legis., Jt. Legis. Mgt. Comm., Div. of Legis. Library Servs., Tallahassee, Fla.).

408. Fla. SB 892, sec. 1 (1974) (proposed FLA. STAT. § 120.52(13)).

409. Fla. CS for SB 892 (1974).

410. FLA. H.R. JOUR. 1327 (Reg. Sess. 1974) (referring to proposed FLA. STAT. §

## 2. History of the Adjudicatory Proceedings Provision

The adjudicatory proceedings provision in the first four Law Revision Council drafts did not contain any access requirement language. The second and third drafts called for adjudicatory procedures to apply “[w]henever proposed agency action involves a disputed issue of material fact, of policy, or of the interpretation of a provision having the effect of law, or whenever a statute other than this act requires a hearing.”<sup>411</sup> In the fourth draft, adjudicatory procedures were to apply “in all contested cases” which involved disputed material facts, policy, or interpretation of provisions having the effect of law.<sup>412</sup> Beginning with the second draft, a definition of “contested case” was added. It was in that definition that an access standard appeared. “Contested case” was defined to mean “a proceeding, including ratemaking and licensing, in which the substantial interests of a party are determined by an agency after an opportunity for adjudicative hearing.”<sup>413</sup> A definition of “contested case” was not included in the Council’s final draft, but the access language in the definition was salvaged and was added to the adjudicatory proceeding provision. The final draft provided that “[t]he provisions of this section shall apply in all proceedings including ratemaking and licensing, in which the substantial interests of a party are determined by an agency.”<sup>414</sup>

The House bill as introduced contained a definition of “contested case” that was the same as that in the preliminary Law Revision Council drafts.<sup>415</sup> Like those drafts, this bill did not include any access language in the adjudicatory proceedings provision.<sup>416</sup> The House committee substitute bill followed the approach taken by the Council’s final draft; no definition for “contested case” was included and the access language developed by the Council was added to the adjudicatory proceedings provision.<sup>417</sup>

The Senate bill as introduced contained the same language as the bill that passed the House.<sup>418</sup> The Senate approved committee

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120.52(9)); FLA. S. JOUR. 907 (Reg. Sess. 1974) (same).

411. Reporter’s Draft No. 1, *supra* note 107, § 0120.6, at 14; Reporter’s Draft No. 3, *supra* note 107, § 0120.6, at 16.

412. Reporter’s Draft No. 4, *supra* note 131, § 0120.6, at 16.

413. Reporter’s Draft No. 2, *supra* note 107, § 0120.2(3), at 3; Reporter’s Draft No. 3, *supra* note 107, § 0120.2(3), at 3; Reporter’s Draft No. 4, *supra* note 131, § 0120.2(3), at 3.

414. Reporter’s Final Draft, *supra* note 107, § 120.6, at 9-12.

415. Fla. HB 2672, sec. 1 (1974) (proposed FLA. STAT. § 0120.2(3)).

416. *Id.* (proposed FLA. STAT. § 0120.8).

417. Fla. CS for HB 2672, 2434 and 2583, sec. 1 (1974) (proposed FLA. STAT. § 120.57).

418. Fla. SB 892, sec. 1 (1974) (proposed FLA. STAT. § 120.57). The provision was

substitute bill did not address adjudicatory proceedings at all. The conference committee report removed the language specifically including ratemaking and licensing but otherwise retained the access language developed by the Law Revision Council.<sup>419</sup>

Several conclusions can be drawn from this history. First, the term "contested case" was abandoned because it tended to reinforce the view that agency action was either adjudicatory or rulemaking and consequently that the procedural protections to which a person was entitled depended on the form the agency action took rather than the effect the action had on a person.<sup>420</sup> One of the major accomplishments of the 1974 Act was to focus "attention on the rights affected rather than the labels given a particular process."<sup>421</sup> This end was to be achieved in part by rejecting the inflexible view of agency action inherent in the term "contested case."<sup>422</sup>

Second, use of the phrase "substantial interests" in both the definition of "party" and in the adjudicatory proceedings provision was a deliberate and considered decision intended to broaden the availability of adjudicatory proceedings.<sup>423</sup> All the sources used by the Law Revision Council as starting points for these provisions—the RMA definitions of "party" and "contested case," the Massachusetts definition of "party," and the 1961 Act's definition of "party"—limited party status and hence the availability of adjudicatory proceedings to persons whose legal rights, duties, or privileges were at stake. Dissatisfaction with such a restrictive view of the availability of adjudicatory proceedings was reflected in the comments to the preliminary Law Revision Council drafts<sup>424</sup> and in

amended on the House floor to exclude "state university student conduct and disciplinary hearings wherein students vote upon or have a vote in the final decision, but such decision does not constitute final agency action." FLA. H.R. JOUR. 915 (Reg. Sess. 1974). This language was subsequently deleted by the conference committee. FLA. H.R. JOUR. 1330 (Reg. Sess. 1974); FLA. S. JOUR. 909 (Reg. Sess. 1974).

419. FLA. H.R. JOUR. 1330 (Reg. Sess. 1974) (referring to proposed FLA. STAT. § 120.57); FLA. S. JOUR. 909 (Reg. Sess. 1974) (same).

420. Reporter's Comments, *supra* note 120, at 17-18.

421. *Id.* at 6.

422. Levinson, *supra* note 97, at 627-28.

423. *Id.*; Reporter's Comments, *supra* note 120, at 12.

424. The comment to the definition of "contested case in the second, third, and fourth drafts cited this statement by Professor Fred Davis, who was a member of the ABA ad hoc task force that consulted on the 1974 revision: "[s]ubstantial" is hardly a precise term, but its imprecision more accurately and honestly focuses attention on the true policy issue involved than do the artificial RMA terms." Reporter's Draft No. 2, *supra* note 107, § 120.2(3), at 3 (Reporter's comment); Reporter's Draft No. 3, *supra* note 107, § 120.2(3), at 3; Reporter's Draft No. 4, *supra* note 131, § 120.2(3), at 3.

the Council's decision to specifically target for reform judicial decisions limiting the availability of adjudicatory proceedings under the 1961 Act.<sup>425</sup> By developing the new phrase "substantial interests" to replace the old "legal rights, duties, or privileges," the drafters intended a more expansive availability of adjudicatory proceedings to result under the 1974 Act than had been the case under the 1961 Act and the other laws used as models for the new Florida Act.<sup>426</sup>

Third, while use of the phrase "substantial interests" in substitution for the phrase "legal rights, duties, or privileges" in the definition of "party" was itself a major break with prior law, the full significance of the intended new direction becomes evident only from the contexts in which the phrase "substantial interests" is but a part. In the first provision, the drafters merely expanded the Massachusetts formulation by extending party status to "specifically named persons whose substantial interests are being determined in the proceeding." The result was to accord party status to a person whose important or significant interests, whether or not those interests were technically recognized as legal rights, were being finally settled by an agency. In the second provision, however, the drafters expanded the concept further by extending party status to any person "whose substantial interests will be affected by the proposed action." They recognized that the determination of a party's substantial interests may have a ripple effect. Therefore, to protect those interests that will be affected, although not determined by an agency, party status was extended to those persons whose substantial interests will be affected by the action the agency proposes to take in determining the substantial interests of another.

Fourth, even though it is clear that "substantial interests" need not be legally protected rights, it seems equally clear that legally

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[T]he discretionary determinations of many governmental agencies and officers which have been characterized as "quasi-judicial," "quasi-legislative" or "quasi-executive," or have otherwise been exempted from the operation of administrative procedure laws, are now brought under the minimum fairness provisions of the proposed act. To this extent the act is intended to overrule cases making the distinction, such as *Bay National Bank [& Trust Co. v. Dickinson]*, 229 So. 2d 302 (Fla. 1st DCA 1969) and *Dickinson v. Judges of the District Court of Appeal*, 282 So. 2d 168 (Fla. Sup. Ct. 1973).

Reporter's Comments, *supra* note 120, at 18.

426. Reporter's Comments, *supra* note 120, at 5, 17-18; Levinson, *supra* note 92, at 628, 658.

protected rights are subsumed under the phrase "substantial interests." Nevertheless, the definition of "party" specifically includes those persons "who as a matter of constitutional right, provision of statute, or provision of agency regulation" are entitled to participate in the proceedings. It is significant that with respect to this aspect of the definition, the Massachusetts model once again was expanded. The Massachusetts provision includes persons who have a constitutional or statutory right to participate and permits agencies by rule not inconsistent with the statutory definition of "party" to "further define the classes of persons who may become parties." The Florida provision, on the other hand, does not restrict agency discretion to confer party status on persons by rule. Thus, by specifically authorizing agencies to adopt rules conferring the right to participate in adjudicatory proceedings, without limitation, the Florida provision expands the opportunity of persons to establish a right of participation.

Fifth, in addition to providing for party status by rule, the provision also authorizes agencies to permit persons to intervene and to participate in a proceeding as parties. The Massachusetts model was expanded in this regard as well. The Massachusetts provision allows agencies to permit intervention as a party; the Florida provision goes further by authorizing agencies to permit both intervention and participation in a proceeding as parties.

Finally, the available record of the House subcommittee debate on the definition of "party" establishes that there was division between two committee members over whether, as a matter of policy, broad or limited access to adjudicatory proceedings ought to be allowed. Concerns about the restrictiveness of the RMA definition apparently were assuaged by the staff explanation that stressed the discretion they perceived would be placed in agencies and DOAH hearing officers to admit persons as parties under the RMA language. Nevertheless, the Subcommittee reversed its position approving the RMA definition of "party" and ultimately accepted the facially more inclusive Law Revision Council definition. It is unfortunate that there is no available record of the discussion leading up to that decision. However, in light of the record that is available, it is reasonable to infer that the legislative committee preferred to complement broad agency discretion to admit persons as parties with broadly stated statutory rights to participate in adjudicatory proceedings as parties.

### 3. Definition of "Party" in Other States

The MSAPA separately defines "party" for purposes of agency proceedings and for purposes of judicial review and civil enforcement proceedings. The MSAPA defines a "[p]arty to agency proceedings" to mean: "(i) a person to whom the agency action is specifically directed; or (ii) a person named as a party to an agency proceeding or allowed to intervene or participate as a party in the proceeding."<sup>427</sup> A majority of states and the District of Columbia follow the RMA approach of defining "party" for all purposes to mean "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party."<sup>428</sup> The Alabama and Wisconsin administrative procedure statutes use the RMA language but expand it to make additional provision for party participation.<sup>429</sup> The Alaska and California

427. 1981 MODEL ACT, *supra* note 112, § 1-102(6), at 79. For purposes of judicial review or civil enforcement proceedings, MSAPA defines party as "(i) a person who files a petition for judicial review or civil enforcement or (ii) a person named as a party in a proceeding for judicial review or civil enforcement or allowed to participate as a party in the proceeding." *Id.* § 1-102(7), at 79. Standing to seek judicial review is addressed separately. *Id.* § 5-106, at 156.

428. 1961 MODEL ACT, *supra* note 93, § 1(5), at 372; ARIZ. REV. STAT. ANN. § 41-1001(5) (1985); ARK. STAT. ANN. § 5-701(b) (1976); COLO. REV. STAT. § 24-4-102(11) (Supp. 1982); CONN. GEN. STAT. ANN. § 4-166(5) (West Supp. 1985); DEL. CODE ANN. tit. 29, § 10102(6) (Supp. 1983); D.C. CODE ANN. § 1-1502(10) (1981); GA. CODE ANN. § 50-13-2(4) (Supp. 1985); HAWAII REV. STAT. § 91-1(3) (1976); IDAHO CODE § 67-5201(5) (Supp. 1985); ILL. ANN. STAT. ch. 127, § 1003.06 (Smith-Hurd 1981); IOWA CODE ANN. § 17A.2(5) (West 1978); LA. REV. STAT. ANN. § 49:951(4) (West Supp. 1985); MICH. COMP. LAWS ANN. § 24.205(4) (Supp. 1985); MONT. CODE ANN. § 2-4-102(7) (1983); NEV. REV. STAT. § 233B.035 (1983); N.H. REV. STAT. ANN. § 541-A:1(X) (Supp. 1983); N.M. STAT. ANN. § 12-8-2(E) (1978); N.Y. A.P.A. LAW § 102(7) (McKinney 1984); N.C. GEN. STAT. § 150A-2(5) (1983); N.D. CENT. CODE § 28-32-01(4) (Supp. 1983); OKLA. STAT. ANN. tit. 75, § 301(8) (West Supp. 1984); R.I. GEN. LAWS § 42-35-1(e) (1977); S.C. CODE ANN. § 1-23-310(4) (Law Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-1(5) (Supp. 1984); TENN. CODE ANN. § 4-5-102(8) (Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 3(5) (Vernon Supp. 1985); UTAH CODE ANN. § 63-46-3(2) (1978); VT. STAT. ANN. tit. 3, § 801(b)(5) (Supp. 1984); WYO. STAT. § 16-3-101(b)(vi) (1982).

429. ALA. CODE § 41-22-3(6) (1982) defines "party" to mean:

Each person or agency named or admitted as a party or properly seeking and entitled as a matter of right (whether established by constitution, statute or agency regulation or otherwise) to be admitted as a party. . . . An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

The official commentary on this provision states that the parenthetical language was taken from FLA. STAT. § 120.52(10)(b) (1977) and that the final sentence is a verbatim adoption of the second sentence of *id.* § 120.52(10)(c). The official commentary concludes that this definition "is intended to permit persons or agencies able to demonstrate a substantial interest in the outcome access to agency proceedings, either as parties or as limited participants." ALA. CODE § 91-22-3, commentary (1982).

Wis. STAT ANN. § 227.01(6) (West 1982) defines "party" to include "each person or agency

statutes define "party" to include the agency, the respondent, and a person, other than an officer or an employee of the agency in his official capacity, who has been allowed to appear in the proceeding.<sup>430</sup> The Ohio statute defines "party" to mean "the person whose interests are the subject of an adjudication by an agency,"<sup>431</sup> the Pennsylvania statute defines "party" as "[a]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding."<sup>432</sup> The Maine,<sup>433</sup> Massachusetts,<sup>434</sup> and Oregon<sup>435</sup> statutes define "party" in greater detail than those of other states, but none approaches the breadth of the Florida definition.

#### 4. Adjudicatory Proceedings in Other States

A majority of the states, the District of Columbia, the RMA, and the MSAPA make adjudicatory proceedings available only when an agency determines legal rights, duties or privileges.<sup>436</sup> Arkansas,

named or admitted as a party. Any person whose substantial interests may be adversely affected by any proposed agency action in a contested case shall be admitted as a party."

430. ALASKA STAT. § 44.62.640(b)(4) (1984); CAL. GOV'T CODE § 11500(b) (West 1980).

431. OHIO REV. CODE ANN. § 119.01(G) (Page Supp. 1984).

432. 2 PA. CONS. STAT. ANN. tit. 2, § 101 (Purdon Supp. 1985).

433. ME. REV. STAT. ANN. tit. 5, § 8002(7) (1979) defines "party" to mean:

A. The specific person whose legal rights, duties or privileges are being determined in the proceeding;

B. Any person participating in the adjudicatory proceeding pursuant to section 9054, subsection 1 or 2; and

C. Any agency bringing a complaint to Administrative Court under section 10051.

*Id.* tit. 5, § 9054(1) (1979) permits the agency conducting the proceeding to allow "any person showing that he is [or] may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, . . . to intervene as a party to the proceeding." Pursuant to *id.* tit. 5, § 9054(2) (1979), an "agency may, by order, allow any other interested person to intervene and participate as a full or limited party to the proceeding."

434. MASS. GEN. LAWS ANN. ch. 30A, § 1(3) (West 1979). *See supra* text accompanying notes 391, 394, 400.

435. OR. REV. STAT. § 183.310(6) (1983) defines "party" to mean:

(a) Each person or agency entitled as of right to a hearing before the agency;

(b) Each person or agency named by the agency to be a party; or

(c) Any person requesting to participate before the agency as a party or in a limited party status which the agency determines either has an interest in the outcome of the agency's proceeding or represents a public interest in such result.

436. ALA. CODE § 41-22-3(3) (1982); ARIZ. REV. STAT. ANN. § 41-1001(2) (1985); CONN. GEN. STAT. ANN. § 4-166(2) (West Supp. 1985); D.C. CODE ANN. § 1-1502(8) (1981); GA. CODE ANN. § 50-13-2(2) (Supp. 1985); HAWAII REV. STAT. § 91-1(5) (1976); IDAHO CODE § 67-5201(2) (Supp. 1985); ILL. ANN. STAT. ch. 127, § 1003.02 (Smith-Hurd 1981); IND. CODE ANN. § 4-22-1-3 (Burns Supp. 1984); IOWA CODE ANN. § 17A.2(2) (West 1978); ME. REV. STAT. ANN. tit. 5, § 8002(1) (1979); MD. STATE GOV'T CODE ANN. § 10-201(c) (1984); MASS. GEN. LAWS ANN. ch. 30A, § 1(1) (West 1979); MICH. COMP. LAWS ANN. § 24.203(3) (West 1981); MINN. STAT. ANN.

Louisiana, and Virginia provide for adjudication when an agency is required by law to decide any matter after notice and hearing.<sup>437</sup> The Colorado provision is similar but with an additional directive that “[a] person who may be affected or aggrieved by agency action shall be admitted as a party.”<sup>438</sup> The California statute defines adjudicatory hearing to mean one which “involves the personal or property rights of an individual, the granting or revocation of an individual’s license, or the resolution of an issue pertaining to an individual.”<sup>439</sup> The New Mexico statute defines an adjudicatory proceeding as one in which the legal rights, duties or privileges of a party are determined by an agency, but it also includes “the imposition or withholding of any sanction and the granting or withholding of any relief.”<sup>440</sup> The words “sanction” and “relief” are defined broadly by the statute, suggesting a wide availability of adjudicatory proceedings.<sup>441</sup>

Wisconsin’s treatment of adjudicatory proceedings is perhaps the closest analogue to Florida’s and, therefore, requires more careful scrutiny. There are two provisions to consider. One is the Wisconsin definition of “contested case”; the other is a provision for a hearing if specified access requirements are met.

§ 14.02(3) (West Supp. 1985); MISS. CODE ANN. § 25-43-3(b) (Supp. 1984); MO. ANN. STAT. § 536.010(2) (Vernon Supp. 1984); MONT. CODE ANN. § 2-4-102(4) (1983); NEB. REV. STAT. § 84-901(3) (1981); NEV. REV. STAT. § 233B.032 (1981); N.H. REV. STAT. ANN. § 541-A:1(III) (Supp. 1983); N.J. STAT. ANN. § 52:14B-2(b) (West Supp. 1985); N.Y. A.P.A. § 102(3) (McKinney 1984); N.C. GEN. STAT. § 150A-2(2) (1983); N.D. CENT. CODE § 28-32-01(3) (Supp. 1983); OHIO REV. CODE ANN. § 119.01(D) (Page Supp. 1984); OR. REV. STAT. § 183.310(2)(a) (1981); 2 PA. CONS. STAT. ANN. § 101 (Purdon Supp. 1985); R.I. GEN. LAWS § 42-35-1(b) (1977); S.C. CODE ANN. § 1-23-310(2) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-1(2) (Supp. 1984); TENN. CODE ANN. § 4-5-102(3) (Supp. 1984); TEX. REV. CIV. STAT. ANN. art. 6252-13(a), § 3(2) (Vernon Supp. 1985); UTAH CODE ANN. § 63-46-11 (1978); VT. STAT. ANN. tit. 3, § 801(b)(2) (Supp. 1984); WASH. REV. CODE ANN. § 34.04.010(3) (Supp. 1985); W. VA. CODE § 29A-1-2(b) (Supp. 1985); WYO. STAT. § 16-3-101(b)(iii) (1982); 1961 MODEL ACT, *supra* note 93, § 1(2), at 371; 1981 MODEL ACT, *supra* note 112, §§ 4-102, 1-102(5) at 1220-23, 79.

437. ARK. STAT. ANN. § 5-701(d) (1976); LA. REV. STAT. ANN. § 49:951(3) (West Supp. 1985); VA. CODE § 9-6.14:12(A) (1978).

438. COLO. REV. STAT. § 24-4-105(2) (1982).

439. CAL. GOV’T CODE § 11500(f) (West 1980).

440. N.M. STAT. ANN. § 12-8-2(B) (1978).

441. *Id.* § 12-8-2(J)(1), for example, defines “sanction” as including the “whole or part of any agency prohibition, requirement, limitation, or other condition affecting the freedom of any person or his property. *Id.* § 12-8-2(K) defines “relief” to mean:

- the whole or part of any agency: (1) grant of money, assistance, license, authority, exemption, exception, privilege or remedy;
- (2) recognition of any claim, right, interest, immunity, privilege, exemption or exception; or
- (3) taking of any other action upon the application or petition of, and beneficial to, any person.



Although the Wisconsin statute uses the term "contested case," it does not limit its use to the determination of legal rights, duties or privileges like the RMA and the majority of states do. Rather, the Wisconsin definition of a "contested case" is:

a proceeding before an agency in which, *after hearing required by law, substantial interests of any party to such proceeding are determined* or adversely affected by a decision or order in such proceeding and in which the assertion by one party of any such substantial interest is denied or controverted by another party to such proceeding.<sup>442</sup>

This definition contains the same three essential elements found in section 120.57's access language: "substantial interests," "party," and "are determined." The importance of these striking similarities between the Wisconsin and Florida provisions, however, is overshadowed by one significant difference. The Wisconsin statute, like the RMA and the administrative procedure statutes of almost all other states, makes the right to an adjudicatory hearing dependent on other law. That is, some law other than the administrative procedure statute itself—the federal or state constitution, substantive statutes, common law or agency rule—must require a hearing to be held before anyone can claim entitlement to the procedural protections offered by the administrative procedure statute.<sup>443</sup> The

442. WIS. STAT. ANN. § 227.01(2) (West 1982) (emphasis added).

443. Most states that incorporate the required hearing by reference do so by using the RMA phrase "by law." ALA. CODE § 41-22-3(3) (1982); ARIZ. REV. STAT. ANN. § 41-1001(2) (1985); ARK. STAT. ANN. § 5-701(d) (1976); GA. CODE ANN. § 50-13-2(2) (Supp. 1985); HAWAII REV. STAT. § 91-1(5) (1976); IDAHO CODE § 67-5201(2) (Supp. 1985); ILL. ANN. STAT. ch. 127, § 1003.02 (Smith-Hurd 1981); MD. STATE GOV'T CODE ANN. § 10-201(c) (1984); MICH. COMP. LAWS ANN. § 24.203(3) (West 1981); MINN. STAT. ANN. § 14.02(3) (West Supp. 1985); MISS. CODE ANN. § 25-43-3(b) (Supp. 1984); MO. ANN. STAT. § 536.010(2) (Vernon Supp. 1984); MONT. CODE ANN. § 2-4-102(4) (1983); NEV. REV. STAT. § 233B.032 (1983); N.H. REV. STAT. ANN. § 541-A:1 (III) (Supp. 1983); N.M. STAT. ANN. § 12-8-2(B) (1978); N.Y. A.P.A. § 102(3) (McKinney 1984); N.C. GEN. STAT. § 150A-2(2) (1983); N.D. CENT. CODE § 28-32-01(3) (Supp. 1983); R.I. GEN. LAWS § 42-35-1(b) (1977); S.C. CODE ANN. § 1-23-310(2) (Law. Co-op. Supp. 1983); S.D. CODIFIED LAWS ANN. § 1-26-1(2) (Supp. 1984); UTAH CODE ANN. § 63-46-11 (1978); VA. CODE § 9-6.14:12(A) (1978) ("the basic laws provide expressly for decisions upon or after hearing"); WIS. STAT. ANN. § 227.01(2) (West 1982); WYO. STAT. § 16-3-101(b)(ii) (1982). Some states use "by law or constitutional right." NEB. REV. STAT. § 84-901(3) (1981); WASH. REV. CODE ANN. § 34.04.010(3) (Supp. 1985); W. VA. CODE § 29A-1-2(b) (Supp. 1985); see also D.C. CODE ANN. § 1-1502(8) (1981). Two states use "by statute." CONN. GEN. STAT. ANN. § 4-166(2) (West Supp. 1985); IND. CODE ANN. § 4-22-1-3 (Burns Supp. 1984). Several states use "by constitution or statute." COLO. REV. STAT. § 24-4-105(2) (1982) ("hearing is required under the state constitution or by this or any other statute"); IOWA CODE ANN. § 17A.2(2) (West 1978); LA. REV. STAT. ANN. § 49:951(3) (West Supp. 1985); ME. REV. STAT. ANN. tit. 5, § 8002(1) (1979); MASS. GEN. LAWS ANN. ch. 30A, § 1(1) (West 1979); N.J. STAT.

Florida statute does not require reference to other law. A person is entitled to an adjudicatory proceeding, either formal or informal, "in all proceedings in which the substantial interests of a party are determined by an agency."<sup>444</sup> Under the Wisconsin scheme, whether one is entitled to a hearing because substantial interests of a party are determined by an agency is, in the first instance, a legislative decision. Under the Florida approach, the legislature may require a hearing under section 120.57 to be conducted before an agency action is taken. The legislature may also exclude a class of interests from the section 120.57 hearing requirements.<sup>445</sup> In general, however, whether an adjudicatory proceeding is necessary is first an executive decision and second a judicial decision. Consequently, because Florida, unlike Wisconsin and unlike the majority of states, does not require other law to require a hearing before the protections of section 120.57 can be sought, there is little to be gained from the actual experiences of these other states in dealing with requests for adjudicatory hearings.<sup>446</sup>

The second provision in the Wisconsin statute relating to adjudicatory proceedings grants a right to a hearing, which is to be treated as a contested case, to any person filing a written request if:

- (a) A substantial interest of the person is injured in fact or threatened with injury by agency action or inaction;
- (b) There is no evidence of legislative intent that the interest is not to be protected;
- (c) The injury to the person requesting a hearing is different in kind or degree from injury to the general public caused by the agency action or inaction; and

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ANN. § 52:14B-2(b) (West Supp. 1984-1985) ("by constitutional right or by statute"); OR. REV. STAT. § 183.310(2)(a) (1983); TENN. CODE ANN. § 4-5-102(3) (Supp. 1984); see also Bonfield, *The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act*, 63 IOWA L. REV. 285, 302-08 (1977) for an examination of the justifications for reference to law external to the APA for hearing requirements.

444. FLA. STAT. § 120.57 (1985).

445. See *id.* § 120.57(5) (making § 120.57 inapplicable when the "substantial interests of a student are determined by the State University System" and providing an alternative procedure); *id.* § 120.52(11)(d) (excluding prisoners and parolees from § 120.57 proceedings).

446. The 1981 MODEL ACT, *supra* note 112, § 4-101(a), (b), by its own terms and without reference to external law requires adjudicatory proceedings. However, the MSAPA links the requirement for adjudicatory proceedings to the definition of "order," which is an agency determination of the "legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons." *Id.* § 1-102(5).

(d) There is a dispute of material fact.<sup>447</sup>

The effect of this provision is to modify the requirement that a hearing be required by law external to the administrative procedure act itself. As a result, even if there is no other law requiring a hearing, one must be granted if the access criteria are satisfied. Because this provision in the Wisconsin administrative procedure act confers a right to a hearing without reference to other law, it operates in the same fashion as section 120.57. On another level, however, the differences between the two states' approaches are palpable. First, Wisconsin requires that the substantial interest of the person requesting the hearing be injured in fact or threatened with injury; Florida requires only that the substantial interests of a party be determined by agency action. Second, Wisconsin requires that there be no evidence of legislative intent that the substantial interest asserted not be protected; Florida has no similar requirement. Third, Wisconsin specifies that the person must be injured in a way that is different in kind or degree from the injury to the general public; Florida has no such requirement. Finally, Wisconsin requires the presence of disputed issues of material fact; Florida requires disputed issues of material fact for a formal proceeding but not for an informal proceeding. The most significant similarity between the Wisconsin provision and Florida's section 120.57 is that neither requires determination of legal rights, duties or privileges. But the importance of that single similarity is outweighed by the comparatively more detailed access language in the Wisconsin provision. In the final analysis, neither Wisconsin provision is close enough to Florida's section 120.57 on the critical points relating to access to those proceedings to warrant further study. Access to adjudicatory proceedings in Florida, like access to most of the administrative proceedings already considered, is not comparable to access to adjudicatory proceedings in any other jurisdiction.

### 5. *Functional Analysis*

The opportunity for an adjudicatory proceeding under section 120.57 is a recognition of the modern day understanding "that a hearing independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discre-

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447. WIS. STAT. ANN. § 227.064(1) (West 1982).

tion."<sup>448</sup> The adjudicatory proceeding provision, like the provisions for administratively challenging proposed and adopted rules, is an intrabranch dispute resolution mechanism. Before an agency takes action that will determine the substantial interests of a party, it must provide an executive branch forum in which questions about the factual bases and policy reasons for its actions can be exposed, challenged and explained on the record. When there are no disputed issues of material fact, the agency has broad discretion, subject only to minimal statutory fairness guidelines, to fashion the executive branch proceeding that must be made available on request.<sup>449</sup> When there are disputed issues of material fact, the contours of the formal proceeding that must be made available are carefully prescribed by the statute.<sup>450</sup>

Although most agencies have the option of having the agency head conduct the formal proceeding, in practice requests for these proceedings are routinely forwarded to the DOAH for hearing.<sup>451</sup> In reality then, most disputes with contested material facts are tried before an independent hearing officer. The parties must support their factual positions with competent and substantial evidence on the record made before the hearing officer. The hearing officer's findings of fact may not be disturbed by the agency head unless a review of the entire record discloses no competent and substantial evidence to support those findings.<sup>452</sup> The scheme embodied in section 120.57(1) puts the agency and the private party or parties on equal footing as adversaries before an independent hearing officer.<sup>453</sup> Although the process resembles a judicial proceeding, it is not one; it is an adjudicatory proceeding conducted according to legislative directive by the executive branch DOAH.

Indeed, any resemblance to a judicial proceeding breaks down after the hearing is completed. In most instances, the hearing officer's order is not a final order; the hearing officer submits a recommended order to the agency.<sup>454</sup> The agency may accept the rec-

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448. *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 591 (Fla. 1st DCA 1977).

449. FLA. STAT. § 120.57(2) (1985).

450. *Id.* § 120.57(1)(b).

451. *Id.* § 120.57(1)(a), (1)(b)(13).

452. *Id.* § 120.57(1)(b)(9).

453. *Id.* § 120.57(1)(b)(3) provides in part that "[t]he referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceedings."

454. *Id.* § 120.57(1)(b)(8). In some instances the legislature has provided by statutes external to chapter 120 that hearing officers' orders issued after a § 120.57 proceeding be final orders. *Id.* § 163.3213(5)(a) (administrative review of land development regulations to deter-

ommended order and enter it as the agency's final order, or the agency may reject or modify the hearing officer's conclusions of law or his interpretation of agency rules. A penalty recommended by a hearing officer may be accepted, reduced or increased by an agency. Only a hearing officer's findings of fact may not be rejected or modified so long as there is competent substantial evidence in the record to support those findings.<sup>455</sup> This design reflects the institutional strengths of each executive branch agency involved. The DOAH was created to "improve the fairness of administrative practice before Florida agencies, by replacing agency employees and representatives with independent hearing officers."<sup>456</sup> Recognizing that the facts will in most instances control the applicable law, the legislature put an independent hearing officer in the pivotal position between the agency and the other parties to perform the important function of finding facts in a fair and impartial manner based exclusively on evidence of record.<sup>457</sup>

The DOAH was intended to operate as a central pool of independent professional fact finders. Because of the importance the legislature attributed to the fairness and impartiality of the fact finding function, it insulated the hearing officers' findings of fact from agency overreaching. On the other hand, the legislature created the various agencies and delegated to them responsibility for developing informed policy, consistent with legislative guidelines, in specialized areas. It is presumed, for example, that the Department of Environmental Regulation has more expertise and specialized knowledge about wetlands than does the Department of Transportation or, for that matter, the DOAH. Having delegated responsibility for policy development and enforcement to the various agencies, the legislature insured their continuing accountability by giving them authority to reject or modify recommended conclusions of law or interpretations of agency rules. Thus, the accommodation, which gives DOAH hearing officers control of the facts and

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mine consistency with the local government plan); *id.* § 394.457(7)(b) (involuntary commitment proceedings); *id.* § 230.23(4)(m)(4) (determining eligibility of exceptional students for special instruction services); *id.* § 337.165(2)(d) (denial or revocation of state contract bid certification of contractors); *id.* § 57.111(4)(d) (awarding attorneys fees and court costs to a prevailing small business party).

455. *Id.* § 120.57(1)(b)(9). By virtue of a 1984 amendment to this subsection, an agency may not reduce or increase a hearing officer's recommended penalty unless it reviews the complete record and states with particularity the reasons for the change and justifies its action by citation to the record. Ch. 84-173, § 2, 1984 Fla. Laws 519, 520.

456. Reporter's Comments, *supra* note 120, at 22.

457. See FLA. STAT. § 120.57(1)(b)(7) (1985).

the agencies control of the interpretation of their statutes and rules, is uniquely suited to provide fairness and accountability in the executive branch adjudicatory forum provided for in section 120.57(1).

The opportunity for an adjudicatory proceeding, either formal or informal, before an agency determines the substantial interests of a party was intended to be broadly available. Three legislative decisions were critical to achieving the goal of broad availability. First was the decision to make the right to adjudicatory proceedings depend solely on the terms of the Administrative Procedure Act itself. The legislature could have followed the example set by the overwhelming majority of states and made the right to a hearing less readily available by requiring some law external to chapter 120 to require a hearing to be held before one would be available under section 120.57. It chose not to do so. Second was the decision to make adjudicatory proceedings available when substantial interests were determined by an agency. Again the legislature could have followed the majority of states and stayed with the choice it made when it enacted the 1961 Act and made the opportunity for hearing available only when an agency would determine the legal rights, duties, privileges or immunities of a party. It chose not to be so restrictive. Third was the decision to make adjudicatory proceedings available to a person whose substantial interests will be affected though not determined by agency action which will determine the substantial interests of another party. The legislature could have restricted the right to adjudicatory proceedings to those persons whose substantial interests were being determined by agency action. It chose instead to permit greater access. Taken together, these three decisions effectively make access to adjudicatory proceedings in Florida the most generous in the country.

In summary, the access criteria for invoking section 120.57 adjudicatory proceedings must be consistent with these legislative policy choices. No law external to chapter 120 need require a hearing. Substantial interests, not necessarily legal rights, must be at stake in the proceeding. A person whose substantial interests will be affected in a proceeding which will determine the substantial interests of another is entitled to a hearing. The access criteria drawn from the plain meaning of the statutory language satisfy these policy choices.

## 6. *Analysis of Cases Concerning Access to Adjudicatory Proceedings*

Generally, the cases concerning access to adjudicatory proceedings have involved one of two questions. First, what is the meaning of "substantial interests" as used in the definition of "party" and in the access language of section 120.57? Second, what is the relationship between section 120.57's access language and other statutory provisions that confer a right upon specifically identified persons to initiate or to participate in proceedings? For purposes of analysis, the cases involving the first question are divided into three categories: (a) competitive economic injury; (b) other substantial interests; and (c) certificates of need and comparative hearings. The cases involving the second question are considered under two headings: (d) DRI and binding letter processes; (e) public contract bid disputes.

### (a) *Competitive Economic Injury*

Section 120.57 requires an adjudicatory proceeding when "the substantial interests of a party are determined by an agency." Thus, even if the party whose substantial interests are being determined does not request an adjudicatory proceeding, any other person who is a party has a right to initiate a proceeding under section 120.57. This situation is likely to occur when, after free form proceedings have concluded, an agency informs an applicant that it intends to grant a requested license.<sup>458</sup> The license applicant is a party whose substantial interests are determined by the agency's decision to grant the license. As the applicant succeeded in getting what he wanted from the agency through free form proceedings, he will not request a hearing. But third persons may have interests that will be affected by the agency decision to grant the license to the applicant. If these third persons can establish party status, they can force an adjudicatory proceeding to determine the correctness of the agency's decision to issue the license. Thus, in these circumstances, the definition of "party" plays a critically impor-

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458. The phrase "free form proceeding" was coined by Professor Levinson to describe the practices which agencies use to transact most of their business and which are "not subject to any legally binding procedural requirements at all." Levinson, *Elements of the Administrative Process: Formal, Semi-Formal, and Free-Form Models*, 26 AM. U.L. REV. 872, 874 (1977). Indeed, free form proceedings have been characterized as those "necessary or convenient procedures, unknown to the APA by which an agency transacts its day to day business." *Capeletti Bros. v. Department of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), *cert. denied mem.*, 368 So. 2d 1374 (Fla. 1979).

tant role.

In *Gadsden State Bank v. Lewis*,<sup>459</sup> the court ruled that Gadsden, a competitor bank, could initiate an adjudicatory proceeding under section 120.57 to test the Department of Banking and Finance's decision to grant a branch banking application to Quincy State Bank. The Department's position that a competitor bank was not a party to another bank's branch application was rejected by the court because the Department had by rule identified parties to proceedings before it as including persons who oppose the granting of an application. Gadsden did oppose the granting of Quincy's application for a branch bank and thus was a person who by "provision of agency regulation, [was] entitled to participate" in the proceeding.<sup>460</sup> Gadsden had acquired party status through the Department's rule; therefore, it had "the right to a hearing even if the agency and the party whose substantial interests are to be determined agree to omit compliance with Section 120.57."<sup>461</sup>

Because the Department's rule makes protesting banks parties to proceedings on other banks' applications, the court had no occasion to consider whether in the absence of such a rule an economic competitor nevertheless could gain party status as a person whose substantial interests would be affected by an agency decision to license a competing bank. There is a suggestion in the opinion that potential competitive injury could support party status only if it were made a legally recognized concern by statute or rule. That suggestion no doubt was precipitated by the Florida Supreme Court's decision in *ASI, Inc. v. Florida Public Service Commission*.<sup>462</sup>

In *ASI*, the supreme court ruled that ASI could not compel the Public Service Commission to conduct a section 120.57 adjudicatory proceeding on an application by Airco Air Freight Delivery, Inc. for a for-hire permit "to transport 'delayed, misplaced and/or misrouted baggage . . . from the Jacksonville International Airport' to specified points in northeast Florida."<sup>463</sup> The court noted that the statute under which the Commission acted required for-

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459. 348 So. 2d 343 (Fla. 1st DCA 1977).

460. FLA. STAT. § 120.52(10)(b) (Supp. 1976).

461. 348 So. 2d at 346 (footnote omitted).

462. 334 So. 2d 594 (Fla. 1976).

463. *Id.* at 595. The term "for-hire" was defined by statute to mean "any motor carrier engaged in the transportation of persons or property over the public highways of this state for compensation, which is not a common carrier or contract carrier but transports such persons or property in single, casual and nonrecurring trips." FLA. STAT. § 323.01(9) (1975).



hire permits to issue "as a matter of right and of course"<sup>464</sup> and then stated:

We are unable to conclude that the Commission's grant of a permit to Airco constitutes 'substantial interests of [ASI being] . . . determined by an agency,' within the intendment of Section 120.57, . . . even assuming that ASI will experience competition from Airco, operating under its new for-hire permit. *The fact is that ASI has no legally recognized interest in being free from competition.* On the contrary, the statutory scheme is one of free and unfettered competition among for-hire motor vehicles on public highways. . . . The procedural requirements established by the administrative procedure act evince no purpose either to alter this substantive policy or to require hearings to find facts which can have no bearing on agency action.<sup>465</sup>

The court's analysis is flawed in several respects. First, it fails to appreciate that any party has a right to an adjudicatory proceeding when the substantial interests of a party are determined by an agency. By substituting ASI by name for the statutory phrase "a party" in its quotation of the section 120.57 access language, the court implies that the right to an adjudicatory proceeding belongs only to the party whose substantial interests are determined in the proceeding. The language of the statute does not support such a restrictive view. On this point, the *Gadsden State Bank* court's more careful analysis yielded a result more in keeping with the meaning of the statutory language.

Second, the court seems to equate "substantial interests" with "legally recognized interest." This is especially troublesome in light of the legislative history and the multifaceted definition of "party." The phrase "substantial interests" was chosen deliberately to make adjudicatory proceedings available to persons whose important or significant interests were affected or determined by agency action whether or not those interests were recognized technically as protected legal rights. Indeed, to equate "substantial interests" with "legally protected interest" as the *ASI* court did renders the definition of "party" inexplicably redundant. As defined, "party" includes specifically any "person, who as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate . . . in the proceeding, or whose substantial

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464. FLA. STAT. § 323.05(1) (1975).

465. 334 So. 2d at 596 (emphasis added) (brackets in original).

interests will be affected by proposed agency action, and who makes an appearance as a party."<sup>466</sup> A person whose interests are legally recognized by the constitution, by statute or by rule is a party under the first part of the provision; a person whose interests are not so recognized but nevertheless are important or significant and will be affected by the proposed agency action is entitled to party status under the second part of the provision. ASI may not have had a legally recognized interest in being free from competition. But that should have been only the beginning, not the end, of the court's inquiry. The next step was to decide whether the proposed agency action—the issuance of a permit to Airco to engage in certain ground transportation activities for compensation—would affect any important or significant interests of ASI. Professor Levinson's response to the question is consistent with the legislative history and the statutory language:

[A] competitor should be regarded as having a substantial interest in any proceeding which would have a substantial impact upon him, such as a proceeding to issue a permit to another party in the same business if favorable action on the application would have a significant impact upon others in the business.<sup>467</sup>

Third, the court fails to appreciate that the right to initiate an adjudicatory proceeding is controlled by the access language of section 120.57 but that the scope of the proceeding is governed by the for-hire permit statute. If the court analyzed the access language of section 120.57 and concluded that ASI was entitled to party status in the Airco proceeding because its substantial interests would be affected if the permit issued, it would then have to turn to the for-hire permit statute to determine the scope of ASI's participation in the proceeding. Granting a competitor access to the proceeding because his substantial interests will be affected by the proposed agency action does not mean that evidence and argument about potential competitive economic injury must be entertained by the agency. The questions that may be put in issue in the proceeding as well as the evidence and argument that must be received are governed solely by the substantive statute which authorizes the agency action. Again Professor Levinson's analysis is persuasive:

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466. FLA. STAT. § 120.52(11)(b) (1985) (emphasis added).

467. England & Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749, 757 n.44 (1977). Professor Levinson's comments on the ASI decision were not joined in or commented upon by his coauthor, Justice England.

The extent of [the competitor's] participation would depend on the law applicable to the granting of permits for the specific type of business activity involved. In a situation such as that in *ASI*, where the statute does not require an applicant to demonstrate public convenience and necessity, the agency might strike as irrelevant any matters asserted by the competitor relating to public convenience and necessity. The competitor might find himself without any remaining arguments for submission to the agency—but this result would follow from defining the scope of the competitor's participation, not from excluding him for lack of substantial interest.<sup>468</sup>

The court's failure to distinguish between the right to an adjudicatory proceeding and the scope of one's participation in that proceeding, and its failure to recognize the relationship between the procedural requirements of chapter 120 and the substantive requirements of other law, caused it to undermine one of the distinctive features of section 120.57, that is, that the right to invoke the section's procedural protections is conferred by its own terms without reference to other law. As a consequence, persons entitled to request adjudicatory proceedings by the terms of section 120.57, principally economic competitors, are being denied the right when competitive economic impact is not a concern in the issuance of a license by statute or rule. This manipulation of the section's access criteria is unfortunate and unnecessary. The Florida Supreme Court's error in *ASI* has been repeated by the district courts of appeal.

Since the early 1960's, sulphur, a necessary ingredient in fertilizer, has been brought into Florida in liquid or molten form. Agrico Chemical Company, a manufacturer of fertilizer, purchased molten sulphur from the Freeport Sulphur Company. Freeport transported the molten sulphur in a specially designed ship and brought it into the state through the Port of Tampa where it was handled by Sulphur Terminals Company until its transfer to Agrico. When a method of transporting sulphur in solid form, referred to as prilled sulphur, became available through a Canadian supplier, Agrico filed an application with the Department of Environmental Regulation (DER) for construction permits to build a facility to handle prilled sulphur. Agrico applied for an air pollution source permit and a waste water facility permit. DER issued the waste water permit and a letter of intent to issue the air permit. Freeport and

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468. *Id.*

Sulphur Terminals filed petitions for section 120.57 proceedings to contest the issuance of the air and waste water permits. Both petitions were referred by DER to the DOAH and assigned to the same hearing officer.<sup>469</sup>

The hearing officer recommended to DER that the petition challenging the waste water permit be dismissed because that permit had already been issued. In its final order, DER dismissed the petition for lack of "standing." It concluded that Freeport and Sulphur Terminals failed to establish that the proposed waste water treatment facility would harm their environmental interests and that the real nature of their substantial interest was future adverse economic impact, a concern not within the "zone of interest" protected by the environmental permitting statute.<sup>470</sup>

Freeport and Sulphur Terminals then amended their petition for a hearing on the air permit application to allege that environmental injury would result from the proposed prilled sulphur facility. The hearing officer found that both Freeport and Sulphur Terminals had the right to a section 120.57 proceeding on the proposed air permit for three reasons: (1) their substantial interests—adverse economic impact—were affected; (2) DER allowed them to intervene by forwarding their petition to the DOAH; and (3) a DER rule entitled them to party status. At the conclusion of the hearing on the permit application, the hearing officer recommended that DER deny the air pollution source permit. DER's final order, approved by the Environmental Regulation Commission, rejected the first two grounds proffered by the hearing officer for permitting Freeport and Sulphur Terminals to initiate the proceeding, but agreed with the hearing officer that a DER rule gave them party status. The final order accepted the hearing officer's recommendation on the substantive question and denied Agrico's air pollution source permit.<sup>471</sup>

On review, the court held that it was error to permit either Freeport or Sulphur Terminals, as economic competitors of Agrico, to participate in Agrico's permit proceedings and directed DER to proceed with the issuance of the air pollution source construction permit. The court's discussion of the economic competitor's right to initiate an adjudicatory proceeding on another's permit application was in two parts. First, whether potential economic injury

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469. *Agrico Chem. Co. v. Department of Env'tl. Reg.*, 406 So. 2d 478, 479 (Fla. 2d DCA 1981), *petition for review denied mem.*, 415 So. 2d 1359 (Fla. 1982).

470. *Id.* at 479-80.

471. *Id.* at 480-81.

qualifies as a "substantial interest" which will be affected in an environmental permitting proceeding; and second, whether DER could and did by rule extend party status to these competitors.

With regard to the meaning of "substantial interests," the court accepted DER's view that the interest must be within the "zone of interest" protected by the permitting statute. The court articulated its standard in these terms:

We believe that before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury. While petitioners in the instant case were able to show a high degree of potential economic injury, they were wholly unable to show that the nature of the injury was one under the protection of [the environmental permitting statute].<sup>472</sup>

While it is true that the court did not call its access test by the name "zone of interest" and it did not cite the United States Supreme Court decision that first announced the test, the federal "zone of interest" test is precisely what the court grafted onto section 120.57.<sup>473</sup>

The federal "zone of interest" test is not an all-purpose rule even in federal law. It was the result of the Supreme Court's effort to give meaning to the Federal Administrative Procedure Act's provision extending a right to judicial review to a person "*adversely affected or aggrieved by agency action within the meaning of a relevant statute.*"<sup>474</sup> When the statute to be construed requires adverse affect "within the meaning of a relevant statute," it may make sense to say that the interest injured must be one arguably within the zone of interests to be protected by the statute under which the agency action is taken. But the statute construed by the *Agrico* court does not say a person is a party if his substantial interests are adversely affected or aggrieved by agency action within the meaning of a relevant statute. It simply says a party is a person whose substantial interests will be affected by proposed

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472. *Id.* at 482.

473. The "zone of interest" test was announced in *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

474. 5 U.S.C. § 702 (1982) (emphasis added).

agency action. There is no justification for using the "zone of interest" test to construe that language.

The *Agrico* court fell into the same error the *ASI* court did. It failed to recognize that the right to initiate section 120.57 proceedings is controlled by that section's own terms, but that the scope of the proceeding is governed by the substantive statute which authorizes the agency's action. The hearing officer did appreciate the point. He conducted what the parties referred to as a "mini-trial" on "standing"<sup>475</sup> during which he allowed Freeport and Sulphur Terminals to introduce evidence of the potential economic injury they would suffer if the permit issued. This evidence was allowed and used to establish that Freeport's and Sulphur Terminals' substantial interests would be affected by the proposed agency action.<sup>476</sup>

During the substantive portion of the hearing, the evidence proffered and admitted went not to the economic effects but to the environmental effects of handling prilled sulphur.<sup>477</sup> Freeport and Sulphur Terminals did not try to persuade either the hearing officer or DER to protect their "profit and loss statement" under a statute designed to protect the environment.<sup>478</sup> What the threat of economic injury gave them was a strong incentive to help DER protect the environment. With the financial resources to match *Agrico* lawyer for lawyer and expert witness for expert witness, Freeport and Sulphur Terminals were able to convince the hearing officer, DER, and the Environmental Regulation Commission that DER's initial decision to issue the air pollution source construction permit was unsound because of the potential damage that construction of a prilled sulphur facility would cause to the environment.<sup>479</sup>

The hearing officer recognized that the plain meaning of section 120.57's access language entitles persons to party status if they can

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475. 406 So. 2d at 481 n.2.

476. *Freeport Sulphur Co. v. Department of Env'tl. Reg.*, 11 Fla. Admin. Rep. 44, 46-47 (1979).

477. *Id.* at 46-50.

478. 406 So. 2d at 482.

479. The hearing officer recommended denial of *Agrico*'s permit because he found as a matter of law *Agrico* failed to provide DER with "reasonable assurance based on plans, test results and other information, that the construction . . . [or] operation . . . of the installation will not . . . cause pollution in contravention of Department standards, rules or regulations." 11 Fla. Admin. Rep. at 50-52 (quoting FLA. ADMIN. CODE R. 17-4.07(1)(19)). DER's final order accepted the hearing officer's findings of fact and his conclusions of law on all matters except those pertaining to Freeport's and Sulphur Terminal's rights to initiate the proceeding. 11 Fla. Admin. Rep. at 52-61.

show that their important or significant interests will be affected by the proposed agency action, without regard to whether their interests are protected by the statute which authorizes the agency action. He also recognized that the environmental permitting statute set the boundaries within which all parties had to try the case. If that statute had permitted DER to consider the competitive economic impact of its permitting decisions, then evidence of economic consequences would have been admissible. As that statute permitted DER to consider only environmental impact, only evidence of environmental consequences would be received and used as a basis for decision. This approach to the problem of economic competitors' participation in environmental permitting proceedings maintains the integrity of section 120.57 and the environmental permitting statute. The *Agrico* court and others that have adopted its "zone of interest" test to control access to section 120.57 proceedings have sacrificed the section's central integrity by forcing it to serve ends better served by the scope of participation concept.<sup>480</sup>

The second part of the court's discussion of competitors' rights to participate in another's permitting proceeding concerned whether DER had by rule allowed economic competitors to participate. DER's position was that it could make "potential competitive economic injury cognizable in its licensing proceedings,"<sup>481</sup> and that it had done that here through its Latest Reasonably Available Control Technology rule (LRACT).<sup>482</sup> In making its decision on *Agrico's* permit, DER was required to determine and apply LRACT. The rule said, in part, "[i]n making the determination the Department shall give due consideration to" among other things "the social and economic impact of the application of technol-

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480. See *Shared Servs. Inc. v. Department of Health & Rehab. Servs.*, 426 So. 2d 56 (Fla. 1st DCA 1983) (applying the *Agrico* test to deny a competitor the right to an adjudicatory proceeding on the applicant's request for licensure to operate an air ambulance service and for certification as an advanced life support provider); see also *North Ridge Gen. Hosp., Inc. v. NME Hospitals, Inc.*, 478 So. 2d 1138 (Fla. 1st DCA 1985) (applying the *Agrico* test to deny a competitor the right to contest an application for a certificate of need to provide an open heart surgery program and to establish a cardiac catheterization lab).

481. 406 So. 2d at 482.

482. FLA. ADMIN. CODE R. 17-2.03 (1981), quoted in *Agrico*, 406 So. 2d at 480-81 n.1. LRACT was repealed before the final hearing was held on the *Agrico* permit. It was replaced with the Best Available Control Technology rule (BACT). FLA. ADMIN. CODE R. 17-2.03(3)(b) (1981), quoted in *Agrico*, 406 So. 2d at 480-81 n.1. BACT provided that any proceeding involving a determination of LRACT in process on the effective date of the rule change was to be governed by LRACT.

ogy.”<sup>483</sup> DER’s interpretation of this rule was that “[e]conomic impact’ is broad enough to reasonably include consideration of the potential economic impacts application of LRACT would have on competitors of the applicant.”<sup>484</sup>

The court rejected DER’s interpretation of its own rule, saying that it was not persuaded that the rule’s reference “to ‘social and economic impact’ can be reasonably read to include the economic impact on a business entity when a competitor is first on the market with a less expensive product.”<sup>485</sup> Rather, in the court’s view, LRACT when “read in the context of DER’s statutory framework”<sup>486</sup> is better interpreted as a cost-benefit directive to DER that it consider the costs to business of complying with the new technology requirements and weigh those costs against the benefits the technology is expected to bring to environmental interests.<sup>487</sup> Thus, the court concluded, LRACT

does not require DER to balance the cost of new technology to the affected business against possible economic losses to a business competitor. Thus, the LRACT Rule is not a ‘provision of agency regulation’ which allows a competitor to object, *solely on the basis of potential competitive economic injury*, to the issuance of the permit.<sup>488</sup>

By rejecting DER’s conclusion that LRACT was an agency regulation which conferred party status on the two competitors in Agrico’s permitting proceeding, the court also rejected DER’s claimed “right to grant standing to economic competitors if it chooses to do so, even though its final decision to issue or deny a permit may not be based on the economic effect on an applicant’s competitor.”<sup>489</sup> DER’s position is supported by two aspects of the definition of “party” in chapter 120. A party is (1) any “person who, . . . [by] provision of agency regulation, is entitled to participate . . . in the proceeding . . .,”<sup>490</sup> and (2) “[a]ny other person, . . . allowed by the agency to intervene or participate in the pro-

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483. FLA. ADMIN. CODE. R. 17-2.03(1)(A)(1)(d) (1981).

484. 406 So. 2d at 482.

485. *Id.*

486. *Id.*

487. *Id.*

488. *Id.* at 482-83 (emphasis supplied by the court).

489. *Id.* at 481.

490. FLA. STAT. § 120.52(11)(b) (1985).



ceeding."<sup>491</sup> The court's inability to divorce the substance of the proceeding from the access question prevented it from seeing that on this point DER was correct. The court did not explain why DER could not allow economic competitors to participate in permitting proceedings if it chose to do so. The opinion did suggest, however, that DER's authority to grant party status by rule or otherwise was limited by the statute which authorized its action on the merits in the same way that affected substantial interests were limited to those within the "zone of interests" protected by that statute. Recall that the court read LRACT "in the context of DER's statutory framework." If the court meant to suggest that the agency discretion to give party status to any other person, conferred on the agency in chapter 120's definition of "party," is limited to persons asserting injury to an interest protected by the agency's substantive statute, it is clearly wrong. Neither the plain meaning of the language used nor the legislative history supports the court's suggestion.

Competitive economic injury is a substantial interest, and if persons claiming economic injury will be affected by proposed agency action, they are entitled to party status. That does not mean that the substantive policy which an agency is responsible for implementing will be misappropriated "to redress or prevent injuries to a competitor's profit and loss statement."<sup>492</sup> It does not mean that hearings will be required "to find facts which can have no bearing on agency action."<sup>493</sup> Rather, it means that persons with a financial incentive will help the agency serve the public interest, not their own private interest, by marshaling competent and substantial evidence to support facts upon which the agency is required to act to make an informed decision. Only facts material and relevant to the agency's decision may be put in issue in the proceeding. What is material and relevant to the agency's decision depends on the terms of the substantive statute which authorizes the agency action.

### (b) *Other Substantial Interests*

The question of a third person's right to initiate section 120.57 proceedings on another's license application has come up when interests other than competitive economic interests have been as-

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491. *Id.* § 120.52(11)(c).

492. 406 So. 2d at 482.

493. *ASI, Inc. v. Florida Pub. Serv. Comm'n*, 334 So. 2d 594, 596 (Fla. 1976).

serted as the substantial interests that will be affected by proposed agency action. For example, in *Hillsboro-Windsor Condominium Association v. Department of Natural Resources*,<sup>494</sup> the association, which owned the common areas of the condominium and the land around it, alleged that its property would be eroded and destroyed if the Department issued a coastal construction control line permit to an adjacent property owner. The allegations of erosion and destruction of its property established that the association's substantial interests would be affected if the permit issued. Consequently, the association had a right to initiate an adjudicatory proceeding on the adjacent property owner's requested permit.

But a homeowners' association and individuals residing across Biscayne Bay from a condominium, who alleged they would be adversely affected by the damage to the bay if the condominium developer constructed a proposed marina, did not establish that their substantial interests would be affected by an agency determination that no lease of sovereignty lands was required for the marina.<sup>495</sup> The court did not say that the residents' interests in the quality of the Bay were not substantial interests; the court said the residents failed to allege how their interests would be affected by the agency decision not to collect rent from the developer in the event permitting authority to construct the marina was secured from DER.<sup>496</sup>

Several cases have concerned whether a particular agency action determined the substantial interests of an individual so as to entitle that person to test the agency decision in a section 120.57 proceeding. In *Greene v. Department of Natural Resources*,<sup>497</sup> Greene sought a section 120.57 proceeding on the Governor and Cabinet's

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494. 418 So. 2d 359 (Fla. 1st DCA 1982).

495. *Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n*, 418 So. 2d 1046 (Fla. 1st DCA 1982), *petition for review denied mem.*, 430 So. 2d 451 (Fla. 1983).

496. After DER issued a letter of intent to grant Grove Isle a water quality control permit for the construction of the marina, Bayshore Homeowners' Ass'n, other associations, and individuals petitioned for a § 120.57 proceeding. The hearing officer's recommended order contained the following finding of fact:

Both Mr. Wm. Cleare Filer and David A. Doheny live close to Grove Isle. Mr. Doheny's residence is on the mainland facing the proposed marina site and Mr. Filer's house is on Pelican Canal. They use the waters of Biscayne Bay around Grove Isle for recreation. If the quality of the water in the proposed marina site were lessened their substantial interests would be affected.

2 Fla. Admin. L. Rep. 639-A (1980). The associations were dismissed as parties because no evidence was presented on which a conclusion that their substantial interests would be affected could be based. *Id.* at 640-A.

497. 414 So. 2d 251 (Fla. 1st DCA 1982).

decision to approve acquisition of a tract of land in Broward County under the state's environmentally endangered land (EEL) purchase program. The acquisition of the tract was recommended by the Conservation and Recreation Land Committee (CARL). Greene claimed that the tract did not meet the legal criteria for an EEL purchase and petitioned for a formal proceeding under section 120.57(1). The Department denied the petition in part because the pleadings "state[d] no substantial interest whatsoever which would be affected by the action taken by the Governor and Cabinet in accepting and approving the C.A.R.L. Selection Final Report."<sup>498</sup>

On review, the court affirmed the Department's denial of the hearing. The court agreed with the Department that the petition for the section 120.57(1) proceeding failed to explain how Greene's substantial interests would be determined or affected by the decision to acquire the tract. Greene was "neither the owner, nor adjacent owner, of any land in the . . . parcel nor the owner of any land on the CARL Committee's acquisition list with lower priority than [the questioned parcel], or the owner of land not on the list but which allegedly should be on the list."<sup>499</sup>

Greene tried to avoid the access requirements of section 120.57 by relying on section 403.412(5)'s citizen standing provision to initiate the section 120.57 proceeding. Section 403.412(5) provides:

In any 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, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state shall have standing to 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 of the state.<sup>500</sup>

The court ruled that Greene's reliance on section 403.412(5) was misplaced for four reasons. First, the provision only applies to suits for injunctive relief in circuit court. Second, the provision only allows a citizen to intervene in a proceeding; it does not permit a citizen to initiate a proceeding. Third, the provision is limited to

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498. *Id.* at 253.

499. *Id.*

500. FLA. STAT. § 403.412(5) (1981).

environmental permitting and licensing, neither of which described the conduct sought to be challenged. Fourth, Greene's verified pleading did not allege that approving the acquisition of the tract as an EEL would impair, pollute, or otherwise injure the air, water, or other natural resources of the state.

The court's third and fourth reasons for denying Greene the use of section 403.412(5) to compel a section 120.57 proceeding on the acquisition approval decision were compelling. However, the first two reasons given by the court were not persuasive. The court's statement that the provision only applied to suits in circuit court for injunctive relief was inaccurate. By its express terms the provision applies "[i]n any administrative, licensing, or other proceedings." The court apparently confused sections 403.412(5) and 403.412(2). It is the latter section which authorizes citizens to maintain suits for injunctive relief in the circuit courts.<sup>501</sup> The court's second point, that the provision only authorizes intervention in an ongoing proceeding not the initiation of a proceeding, is debatable. The language of the provision supports the court's conclusion. But at least one other court in dictum said that a citizen may use section 403.412(5) in an appropriate case to initiate a section 120.57 proceeding after free form proceedings have ended and the agency has given notice of its intent to issue a license.<sup>502</sup>

Before the legislature removed proceedings in which the substantial interests of a student were determined by the state university system from section 120.57,<sup>503</sup> two cases alleging university action against students constituted a determination of the students' substantial interests were decided. In the first, *Sterman v. Florida State University*,<sup>504</sup> a candidate for a Ph.D. in science education was offered instead an Ed.D. degree after unsuccessfully defending his Ph.D. dissertation. The degree transfer was offered by Sterman's doctoral committee and approved by his major professor. Subsequently, the department chairman refused to allow him to receive the Ed.D. degree. Sterman requested a section 120.57 adjudicatory proceeding; the university denied the requested hearing, in part, because it claimed Sterman failed to allege a determination of his substantial interests which would entitle him to a hearing. On appeal, the court reversed the university.

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501. *Id.* § 403.412(2)(a).

502. *Manasota-88, Inc. v. Department of Envtl. Reg.*, 441 So. 2d 1109, 1111 (Fla. 1st DCA 1983).

503. FLA. STAT. § 120.57(5) (1985).

504. 414 So. 2d 1102 (Fla. 1st DCA 1982).

The university supported its position on two grounds. First, it claimed that degree transfers were prohibited by university rules. Therefore, Sterman could not assert a substantial interest had been determined. The court noted that because no hearing had been held, the facts alleged by Sterman in his petition for the hearing were presumed true. Sterman alleged that degree transfers were not prohibited and that they were common at the university. By deciding against him on this point, without giving him an opportunity to support his position with evidence, the court ruled that the university improperly decided an issue that went to the merits of Sterman's claim. Second, the university claimed that Sterman's substantial interest—the proffered Ed.D. degree—was based on a subjective academic assessment of his performance and “a substantial interest in a decision based upon the assessment of a student's academic performance would not be a substantial interest within the scope of that term as used in 120.57.”<sup>505</sup> The court rejected the university's argument. The real interest asserted by Sterman's petition “was in a degree which had been offered and approved by authorized university officials and subsequently revoked without explanation.”<sup>506</sup> Determining the propriety of the revocation would not concern the subjective assessment of Sterman's academic performance.

In the second case, a student who was a candidate for a Ph.D. in economics sought a section 120.57 proceeding on the Department's refusal to readmit him to the doctoral degree program after he had been dismissed for academic reasons. The university denied the student's request for a hearing and the student appealed.<sup>507</sup> After recounting the unhappy details of the student's academic life since beginning the doctoral program, the court concluded the “evidence” supported the university's position that the readmission decision was based solely on academic considerations. The court then wandered far from the question before it and speculated that if a hearing were ordered in this case it “would open this Court and the Department of Administrative Hearings [sic] to a flood of claims which could be filed anytime a university or college student was dissatisfied with his grade in a particular course.”<sup>508</sup> In summary fashion, the court concluded that the denial of readmission to the doctoral program was “not a decision in which ‘the substan-

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505. *Id.* at 1104.

506. *Id.*

507. *Beheshtitabar v. Florida State Univ.*, 432 So. 2d 166 (Fla. 1st DCA 1983).

508. *Id.* at 167.

tial interests of a party are determined by an agency' within the meaning of Section 120.57."<sup>509</sup>

There are several problems with the court's analysis. Even though no hearing had been held, the court did not, as it did in *Sterman*, presume that the facts alleged in the petition requesting the hearing were true. The university alleged the decision was an academic one. The student, an Iranian citizen, claimed the decision was motivated in part by a desire to punish him for the seizure of the American embassy in Iran and the taking of American hostages.<sup>510</sup> The court permitted the university to decide against the student without giving him an opportunity to support his claim with evidence. The court accepted the university's version of a disputed material fact as "evidence" which not surprisingly supported the university's conclusion that the nonreadmission decision was based solely on academic grounds. In effect, the student was denied access to a section 120.57 proceeding because the court concluded, without benefit of a record compiled during an adversary proceeding, that he would lose on the merits. The strength of a party's position on the merits of a claim is not a proper consideration when deciding whether a petition alleges that agency action determined the substantial interests of a party. The right to a hearing and the ability to prevail on the merits after the hearing are totally different and separate questions.

The court muddled the access question even further with its speculation about the flood of student complaints over grades in particular courses. The question before the court was not whether a section 120.57 proceeding was required when a student disagreed with the bona fide academic evaluation of a professor who awarded a grade of "C" when a student believed he deserved an "A". The question presented to the court was whether a section 120.57 proceeding was required when a student was denied readmission to a graduate degree program allegedly because the academic evaluation was tainted by improper and unprofessional considerations. The *Sterman* case, decided a year earlier but not cited by the majority, was a well reasoned precedent for holding that the university determined the student's substantial interests when it denied him readmission to the doctoral program under the circumstances alleged.<sup>511</sup>

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509. *Id.*

510. *Id.* at 168 (Ervin, J., specially concurring).

511. Judge Ervin in his concurring opinion did rely on *Sterman v. Florida State Univ.*, 414 So. 2d 1102 (Fla. 1st DCA 1982) to support his view that the university's action did

The final two cases under this heading concern whether school board personnel decisions determine substantial interests entitling the affected individual to a section 120.57 hearing. In *Johnson v. School Board of Palm Beach County*,<sup>512</sup> a tenured classroom teacher was suspended without pay by the superintendent after the teacher assaulted a student. The superintendent notified the teacher by letter that the suspension without pay was effective immediately, that the superintendent would recommend to the school board at its next meeting that it ratify his suspension decision, and that it terminate the teacher's employment. The school board retroactively ratified the superintendent's decision to suspend the teacher without pay. Subsequently, a hearing was held on a formal petition to terminate the teacher's contract; the school board's final order dismissing the teacher from employment was upheld by the State Board of Education. The teacher then sought judicial review of that portion of the final order which sustained the legality of his suspension without pay and the board's retroactive ratification of it.

The teacher challenged his suspension without pay as a denial of state and federal constitutional due process guarantees. The court avoided one constitutional question by holding that the superintendent had statutory authority to suspend a teacher in an emergency, but no authority to suspend without pay. The court found that while the school board did have statutory authority to suspend without pay, its authority was prospective only. Therefore, the teacher was entitled to full pay during the period of suspension before the board's meeting. The court then had to decide whether the board constitutionally could suspend the teacher without pay pending the hearing on his termination from employment, or whether due process required a presuspension hearing. After balancing the school board's and the teacher's competing interests, the court held that a postsuspension hearing conducted with reasonable diligence and dispatch satisfied constitutional due process requirements.<sup>513</sup>

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determine the student's substantial interests. He concurred in the judgment denying the student a hearing on the limited ground that the student waived his right to a § 120.57 proceeding. *Id.*

512. 403 So. 2d 520 (Fla. 1st DCA 1981).

513. *Id.* at 525. As authority for this holding, the court relied on Justice Powell's concurring opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974). In *Arnett*, the Court used a balance of competing interests approach in upholding statutory procedures for the dismissal of federal civil service employees. Of the six Justices who reviewed these procedures in light of the requirements of the due process clause, only Justices Powell and Blackmun found the hear-

It was from this federal constitutional perspective that the court considered whether section 120.57 required a hearing before suspension without pay. The court's treatment of the question was conclusory and obviously was influenced by its resolution of the constitutional issue: "While the *termination* of an employee would be a proceeding affecting the substantial interest of a party, requiring the agency action to be in accordance with Section 120.57, . . . we conclude that suspension without pay pending a full evidentiary termination hearing is not such a proceeding."<sup>514</sup> Balancing competing interests may be an appropriate test for determining whether the Constitution requires a hearing before government invades protected liberty or property interests.<sup>515</sup> But balancing competing agency and private interests is not an appropriate method for determining whether a person's substantial interests have been determined by agency action. The court's resolution of the constitutional claim against the teacher meant only that the teacher was not a "person who, as a matter of constitutional right" was entitled to a section 120.57 proceeding as a party.<sup>516</sup> The court never asked whether the teacher's interest in the continuation of his pay was a "substantial interest . . . being determined in the proceeding" by the school board's action.<sup>517</sup> Had the question been put this way, surely the response would have entitled the teacher to a section 120.57 proceeding before the school board suspended him without pay.

In *Martin v. School Board of Gadsden County*,<sup>518</sup> a teacher requested a section 120.57 adjudicatory proceeding on the school board's decision to transfer her from one elementary school to another in the district. The petition requesting the hearing asserted the transfer was a disciplinary measure initiated by the superintendent after he received a letter from the principal at Martin's

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ing after dismissal sufficient. Justices Douglas, Brennan, White, and Marshall thought a prior hearing was required.

514. 403 So. 2d at 527 (footnote omitted) (emphasis in original). In a later case, *Strange v. School Bd. of Citrus County*, 471 So. 2d 90, 92 (Fla. 5th DCA 1985), the court read a provision in FLA. STAT. § 231.36(4)(c) (1983) that "the school board shall determine upon the evidence submitted whether the charges have been sustained" to contemplate that the school board would hold a hearing before suspending a teacher without pay. In *Strange*, the teacher was offered an opportunity for a formal hearing but she never requested one. The court concluded she had waived her right to a formal hearing on her suspension.

515. For a discussion critical of interest balancing in this area, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 539-43 (1978).

516. FLA. STAT. § 120.52(11)(b) (1985).

517. *Id.* § 120.52(11)(a).

518. 432 So. 2d 588 (Fla. 1st DCA 1983).



school complaining that Martin's "actions and attitudes have detrimentally affected the morale of the faculty and staff."<sup>519</sup> Martin claimed the charge was not supported by facts and that without a hearing she would "be denied the opportunity to challenge the accuracy of such statements."<sup>520</sup> The school board's denial of the requested hearing was affirmed on review.

The court held no error was committed by the school board when it denied Martin a hearing because the petition requesting the hearing "wholly fail[ed] to identify what substantial interest [was] affected. There [was] no allegation of harm done to the teacher by the transfer. No pecuniary harm was alleged. No damage to reputation was alleged . . . ."<sup>521</sup> That holding was not remarkable. The model rules require a petition for formal proceedings to contain "an explanation of how [the petitioner's] substantial interests will be affected by the Agency determination"<sup>522</sup> and provide for the denial of a petition "if the petitioner does not state adequately a material factual allegation, such as a substantial interest in the Agency determination."<sup>523</sup>

519. *Id.* at 590.

520. *Id.*

521. *Id.* at 588.

522. FLA. ADMIN. CODE R. 28-5.201(2)(b) (1983).

523. *Id.* R. 28-5.201(3)(a). This rule also requires an agency to give written notice to all parties of the action taken on [a] petition [requesting a hearing] and to "state with particularity its reasons therefor." *Id.* R. 28-5.201(3)(b). In *Sims v. Board of Trustees of North Fla. Junior College*, 444 So. 2d 1115 (Fla. 1st DCA 1984), *Sims*, the President of the North Florida Junior College, requested a § 120.57(1) proceeding after the college's board of trustees voted not to renew his employment contract. *Sims* claimed the termination of his employment affected his substantial interests, that his employment was "subject to written and oral agreements which have been entered into or amended within the past year and which provide for notice of non-renewal and specifications of good and sufficient cause for non-renewal; [and that] the Board has neither provided notice nor specified good and sufficient cause." 444 So. 2d at 1116. The Board denied the petition because it appeared untimely and because "the official records of the College negated the material assertions of [his] petition." 444 So. 2d at 1116. The court held the petition requesting the hearing was timely and that the second reason given by the Board did not state the reasons for denying the petition with sufficient particularity to satisfy FLA. ADMIN. CODE R. 28-5.201(3)(b) (1983).

On remand, the Board again voted to deny *Sims*' request for a § 120.57(1) proceeding. In a four page letter to *Sims* from the Chairman of the Board of Trustees, several reasons were offered to support the decision to deny the hearing. The principal reasons were that the employment contract between *Sims* and the Board expressly stated that "[n]o legal cause shall be required of the Board in the event that the [President] is not reemployed by the Board in the position held by the [President] under the terms of this agreement after June 30, 1980 . . .," that "[a]ll official action of the Board of Trustees is recorded in the official minutes of the meetings of the Board of Trustees," and that "[a]ll agreements to which the Board of Trustees is a party are included in the official records of the Board of Trustees." Neither the minutes nor the records reflected any agreements between the Board and *Sims* regarding his employment as President. Record on Appeal at 42, *Sims v. Board of Trustees*

The dissent charged the majority had accepted the school board's argument that Martin had "no legally recognized interest to teach at a particular school; accordingly, her substantial interests [were] not affected by the transfer,"<sup>524</sup> and thus the majority had immunized school board personnel decisions from chapter 120. While the majority insisted that was untrue, that it required only some showing that substantial interests would be affected and that the petition failed to satisfy that requirement, the meaning of this passage from the majority's opinion is otherwise hard to understand:

We are, in effect, asked to find that Administrative Procedures Act formal hearings are, as a matter of law, a part of a school system's personnel procedures. We will not do this.

Personnel decisions are necessarily judgment calls involving a multitude of factors. If a superintendent in his or her discretion, supported by the School Board, decides that harmony between administration and faculty is best served by an intrasystem transfer, it is not this Court's job to second-guess them.<sup>525</sup>

Nothing in chapter 120 or in any other case suggests that personnel decisions of school boards or any other agency are beyond the procedural discipline of section 120.57. Any decision by an agency is subject to the hearing requirements of section 120.57, if the decision determines or affects the substantial interests of a party. To suggest, as the majority does, that personnel decisions rest solely in the unbridled and unchallenged discretion of the superintendent and the school board is unprecedented. The availability of a hearing does not depend on any characterization of the agency's decision. Rather, section 120.57 proceedings are available to any person "whose substantial interests are threatened . . . by agency action which is proceeding arbitrarily, imperiously, or obviously."<sup>526</sup> Notwithstanding the majority's novel suggestion to the contrary, section 120.57 is, as a matter of law, a part of any agency's personnel procedures to the extent that substantial interests are deter-

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of North Fla. Junior College, 473 So. 2d 1 (Fla. 1st DCA 1985).

Sims again appealed the denial of his petition for hearing. The court ruled that this time the Board stated with sufficient particularity why no hearing was required and affirmed the Board's denial of Sims' petition. 473 So. 2d at 1.

524. 432 So. 2d at 590 (Ervin, J., dissenting).

525. 432 So. 2d at 588-89.

526. State *ex rel.* Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 591 (Fla. 1st DCA 1977).

mined or affected by an agency decision.<sup>527</sup>

(c) *Certificates of Need and Comparative Hearings*

Federal law requires states to designate a planning agency to approve proposed capital expenditures for health care facilities if federal criteria for need are satisfied. Unless the state planning agency approves the capital expenditure, federal reimbursement for health care costs to providers, principally under the Medicare and Medicaid programs, is reduced by the amount necessary to assure federal money is not used to support unnecessary capital expenses incurred by health care providers.<sup>528</sup> Federal law also requires states to establish a certificate of need (CON) program in order for them to qualify for grants under federal health programs.<sup>529</sup> Responding to this federal encouragement, the Florida Legislature enacted the Health Facilities and Health Services Planning Act which contains Florida's CON program and names the Department of Health and Rehabilitative Services (HRS) as this state's health care planning agency.<sup>530</sup> The Act specifically provides that "[a]n applicant or a substantially affected person who is aggrieved by the issuance, revocation, or denial of a certificate of need shall have the right . . . to seek relief according to the provisions of the Administrative Procedure Act."<sup>531</sup>

Initially, HRS' position was that each application for a CON was granted or denied on its individual merits alone on a first come first served basis and not in comparison with other applications for the same kind of facility in the same service area. As a consequence, each applicant was entitled to an adjudicatory proceeding on the denial of his own application for a CON, but a competing applicant was not entitled to a hearing on the issuance of another's application. Applicants had no right to consolidate the proceedings and force a comparative evaluation of competing applications. Two cases decided in 1979 rejected HRS' position. In one case, the court relied on section 120.57's access language to conclude that a competitor did have a right to a hearing on the issuance of an-

527. *Wahlquist v. School Bd. of Liberty County*, 423 So. 2d 471, 472-75 (Fla. 1st DCA 1982); *Foreman v. Columbia County School Bd.*, 408 So. 2d 653, 653-54 (Fla. 1st DCA 1981); *Webster v. South Fla. Water Management Dist.*, 367 So. 2d 734 (Fla. 4th DCA 1979); *Witgenstein v. School Bd. of Leon County*, 347 So. 2d 1069, 1071-72 (Fla. 1st DCA 1977).

528. 42 U.S.C. § 1320a-1 (1982).

529. *Id.* § 300k-300n.

530. FLA. STAT. §§ 381.493-.499 (1985).

531. *Id.* § 381.494(8)(e).

other's CON. In the other case, the court applied the federal *Ashbacker* doctrine to Florida CON proceedings and concluded that a comparative hearing in which all competing applications were considered together was required to satisfy fundamental notions of fairness.

In *Bio-Medical Applications of Ocala, Inc. v. Office of Community Medical Facilities*,<sup>532</sup> Bio-Medical and Shands Teaching Hospital each submitted applications for a CON to provide a ten-station kidney dialysis center in Ocala. HRS denied Bio-Medical's application and granted Shands', finding it to be a "less costly and more appropriate alternative."<sup>533</sup> HRS refused to permit Bio-Medical to contest Shands' CON in an adjudicatory proceeding; it conceded that Bio-Medical was entitled to a hearing on the denial of its own CON. Bio-Medical appealed HRS' final order denying it the right to a section 120.57 proceeding on Shands' application for a CON. Bio-Medical claimed that the Health Facilities and Health Services Planning Act entitled it to a hearing on the Shands application because it was an "applicant . . . aggrieved by the issuance . . . of a certificate of need."<sup>534</sup>

The court found it unnecessary to decide "whether 'any' simultaneous applicant"<sup>535</sup> for a CON was entitled to an adjudicatory proceeding when a competitor's application was granted after free form proceedings. The court limited its holding to applicants whose applications were simultaneous and mutually exclusive. In that circumstance, the court said "each competitor is potentially a party to the proceedings on the other's application. Each is one 'whose substantial interests will be affected by proposed agency action' on the other's application."<sup>536</sup> Therefore, as a party Bio-Medical was entitled to initiate a section 120.57 hearing in proceedings which would determine Shands' substantial interests.

The court's conclusion undoubtedly was correct, but its analysis of Bio-Medical's party status was a bit curious. Bio-Medical, after all, was claiming that it was entitled to a hearing on the Shands application because of the provision in the Health Facilities and Health Services Planning Act which at the time gave "any applicant . . . aggrieved by the issuance or denial" of a CON the right "to seek relief according to the provisions of the Administrative

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532. 374 So. 2d 88 (Fla. 1st DCA 1979).

533. *Id.*

534. FLA. STAT. § 381.494(6)(e) (1977).

535. 374 So. 2d at 89.

536. *Id.*

Procedure Act." Bio-Medical was claiming party status by "provision of statute," not as one "whose substantial interests will be affected by proposed agency action." But by relying on that part of the definition which makes a person a party if his substantial interests will be affected by the agency action, the court narrowed access to section 120.57 proceedings in CON cases to applicants whose applications were both simultaneous and mutually exclusive. Had it focused on the "provision of statute" part of the definition, the court would have seen that the legislature granted party status to any applicant aggrieved. That grant of party status by statute arguably was broader than the court's with its additional requirements of simultaneity and mutual exclusivity.<sup>537</sup>

The only question in *Bio-Medical Applications of Ocala* was the right of a competing applicant to initiate a section 120.57 proceeding on another's application which the agency intended to grant. The court did not have to address the question whether the right to participate in another's CON application proceeding adequately protected all applicants' rights to a fair consideration of their proposals. That question was considered in *Bio-Medical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services*.<sup>538</sup>

In *Bio-Medical Applications of Clearwater*, Kidneycare of Florida, Inc. submitted an application for a CON to construct a ten-station kidney dialysis center in Clearwater. HRS denied the CON based on its determination that there was no need for additional dialysis stations in that area. Kidneycare's request for a hearing was referred to the DOAH. At about the same time, Bio-Medical Applications of Clearwater submitted an application for a CON to install a twenty-station kidney dialysis facility in Clearwater. HRS denied Bio-Medical's application for a CON. Bio-Medical's request for a hearing was also referred to the DOAH. Bio-Medical was permitted by the hearing officer to intervene in Kidneycare's proceeding, but its attempt to convince the hearing officer that the later scheduled proceeding on its own application should be consolidated with the Kidneycare proceeding was not successful. At the

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537. The legislature amended the Health Facilities and Health Services Planning Act in 1980 to give a right to a hearing to "[a]n applicant, a substantially affected person or health systems agency." Ch. 80-87, § 4, 1980 Fla. Laws 594, 598 (codified at FLA. STAT. § 381.494(7)(e) (Supp. 1980)). This provision was amended deleting reference to "health systems agency." Ch. 82-182, § 3, 1982 Fla. Laws 628, 632 (current version at FLA. STAT. § 381.494(8)(e) (1985)).

538. 370 So. 2d 19 (Fla. 2d DCA 1979).

conclusion of the hearing, the hearing officer recommended to HRS that Kidneycare's application for a CON to construct a ten-station dialysis center be approved. HRS' final order, accepting the hearing officer's recommendation, was rendered before the hearing was conducted on Bio-Medical's application. After that hearing was concluded, the hearing officer recommended that HRS approve a CON authorizing Bio-Medical to operate a seven-station dialysis facility rather than the twenty-stations requested.

Bio-Medical sought judicial review of HRS' final order issuing a CON to Kidneycare alleging that the failure to consolidate its application with Kidneycare's for hearing was a material error in procedure that affected the fairness of the proceeding and the correctness of HRS' action.<sup>539</sup> The court agreed with Bio-Medical that in these circumstances the principle announced by the United States Supreme Court in *Ashbacker Radio Corp. v. FCC*<sup>540</sup> applied: "[W]here two *bona fide* applications for administrative approval are mutually exclusive, the grant of one without a hearing to both deprives the loser of the hearing to which he is entitled."<sup>541</sup> When opposing applicants are competitors for a fixed pool of needed services as in this case, the court said:

fairness requires that the agency conduct a comparative hearing at which the competing applications are considered simultaneously. Only in that way can each party be given a fair opportunity to persuade the agency that its proposal would serve the public interest better than that of its competitor. Such an opportunity is not afforded by merely allowing an applicant to intervene in the proceedings pertaining to a competing application since the merits of the intervenor's proposal are not thereby presented for comparative consideration.<sup>542</sup>

As the court noted, no federal or state statute, including chapter 120, recognized the need for or established procedures for accommodating comparative hearings in CON cases. Just as in *Ashbacker* itself, the need for comparative hearings was recognized by the judiciary and was based on common law concepts of fair

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539. As an intervenor in the Kidneycare proceeding, Bio-Medical was a party and thus was able to seek judicial review. FLA. ADMIN. CODE R. 28-5.104 (1983). A court must remand a case for further proceedings if a material error in procedure affected the fairness of the proceeding or the correctness of the agency decision. FLA. STAT. § 120.68(8) (1985).

540. 326 U.S. 327 (1945).

541. 370 So. 2d at 23.

542. *Id.*

play and fundamental fairness. After *Bio-Medical Applications of Clearwater*, the legislature directed HRS to provide by rule for "applications to be submitted on a timetable or cycle basis . . . and provide for all completed applications pertaining to similar types of services, facilities, or equipment affecting the same service district to be considered in relation to each other no less often than two times a year."<sup>543</sup> By rule, applications in the same batching cycle for similar needs in the same service district are presumed to be simultaneous and mutually exclusive applications on which a comparative hearing must be held if requested.<sup>544</sup>

Although the batching cycle mechanism takes some of the guess work out of determining whether applications are simultaneous and therefore subject to a comparative hearing, it does not operate perfectly. For example, continuances may delay hearings on earlier batched applications until after later batched applications have been considered. In these circumstances, applicants from the earlier batch cycle are entitled to intervene in the proceedings on the later batch cycle applications.<sup>545</sup> No reported case has ruled on the availability of a comparative hearing in these circumstances. Whether applicants in a later batch cycle may intervene in or consolidate their proceedings with proceedings to dispose of earlier batch cycle applications is not clear.<sup>546</sup>

In *Community Psychiatric Centers, Inc. v. Department of Health and Rehabilitative Services*,<sup>547</sup> the court ruled that an applicant whose CON application was four batch cycles later than the application on which it sought to compel a comparative hearing was not entitled to a comparative hearing under the principles of *Bio-Medical Applications of Clearwater* because the applications were not simultaneous. But the court went on to suggest that an applicant in a later batch cycle could be entitled to a comparative hearing with earlier batch cycle applications, if the later batch cycle applicant was an "affected person" as defined by an HRS rule.<sup>548</sup> The court concluded that the applicant was not an "af-

543. Ch. 80-187, § 4, 1980 Fla. Laws 594, 598 (current version at FLA. STAT. § 381.494(5) (1985)).

544. FLA. ADMIN. CODE R. 10-5.08(1) (1984).

545. *Federal Property Management Corp. v. Health Care & Retirement Corp. of Am.*, 462 So. 2d 493, 495-96 (Fla. 1st DCA 1985).

546. 462 So. 2d at 495.

547. 474 So. 2d 870, 872 (Fla. 1st DCA 1985).

548. FLA. ADMIN. CODE R. 10-5.02(20) (1984) defines "affected person" to mean:

the person whose application/proposal is being reviewed, members of the public who are to be served by the person proposing the project, health care facilities and

ected person" within the meaning of the HRS rule, and thus was not entitled to a comparative hearing. It is troublesome, however, that the court relied on an HRS rule that identifies persons who may request that HRS hold a public hearing on a CON application.<sup>549</sup> The rule which the court should have looked to identifies the persons who may invoke section 120.57 proceedings, as "persons whose interests are substantially affected."<sup>550</sup>

In *Gulf Court Nursing Center v. Department of Health and Rehabilitative Services*,<sup>551</sup> the court held that an applicant, whose CON application was filed nine months and at least one batching cycle later than the application on which it sought to compel comparative review, was entitled to a comparative hearing under *Biomedical* principles. Provincial House of Florida and Beverly Enterprises filed applications for CONs to construct 120-bed nursing home facilities in Lee County in January 1981 and March 1981, respectively. Both applications were designed to meet the projected bed need for 1983 contained in the 1981 health systems plan for Lee County. HRS comparatively reviewed Provincial's and Beverly's applications with one filed by Health Care Management and awarded a CON for seventy-eight nursing home beds to Health Care Management. The CON applications of Provincial and Beverly were denied and they requested a hearing. Late in December 1981, and before the hearing was held, HRS entered into a stipulation with Provincial and Beverly granting each of them a CON for seventy-two nursing home beds. The CONS were granted because the 1982 health systems plan for Lee County identified a need for 143 additional nursing home beds in 1985.

In the meantime, Gulf Court filed an application for a CON to

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health maintenance organizations located in the health service area in which the service is proposed to be offered or developed which provide services similar to the proposed services under review, and health care facilities and health maintenance organizations which, prior to receipt by the agency of the proposal being reviewed, have formally indicated an intention to provide such similar services in the future.

See also *NME Hosp., Inc. v. Department of Health & Rehab. Servs.*, 10 Fla. L.W. 1976 (Fla. 1st DCA Aug. 23, 1985) (citing FLA. ADMIN. CODE R. 10-5.02(20) (1984)) as authority for finding that existing hospitals in the same service district where a new facility was proposed, were substantially affected by HRS' decision to grant the CON for the new facility). But see *North Ridge Gen. Hosp., Inc. v. NME Hosps., Inc.*, 478 So. 2d 1138 (Fla. 1st DCA 1985) where the court buttressed its conclusion that a competitor hospital's future adverse economic effect was not within the zone of interest the Health Facilities and Health Services Planning Act was designed to protect by noting that the competitor hospital was not an "affected person" under FLA. ADMIN. CODE R. 10-5.02(20) (1984).

549. FLA. ADMIN. CODE R. 10-5.10(1)(a) (1984).

550. *Id.* R. 10-5.10(8).

551. 10 Fla. L.W. 1983, 1985-86 (Fla. 1st DCA Aug 23, 1985).



construct a 120 bed nursing home facility in Lee County in early December 1981. Gulf Court's application was based on the 143 bed need projected in the 1982 health systems plan. Gulf Court's application was comparatively reviewed with other applications in the same batching cycle but not with Provincial's and Beverly's applications. Gulf Court's application was denied because the projected need for 143 additional beds was met when the Provincial and Beverly CONs were granted. Gulf Court sought a hearing on the denial of its application and on the grant of CONs to Provincial and Beverly. The hearing officer recommended that Gulf Court have its application comparatively reviewed with Provincial's and Beverly's applications. HRS' final order rejected the hearing officer's recommendation and concluded that Gulf Court was not entitled to a comparative review with Provincial and Beverly. Gulf Court appealed.

The court reversed HRS' final order and ruled in these circumstances the later batched Gulf Court application was entitled to comparative review with the earlier batched Provincial and Beverly applications. The court rejected HRS' position that *Biomedical* only required comparative consideration of applications filed simultaneously or nearly simultaneously in time. The court said that "[m]utual exclusivity of the competing applications must be judged by whether each seeks to meet the same 'fixed pool of needed investments.'"<sup>552</sup> The original applications filed by Provincial and Beverly were based on 1983 projected bed needs. Gulf Court's application was based on 1985 projected bed needs. Therefore, considering the applications as they were submitted by the parties, there was no mutual exclusivity because the applications addressed different fixed pools of needed investments. The situation changed, however, when HRS stipulated, in apparent violation of statute and its own rules, that the Provincial and Beverly applications would be granted to meet a need the applications did not address—the 1985 projected need.<sup>553</sup> By its action, HRS effectively

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552. *Id.* at 1985.

553. The court noted that federal and state statutes and HRS rules require applications for CONs to be consistent with the applicable health systems plan. *Id.* at 1985-86; see 42 U.S.C. §§ 300m-6(a)(5)(B)(ii), 300m-6(g) (1982); FLA. STAT. §§ 381.494(4)(a), .494(6)(c)(1), .494(8)(a) (1983); FLA. ADMIN. CODE R. 10-5.09(1) (1984). Furthermore, by statute, only completed applications must be comparatively reviewed. FLA. STAT. § 381.494(5) (1983). By rule, HRS has prescribed procedures for supplementing or amending a completed application, FLA. ADMIN. CODE R. 10-5.08(7) (1984), and for resubmitting an updated application for reconsideration after an application is denied. FLA. ADMIN. CODE R. 10-5.14 (1984). None of the procedures under these rules were followed to amend Provincial's and Beverly's applica-

put Provincial and Beverly in competition with Gulf Court for the same fixed pool of needed nursing home beds. Consequently, even though the applications were filed in different batching cycles and, therefore, were not simultaneous in time, they were mutually exclusive and comparative review was required.<sup>554</sup>

In addition to competing applicants, others have been given access to section 120.57 proceedings on CON applications. In *Collier Medical Center, Inc. v. Department of Health and Rehabilitative Services*,<sup>555</sup> existing hospitals were given access to a proceeding on a CON for a proposed new hospital. The applicant tried to deny their intervention by claiming their only interest was potential economic injury; an interest the applicant claimed was not within the "zone of interests" protected by statute or chapter 120's definition of "party." The court rejected the argument saying "the effect of the proposed . . . facility on the continued financial feasibility of the intervenors is a recognized interest under Florida certificate of need law."<sup>556</sup>

More problematic is *Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services*,<sup>557</sup> which extends the *Florida Home Builders*<sup>558</sup> associational standing rule to proceedings conducted under section 120.57.<sup>559</sup> HRS approved a CON application for the construction of a one-hundred bed acute care hospital in Lehigh Acres. The Farmworker Rights Organization objected and requested a section 120.57 proceeding on the CON application; HRS denied the requested hearing because no member of the organization was made a party to the request. On appeal, the court reversed. Although it recognized that *Florida Home Builders* involved the right of an association to challenge the validity of an adopted rule under section 120.56, the court saw no

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tions. 10 Fla. L.W. at 1986.

554. See also *University Medical Center, Inc. v. Department of Health & Rehab. Servs.*, 478 So. 2d 1138 (Fla. 1st DCA 1985) (affirming a hearing officer's nonfinal order denying a motion to consolidate CON applications for comparative hearing because the applications were not made part of the record on appeal and, therefore, the court could not determine which fixed pool of need or which health systems plan was the basis of each application).

555. 462 So. 2d 83, 86 (Fla.1st DCA 1985).

556. *Id.* at 86. *Contra* *North Ridge Gen. Hosp., Inc. v. NME Hosps., Inc.*, 10 Fla. L.W. 2548 (Fla. 1st DCA 1985). *But cf.* *Humana, Inc. v. Department of Health & Rehab. Servs.*, 469 So. 2d 889 (Fla. 1st DCA 1985); *Shared Servs., Inc. v. Department of Health & Rehab. Servs.* 426 So. 2d 56 (Fla. 1st DCA 1983).

557. 417 So. 2d 753 (Fla. 1st DCA 1982).

558. *Florida Home Builders Ass'n v. Department of Labor & Employment Sec.*, 412 So. 2d 351 (Fla. 1982).

559. See *supra* notes 299-306 and accompanying text.

reason why the same access standard should not apply to section 120.57 proceedings. The court explained its conclusion:

For the purpose of standing, there is no significant difference between a section 120.56(1) and a section 120.57(1) proceeding. In order to establish standing in the former case a person must show that he has been 'substantially affected' by the challenged rule, while in the latter case a party must show that his 'substantial interests' are being determined. Based on the similarities between the standing requirements of these two sections, we now hold that the standing requirements for associations as set forth in *Florida Home Builders* shall apply equally in both section 120.56(1) and section 120.57(1) proceedings.<sup>560</sup>

In other sections of this Article, the differences between the access language of section 120.56 and the access language of section 120.57 were explored.<sup>561</sup> The most important difference ignored by the court in *Farmworker Rights Organization* is that adjudicatory proceedings can only be initiated by a person who is a party. An association seeking to represent its members' interests in an adjudicatory proceeding would have to rely on a statutory provision, an agency rule, or agency acquiescence to acquire party status. Acting as a representative of its members' interests, an association cannot be a person "whose substantial interests will be affected by proposed agency action."<sup>562</sup> The substantial interests that will be affected must be personal to the person seeking party status. No statutory provision confers party status on an association to permit its participation in adjudicatory proceedings on a CON. No HRS rule gives party status to an association for purposes of participating in CON proceedings. Although it had the discretion to permit the association's participation, HRS did not allow the association to intervene or participate in the CON proceeding. The association's interests as an association were not affected by HRS' decision to approve the CON for an acute care hospital. The Farmworker Rights Organization could not establish party status and should have been denied the right to initiate adjudicatory proceedings on the CON application.

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560. 417 So. 2d at 754-55.

561. See *supra* notes 264-70, 388-426 and accompanying text.

562. FLA. STAT. § 120.52(11)(b) (1985) (emphasis added).

(d) *DRI and Binding Letter Processes*

While it is clear that no law external to chapter 120 must require a hearing to be held before a person can claim a right to section 120.57 proceedings, it is equally clear that external law may limit access to those proceedings. Two provisions in the Environmental Land and Water Management Act specifically identify the persons and entities who may participate in administrative proceedings concerning developments of regional impact (DRIs). The courts consistently and, in my opinion, correctly have rebuffed attempts to use the broader access language of section 120.57 to entitle others not specifically identified to participate.

The first provision specifies that a local government order relating to a DRI may be appealed to the Land and Water Adjudicatory Commission (the Governor and Cabinet) by "the owner, the developer, an appropriate regional planning agency, . . . or the state land planning agency."<sup>563</sup> This provision is important because the first and only opportunity for a section 120.57 proceeding in the DRI process is when an appeal is taken to the Land and Water Adjudicatory Commission.<sup>564</sup> At the earlier stages of the process, either substantial interests are not determined<sup>565</sup> or the determination of substantial interests is not made by an agency subject to chapter 120.<sup>566</sup> Nevertheless, in *Caloosa Property Owners Association, Inc. v. Palm Beach County Board of County Commissioners*,<sup>567</sup> the court recognized that while the legislature required the Commission to conduct appeals in accordance with chapter 120, it also limited the persons who could invoke section 120.57 proceedings to those specifically authorized to take an appeal. To permit any person who alleged that his substantial interests were either

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563. *Id.* § 380.07(2).

564. Proceedings before the Commission are conducted pursuant to chapter 120. *Id.* § 380.07(3).

565. An application for development approval (ADA) is filed with the local government having zoning authority over the proposed development. *Id.* § 380.06(6)(a). Because by definition a DRI affects more than one county, the statutory scheme requires review of an ADA by the appropriate regional planning council. Regional planning councils are agencies subject to chapter 120, *id.* § 120.52(1)(b), but because they only have power to recommend approval or rejection of the ADA to local governments, their action does not determine the substantial interests of a party. *Id.* § 380.06(12)(a).

566. The local government determines substantial interests by either approving or rejecting the DRI. But counties and municipalities are not agencies for chapter 120 purposes unless they are expressly made subject to the chapter by general or special law. *Id.* § 120.52(1)(c).

567. 429 So. 2d 1260, 1263-64 (Fla. 1st DCA 1983), *petition for review denied mem.*, 438 So. 2d 831 (Fla. 1983).

affected or determined by the development order to request a section 120.57 proceeding from the Commission would contravene the specific legislative designation and destroy the legislature's purpose in setting up the DRI review process which was to establish "primarily a comprehensive land use review technique for large scale development involving primarily two groups—developers on one hand, and on the other, governmental planners and permitting authorities."<sup>568</sup>

The second provision permits a developer who is in doubt whether his proposed development is a DRI to seek a determination from the state land planning agency (the Bureau of Land and Water Management in the Department of Community Affairs). Within thirty-five days of acknowledgement of a sufficient application, the Bureau must issue a binding letter of its interpretation of the proposed development. The Bureau's decision binds all agencies—state, regional, and local—and the developer.<sup>569</sup>

By rule, the Bureau must solicit and accept information relevant to the application for a binding letter from the appropriate regional planning council and the appropriate local government; the Bureau may solicit and accept information from other persons who may have factual information relevant to the application.<sup>570</sup> As expressed in its rules, the Bureau's interpretation of the statutory binding letter provision precludes anyone but the developer from requesting either a formal or informal proceeding under section 120.57.<sup>571</sup> The courts have endorsed the Bureau's interpretation of the provision. The binding letter process involves only the developer and the Bureau. Neither regional planning councils nor adjacent or adjoining property owners have the right to participate in the process or to initiate a section 120.57 proceeding on an application for a binding letter.<sup>572</sup>

When considering whether third persons had any claim of right

568. *Id.* at 1264.

569. FLA. STAT. § 380.06(4)(a), (d) (1985).

570. FLA. ADMIN. CODE R. 27F-1.16(3) (1979).

571. *Id.* R. 27F-1.16(8), (9), (12). *Contra* Peterson v. Florida Dep't of Community Affairs, 386 So. 2d 879 (Fla. 1st DCA 1980), where adjacent property owners were offered an informal proceeding after a binding letter was issued.

572. *Peterson*, 386 So. 2d 879; *Suwannee River Area Council Boy Scouts of Am. v. Florida Department of Community Affairs*, 384 So. 2d 1369, 1373-74 (Fla. 1st DCA 1980); *South Fla. Regional Planning Council v. Land and Water Adjudicatory Comm'n*, 372 So. 2d 159, 165-67 (Fla. 3d DCA 1979); *South Fla. Regional Planning Council v. Florida Div. of State Planning*, 370 So. 2d 447, 449 (Fla. 1st DCA 1979), *cert. denied mem.*, 381 So. 2d 770 (Fla. 1980).

to participate formally in the binding letter process, the courts consider the purpose and effect of a binding letter.

A binding letter only determines whether a proposed development is a DRI; it is not a permit to begin any development activity and does not protect the developer from any state, federal, or local restrictions applicable to its development. It does not supplant any local requirements. It does not insulate the developer from the jurisdiction or permitting requirements of other federal, state, or local agencies.<sup>573</sup>

The binding letter device is one which a developer may voluntarily pursue. If the opinion rendered in the binding letter is that the proposed development is a DRI, then the developer knows that, in addition to other permitting requirements, he must submit his proposed development for review and approval by the appropriate local government. If the opinion given in the binding letter is that the proposed development is not a DRI, DRI review and approval by local government is not necessary.

The DRI appeal and the binding letter provisions are examples of the legislature's determining in a statute external to chapter 120 who may initiate a section 120.57 proceeding. The executive branch agencies and the courts have given effect to these legislative decisions and in doing so have followed the cardinal rule of statutory construction that the specific controls the general. The specific provisions of the Environmental Land and Water Management Act control over the general provisions of the Administrative Procedure Act.

*(e) Public Contract Bid Disputes*

In 1981, the legislature amended chapter 120 to make special provision for invoking section 120.57 proceedings when the agency action concerns a bid solicitation or a contract award. In addition to providing how notice of the agency decision is to be given, the provision requires that the notice contain a statement that failure to comply with the time requirements for filing a protest shall constitute a waiver of chapter 120 proceedings.<sup>574</sup> A written protest must be filed with the agency within seventy-two hours of receipt of the notice of the agency decision. A formal written protest must

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573. *Peterson v. Florida Dep't of Community Affairs*, 386 So. 2d at 880-81.

574. FLA. STAT. § 120.53(5)(a)(1), (2) (1985).

be filed with the agency within ten days of the filing of the notice of protest.<sup>575</sup> Receipt of the notice of protest stops the bid solicitation process or the contract award process until the protest is resolved unless the agency head determines in writing and states with particularity that the process must continue to avoid immediate and serious danger to the public health, safety, or welfare.<sup>576</sup> Provision is made for resolution of the protest by mutual agreement. If resolution is not possible within seven days from the receipt of the formal written protest and there are no disputed issues of material fact, then an informal proceeding under section 120.57(2) is to be conducted. If there are disputed issues of material fact, the agency must refer the protest to the DOAH for a formal proceeding under section 120.57(1).<sup>577</sup>

Instead of relying on section 120.57's access language and the definition of "party," the provision identifies the persons who may file notices of protest, formal written protests, and hence request proceedings under section 120.57 if settlement by mutual agreement is not possible. For purposes of resolving contract bid disputes, "[a]ny person who is affected adversely by the agency decision" may request a section 120.57 proceeding so long as the specified prehearing requirements were satisfied in a timely manner.<sup>578</sup> The cases ignore the "affected adversely" requirement and continue to determine whether substantial interests are involved.

Before the legislature made special provision for handling contract bid disputes, one court accepted as a correct statement of the law the conclusion of a hearing officer regarding the right of a second lowest bidder to challenge the qualifications of the apparent lowest bidder: "[T]he right of a bidder for a public contract to a fair consideration of his bid and his right to an award of the contract if his is the lowest, responsible bid are matters of "substantial interest" to him, thus entitling him to a hearing pursuant to 120.57.'"<sup>579</sup> Another court accepted the notion that a second lowest bidder established that it had a substantial interest to be determined by the agency action in awarding the contract to another, but held that a third lowest bidder could not.<sup>580</sup>

575. *Id.* § 120.53(5)(b).

576. *Id.* § 120.53(5)(c).

577. *Id.* § 120.53(5)(d)(1), (2).

578. *Id.* § 120.53(5)(b) (emphasis added).

579. *Couch Constr. Co. v. Department of Transp.*, 361 So. 2d 184, 186 (Fla. 1st DCA 1978).

580. *Preston Carroll Co. v. Florida Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d

In two cases decided since the legislative change, in which the right to challenge the agency's decision in a section 120.57 proceeding was discussed, the courts' treatment of the question was summary and made no mention of the changed access standard. In *International Medical Centers, H.M.O. v. Department of Health and Rehabilitative Services*,<sup>581</sup> the court held that bidders in the first and second lowest positions "were parties whose substantial interests were determined by the agency's decision to reject all bids and to withdraw the [request for proposals]"<sup>582</sup> for providing prepaid health care services to refugees in Dade County. Had the access question been analyzed under the "affected adversely" standard, the same conclusion undoubtedly would have been reached. The Department's decision to reject all bids and to withdraw the request for proposal was made after it had announced its intention to use a health maintenance organization (HMO) to provide for the health care needs of refugees rather than the more costly fee-for-service method. The Department said only one contract would be awarded; it did not reserve the right to reject all bids. Of the four bids submitted, three were considered possible winners according to the criteria set forth by the Department for selecting the winning bid.<sup>583</sup> In these circumstances, the lowest and second lowest HMO bidders certainly were affected adversely by the Department's decision to reject all bids and to continue the fee-for-service approach. Although not at issue in the case, the third lowest HMO bidder also was affected adversely by the agency decision, and would have had the right to a section 120.57 proceeding if it had requested one.

*Capeletti Brothers, Inc. v. Department of General Services*,<sup>584</sup> involved an attempt by a fourth lowest bidder to challenge the award of a contract to the lowest bidder, to force the agency to reject all bids, and to readvertise because of a material misrepresentation in the site drawings. The contract was for the rough site preparation for a correctional facility in Dade County. The site drawings showed a road running parallel to the northern boundary of the project as a public road. In fact, the road was privately owned. Capeletti had an agreement with the owner to use the private road. Before the bids were submitted, Capeletti notified the

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DCA 1981).

581. 417 So. 2d 734 (Fla. 1st DCA 1982).

582. *Id.* at 736.

583. *Id.* at 735.

584. 432 So. 2d 1359 (Fla. 1st DCA 1983).



project architect of the mistake in the drawings and asked whether another access road would be provided to the successful bidder. No answer was received. After the bids were opened, the Department announced its intent to award the contract to the lowest bidder.

Capeletti timely filed a notice of protest and a petition for a section 120.57(1) proceeding. The Department notified the lowest bidder that it was rejecting all bids because the site drawing was misleading. The lowest bidder then filed a notice of protest and a request for a section 120.57(1) proceeding. The two petitions were consolidated for hearing; the hearing officer found that neither the parties nor the other bidders had been misled by the site drawings and recommended the award of the contract to the original lowest bidder. The Department rendered its final order accepting the hearing officer's recommendation and Capeletti appealed. The court's discussion of the access question was limited to this footnote observation: "[n]o issue has been raised on appeal regarding the standing of Capeletti, the fourth lowest bidder, to challenge DGS' agency actions. In any event, Capeletti's interest would appear to be substantial enough to support such standing."<sup>585</sup>

If the court had tested Capeletti's right to challenge the Department's initial decision to award the contract to the lowest bidder under the "affected adversely" standard, it probably would have concluded that he was entitled to a section 120.57(1) proceeding. Capeletti's position was that the bid specification materials were materially misleading and that the three bids lower than its bid, therefore, did not reflect the real cost of performing the contract. The Department's decision to award the contract to the apparent lowest bidder in these circumstances adversely affected Capeletti and it should have been permitted to challenge the agency decision for that reason.

Resolution of public contract bid disputes has been singled out by the legislature for special treatment. The notice requirements imposed on agencies and the prehearing requirements imposed on protesters are different from the requirements imposed by section 120.57. Although bid disputes ultimately may be resolved in a section 120.57 adjudicatory proceeding, the legislature has specified that only persons "affected adversely" by an agency decision may request such a proceeding. Persons "affected adversely" by the agency decision are also likely to be parties whose substantial interests are determined by the agency as *International Medical*

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585. *Id.* at 1360 n.1 (citation omitted).

*Centers* and *Capeletti Brothers* indicate. Nevertheless, the two standards are not necessarily synonymous and attempts to make them so should be discouraged by analyzing access questions in this context against the "affected adversely" standard the legislature provided specifically for bid disputes.

## VI. CONCLUSION

This Article challenges several well entrenched propositions in Florida administrative law relating to the right to initiate various administrative proceedings. It is critical of reliance on federal law in general and federal judicial standing law in particular to resolve questions of access to these executive forum proceedings. It proposes language without judicial connotations to be used when thinking and talking about the right to initiate administrative proceedings. It suggests a new analytical approach which emphasizes the access language provided by the legislature for each of the seven proceedings available and which stresses the importance of understanding the function or purpose of each proceeding and the relationship between each proceeding's function and the right to initiate or participate in it. The access standards which result from this analysis are not as familiar to judges and lawyers as are the judicial standing rules, but they do reflect the institutional differences between the executive and the judicial branches of government and they do better serve the interests intended by the legislature to be served.

