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1999 Amendments to the Florida Administrative Procedure Act: *Phantom Menace* or *Much Ado About Nothing?*

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**1999 AMENDMENTS TO THE FLORIDA
ADMINISTRATIVE PROCEDURE ACT: *PHANTOM
MENACE OR MUCH ADO ABOUT NOTHING?***

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LAWRENCE E. SELLERS, JR.****

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I. INTRODUCTION

“We think this provision was developed to roll back some 400 exist-
ing environmental rules.”¹

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"I think that anybody who would oppose this bill is a fascist. This bill only will affect agencies when they go above and beyond what they have authority to do."²

In 1999, the Florida Legislature enacted additional amendments to the Administrative Procedure Act (APA) primarily to address several appellate court rulings interpreting the 1996 revisions to the APA.³ The 1999 amendments enjoyed broad support in the Legislature,⁴ which viewed the amendments as merely clarifying the limits on agency rulemaking authority and "leveling the playing field" in disputes between citizens and their government.⁵ However, the amendments were strongly opposed by others primarily because of claims that they would put hundreds of environmental rules in jeopardy.⁶ In other words, some thought the 1999 legislation was the *Phantom Menace*,⁷ while others thought it was *Much Ado About Nothing*.⁸

1. Julie Hauserman, *Bills Attack Preservation, Activists Say*, ST. PETE. TIMES, May 24, 1999, at B5 (quoting Terrell Arline, Legal Dir., 1000 Friends of Florida) [hereinafter, *Bills Attack*]. Susie Caplowe of the Sierra Club also stated "[Governor Jeb] Bush just pushed environmental enforcement down the tubes in the State of Florida. Every year we get pushed back further." Julie Hauserman, *New Law Will Ease State Rules Battles*, ST. PETE. TIMES, June 18, 1999, at 1B.

2. Josh Zimmer, *Environmental Groups Target Legislation Limiting Regulations*, ST. PETE. TIMES, Mar. 16, 1999, Citrus Times at 1 (quoting Rep. Nancy Argenziano).

3. See Fla. H.R. Comm. on Water & Resource Mgmt., HB 107 (1998) Staff Analysis 4 (Dec. 21, 1998) (on file with comm.) ("HB 107 addresses several cases interpreting 1996 amendments to the APA."). The key appellate decisions are: *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), *rev. denied*, 727 So. 2d 904 (Fla. 1999); *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks*, 721 So. 2d 317 (Fla. 1st DCA 1998); *Department of Children and Families v. Morman*, 715 So. 2d 1076 (Fla. 1st DCA 1998); and *Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998).

4. The final legislation was approved by the House of Representatives by a vote of 113 to 5 and in the Senate by a vote of 39 to 1. See sources cited *infra* note 13.

5. Ken Pruitt, *HB 107 Not Anti-Environment, It Fends Off Encroaching Rules*, STUART NEWS, Apr. 16, 1999, at 9A.

6. See, e.g., Shirish Date, *Pruitt Aid Puts 400 Environmental Rules in Jeopardy*, PALM BCH. POST, Mar. 4, 1999, at B1 (arguing that the legislation would allow property owners to challenge some 400 existing environmental rules); *Bills Attack*, *supra* note 1 ("Developers could have a leg up when they want to challenge state [environmental] rules").

7. STAR WARS: EPISODE I—THE PHANTOM MENACE (Lucasfilm Ltd. 1999). In this episode:

[Jedi master Qui-Gon Jinn and his apprentice, Obi-Wan Kenobi,] hoping to settle a dispute between the flabby Republic and an insurgent Trade Federation, find Queen Amidala (Natalie Portman) on the planet Naboo. Diverted to Tatooine, they meet the boy Anakin Skywalker (Jake Lloyd), who has a mysterious force—perhaps *the Force*. They amass for a fierce face-off against battle droids and the malefic Darth Maul (Ray Parker).

Richard Corliss, *The Phantom Movie*, TIME, May 17, 1999, at 80.

8. William Shakespeare, MUCH ADO ABOUT NOTHING. In this Shakespearean comedy, a friendly conspiracy is hatched to make feuding Beatrice and Benedick fall in love.

The major revisions enacted just three years earlier, in 1996,⁹ were intended to clarify the limitations on agency rulemaking authority and "level the playing field" in disputes between citizens and their government.¹⁰ Subsequently, Florida's appellate courts issued several decisions¹¹ interpreting the 1996 amendments in ways that

9. A number of articles discuss the 1996 amendments to the Florida APA. *See, e.g.*, Donna E. Blanton & Robert M. Rhodes, *Loosening the Chains that Bind: The New Variance and Waiver Provision in Florida's Administrative Procedure Act*, 24 FLA. ST. U. L. REV. 353 (1997) (discussing variance and waiver provisions of 1996 APA as tools for agency flexibility and introducing common sense to government decision making); F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 FLA. ST. U. L. REV. 309 (1997) (reviewing new provisions of the APA affecting legislative direction and oversight of agency rulemaking); Wade L. Hopping & Kent Wetherell, *The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of "Unadopted Rules" and "Incipient Policies" by Agencies in Florida's Administrative Procedure Act*, 48 FLA. L. REV. 135 (1996) (focusing on the new limitations on state agency policy making through adjudication); James P. Rhea & Patrick L. "Booter" Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 FLA. L. REV. 1 (1996) (providing legislative history and overview of the 1996 APA); Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283 (1997) (reviewing the recent history of APA reform and surveying likely impacts of provisions of 1996 revised APA); Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform*, 48 FLA. L. REV. 93 (1996) (reviewing the development of rulemaking reforms that were enacted in 1996); Elizabeth C. Williamson, Comment, *The 1996 Florida Administrative Procedure Act's Attorney's Fees Reforms: Creating Innovative Solutions or New Problems?*, 24 FLA. ST. U. L. REV. 439 (1997) (using cost/benefit analysis to examine revisions of attorney's fee provision in the 1996 APA).

A special issue of the *Florida Bar Journal* also contains a number of articles on the 1996 amendments. *See* Donna E. Blanton & Robert M. Rhodes, *Flexibility, Flexibility, Flexibility: The New Variance and Waiver Provision*, FLA. B.J., Mar. 1997 at 35 (examining variance and waiver provisions as tools for flexibility while preserving legislative intent); Governor Lawton Chiles, *On Rules Reduction and Rational Executive Branch Reform*, FLA. B.J., Mar. 1997, at 16 (discussing the need to cut outdated, duplicative, and irrelevant rules); Martha J. Edenfield, *Attorneys' Fees and Costs*, FLA. B.J., Mar. 1997, at 73 (examining 1996 APA revisions on the ability of private litigants to recover attorney's fees and costs from governmental agencies that exceed their legislative delegated authority); Carol A. Forthman, *Resolving Administrative Disputes*, FLA. B.J., Mar. 1997, at 77 (examining the addition of mediation and summary procedure to the Florida APA in order to streamline noncomplex procedures); Wade L. Hopping, Lawrence E. Sellers & Kent Wetherell, *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?*, FLA. B.J., Mar. 1997, at 20 (focusing on amendments to APA designed to create greater agency accountability in exercising delegated legislative authority); Patrick L. "Booter" Imhof & James Parker Rhea, *Legislative Oversight*, FLA. B.J., Mar. 1997, at 28 (discussing legislative oversight over agency rulemaking and perception that agency rules went beyond legislative intent); Linda M. Rigot & Ralph A. DeMeo, *A Special Issue: Florida's 1996 Administrative Procedure Act*, FLA. B.J., Mar. 1997, at 12 (providing introduction to special issue of *Florida Bar Journal* addressing the 1996 APA); Dan R. Stengle & S. Curtis Kiser, *Adjudicatory Proceedings and Pending Proceedings*, FLA. B.J., Mar. 1997, at 40 (examining the impact of the 1996 APA revisions on adjudicatory proceedings); William E. Williams & Vikki R. Shirley, *Legislative Reform of Disputed Competitive Procurement Decisions*, FLA. B.J., Mar. 1997, at 45 (discussing clarification of the appropriate scope of administrative hearings dealing with contested competitive procurement decisions and the role of administrative law judges in those proceedings).

10. Sellers, *supra* note 9, at 123-30.

11. *See* sources cited *supra* note 3.

some legislators say were not intended.¹² In response, measures were filed in both the House and Senate to amend the APA to clarify the Legislature's intent. The Legislature ultimately approved the House Bill, Committee Substitute for House Bill 107,¹³ sponsored by Representative Ken Pruitt (Repub., Pt. St. Lucie).¹⁴ Notwithstanding numerous requests to veto the bill,¹⁵ Governor Jeb Bush signed the leg-

12. See Pruitt, *supra* note 5; see also Ken Pruitt, *State Agencies Abuse Rule-Making Authority*, TALL. DEM., May 27, 1999, at A11; Fla. H.R. Comm. on Govtl. Rules & Regs., HB 107 (1999) Staff Analysis (Jan. 29, 1999) (on file with comm.).

13. House Bill 107 was heard in the Committee on Water & Resource Management on January 7, 1999, and was reported favorably with one amendment. See FLA. H.R. JOUR. 101 (Reg. Sess. 1999). It was heard in the Committee on Governmental Operations on January 21, 1999, and was reported favorably with 11 amendments. See *id.* at 102. House Bill 107 was heard in the Committee on Governmental Rules & Regulations on February 1, 1999, and made into a committee substitute. Committee Substitute for House Bill 107 was formally introduced and referred to the Committees on Water & Resource Management, Governmental Operations, and Governmental Rules & Regulations on March 2, 1999. See FLA. H.R. JOUR. 26 (Reg. Sess. 1999). It was placed on the calendar on March 2, 1999. See *id.* at 103. It was placed on the Special Order Calendar and read a second time on March 4, 1999. See *id.* at 142, 152. Committee Substitute for House Bill 107 was read a third time, and, on March 10, 1999, the House passed the committee substitute by a 109-8 vote. See *id.* at 257.

Committee Substitute for House Bill 107 was in Senate messages on March 16, 1999. It was received and referred to the Committees on Governmental Oversight and Productivity and Fiscal Policy on April 15, 1999. See FLA. S. JOUR. 584 (Reg. Sess. 1999). Committee Substitute for House Bill 107 was withdrawn from Governmental Oversight and Productivity and Fiscal Policy, substituted for CS/CS/SB 206, read a second time, and amended on April 23, 1999. See *id.* at 720. It was read a third time and passed on a 39-1 vote on April 26, 1999. See *id.* at 836.

Committee Substitute for House Bill 107 was in returning messages (to the House) on April 26, 1999. The House concurred in the Senate amendments and passed the bill on a 113 to 5 vote on April 27, 1999. See FLA. H.R. JOUR. 1470, 1472 (Reg. Sess. 1999). Committee Substitute for House Bill 107 was then engrossed and enrolled that day. See *id.* at 1473. The bill was signed by the Legislative Officers on June 4, 1999, and by the Governor on June 18, 1999.

Senate Bill 206 was formally introduced and referred to the Committees on Governmental Oversight & Productivity and Fiscal Policy on March 2, 1999. See FLA. S. JOUR. 28 (Reg. Sess. 1999). It was heard in the Committee on Governmental Oversight & Productivity on March 11, 1999, and made into a committee substitute. See *id.* at 257. Committee Substitute for Senate Bill 206 was heard in the Committee on Fiscal Policy on April 21, 1999, and made into a committee substitute. See *id.* at 707. It was placed on the Calendar on April 22, 1999. See *id.* at 708. Fiscal Policy's Committee Substitute for Senate Bill 206 was placed on the Special Order Calendar on April 23, 1999. See *id.* at 792. It was read a second time, and amended. See *id.* at 720. House Bill 107 was substituted and CS/CS/SB 206 was laid on the table on April 23, 1999. See *id.*

14. Senator John Laurent (Repub., Bartow) sponsored the Senate companion, CS/CS/SB 206.

15. See, e.g., Letter from Clay Henderson, Pres., Florida Audubon Society, to Gov. Jeb Bush (May 6, 1999) (on file with author) (expressing the view that House Bill 107 would frustrate Florida's ability to protect its natural environment); Letter from Charles G. Patison, Exec. Dir., 1000 Friends of Florida, to Gov. Jeb Bush (May 7, 1999) (on file with author) (urging Gov. Bush to veto House Bill 107 because it threatens "virtually every environmental rule on the books"); see also Shirish Date, *Bush Down to Wire on Controversial Bill*, PALM BCH. POST, June 17, 1999, at A13 (stating that Gov. Bush received 182 cards, letters, and phone calls urging him to veto House Bill 107); *Bills Attack*, *supra* note 1 (discussing 1999 revisions to APA requiring state agencies to justify

islation and it became effective on June 18, 1999.¹⁶ This Article summarizes some of the key provisions in this legislation ("the 1999 legislation"). Part II discusses the new limitations on rulemaking authority. Part III describes the efforts to level the playing field. Part IV reviews several other miscellaneous changes.

II. LIMITATIONS ON RULEMAKING AUTHORITY

A. *The Clarified Rulemaking Standard*¹⁷

1. *The Original Standard*

When the Legislature significantly revised the APA in 1996,¹⁸ it overturned a series of appellate cases, which held that a rule was valid if it was reasonably related to its enabling statute and was not arbitrary and capricious.¹⁹ The Legislature established a statutory

discussing 1999 revisions to APA requiring state agencies to justify rules with specific language).

Many of the state's newspapers carried editorials urging Governor Bush to veto the bill. See, e.g., Editorial, *A Bill That Deserves Bush's Contempt*, TAMPA TRIB., May 25, 1999, at A6 (stating that the bill was "designed to allow affected businesses to sabotage public safeguards"); Editorial, *Eco-Havoc Awaits State Unless Bush Prevents It*, PALM BCH. POST, June 17, 1999, at A2 (stating that Governor Bush would be abandoning "state protection for the environment and natural resources" if he did not veto House Bill 107); Editorial, *Environmental Sabotage; Backdoor Bill Would Gut State Standards, If Bush Lets It*, SARASOTA HERALD-TRIB., May 8, 1999, at A2 (stating that Committee Substitute for House Bill 107 is a "harmful, underhanded piece of work" and "deserves the Governor's veto and the public's scorn"); Editorial, *New Rules for One Firm; New Danger to Florida*, PALM BCH. POST, May 6, 1999, at A2 (stating Governor Bush should veto House Bill 107 because of its unintended consequences); Editorial, *Pruitt's Bill Goes Too Far to Help One of His Pals*, TALL. DEM., May 25, 1999 at A6 (stating that "House Bill 107 is redundancy squared" since Governor Bush has authority over agencies and their rules); Editorial, *A Six-Pack for Bush to Beat GOP Hangover*, PALM BCH. POST, May 25, 1999, at A1 (describing House Bill 107 as "the worst legislation" of the session and should be vetoed by the Governor); Jim Rossi, *Amendments to APA Bill Don't Correct Problems*, TALL. DEM., June 8, 1999 (acknowledging inaccuracies in his June 2 piece); Jim Rossi, *Ken Pruitt's Bill Would Protect Interests of a Special Few*, TALL. DEM., June 2, 1999 at A7 (stressing need for a "balanced and deliberate law reform process" rather than bills drafted by "a few members of the legislature and lobbyists" advocating provisions that benefit their clients) [hereinafter *Ken Pruitt's Bill*].

16. See Act effective June 18, 1999, ch. 99-379, 1999 Fla. Laws 3788; see also Julie Hauserman, *New Law Aids State Rule Challenges*, ST. PETE. TIMES, June 18, 1999, at B1 (stating that despite "the objections of Florida's major environmental groups, Gov. Bush" signed House Bill 107); Editorial, *A Bad Sign*, ST. PETE. TIMES, June 25, 1999, at A16 (stating that Gov. Bush's support of House Bill 107 "is a discouraging sign for the future of environmental protection").

17. For purposes of discussion, the phrase "rulemaking standard" refers to the identical language found both in section 120.52(8) and section 120.536(1), *Florida Statutes* (1999).

18. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147.

19. See *id.* §§ 3, 9, 1996 Fla. Laws at 159 (codified at FLA. STAT. §§ 120.52(8) and 120.536(1) (1999)).

standard for and provided limitations on rulemaking.²⁰ The final bill analysis explained:

The definition of "Invalid exercise of delegated authority" is expanded. A proposed rule or existing rule is an invalid exercise of delegated legislative authority if a rule is not supported by competent substantial evidence or if the rule imposes regulatory costs on a regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

The definition is further amended to provide that a grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule. A specific law to be implemented is also required. An agency may only adopt rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. This provision would prevent an agency from adopting a rule that is based only on its general rulemaking authority and not on a specific statute to be implemented as required by section 120.54(3)(a), Florida Statutes.

This section also provides that no agency shall have the authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. These two provisions would overrule the decisions that followed the rule established prior to the enactment of the section 120.52(8), Florida Statutes, that "rules and regulations would be upheld so long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious."

Further, this provision states that statutory language which grants rulemaking authority or which generally describes the powers and functions of an agency is to be construed to extend no further than the particular powers and duties conferred by that statute.²¹

Commentators did not make much of this new standard. Most made brief remarks paraphrasing the discussion in the final bill analysis.²² One commentator noted:

The four sentences of 120.536(1) are potentially the most far-reaching of any in the 1996 amendments. They are a simple but clear rejection of the concept that a mere statement of legislative policy or purpose coupled with a broad grant of rulemaking power constitutes sufficient authorization for agency rulemaking. Policy

20. *See id.*

21. Fla. H.R. Select Comm. on Streamlining Govtl. Regs., CS/SB 2290 & 2288 (1996), Staff Analysis at 23-24 (final June 14, 1996) (on file with comm.).

22. *See Boyd, supra note 9, at 331-50; Hopping, Sellers & Wetherell, supra note 9, at 24; Rhea & Imhof, An Overview of the 1996 Administrative Procedure Act, supra note 9, at 48-56; Rhea & Imhof, Legislative Oversight, supra note 9, at 29-31; Rossi, supra note 9, at 295-97; Sellers, supra note 9, at 126-28.*

choice involves not simply what ends are to be sought, but what means are to be employed to get there. Few, indeed, disagree that it is desirable to have clean air and water, economic prosperity, and good public health. Rather, given limited resources, the controversies arise over the choice of programs. The true formulation of basic policy occurs in the determining the approach to achieving these universally shared goals. It is these mid-level policy decisions that require compromises and involve the most difficult political choices.²³

One commentary noted, "it is likely that the section will generate a new body of case law addressing the new rulemaking provisions."²⁴ This came to pass in 1997 with a series of cases.²⁵

2. *Judicial Interpretation of the Rulemaking Standard*

In *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*,²⁶ the petitioner land owners challenged proposed rules of the District that would create a regulatory subdistrict in the Spruce Creek and Tomoka River Hydrologic Basins, and would create new standards for managing and storing surface waters in developments therein.²⁷ The administrative law judge (ALJ) held that although the proposed rules are not arbitrary or capricious, are supported by competent and substantial evidence, and substantially accomplish the statutory objectives, they are invalid as a matter of law because the rules lack the underlying statutory detail required by the new rulemaking standard in sections 120.52(8) and 120.536(1), *Florida Statutes*.²⁸ The District appealed on this issue.²⁹

The First District Court of Appeal reversed the ALJ's final order, holding the proposed rules valid.³⁰ The court applied a "functional test based on the nature of the power or duty at issue and not the level of detail in the language of the applicable statute."³¹

According to the court, the question was:

... [W]hether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid ex-

23. Boyd, *supra* note 9, at 341.

24. Rhea & Imhof, *An Overview of the 1996 Administrative Procedure Act*, *supra* note 9, at 54.

25. See *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998), *rev. denied* 727 So. 2d 904 (Fla. 1999); Department of Bus. & Prof. Reg. v. Calder Race Course, Inc., 724 So. 2d 100 (Fla. 1st DCA 1998); *St. Petersburg Kennel Club v. Department of Bus. & Prof. Reg.*, 719 So. 2d 1210 (Fla. 2d DCA 1998).

26. 717 So. 2d at 75.

27. See *id.*

28. See *id.* at 76-77; see also FLA. STAT. §§ 120.52(8), 536(1) (Supp. 1996).

29. See *Consolidated-Tomoka*, 717 So. 2d at 76-77.

30. See *id.* at 81.

31. *Id.* at 80.

ercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented.³²

In applying this test, the court found that the Legislature delegated "authority to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas."³³ The challenged rules fell within the class of powers delegated by the statute and, therefore, were a valid exercise of delegated legislative authority.³⁴

In *Department of Business and Professional Regulation v. Calder Race Course, Inc.*,³⁵ the Department challenged the ALJ's final order invalidating rules that would have authorized the Department to conduct warrantless searches of persons and places within a permitted pari-mutual wagering facility.³⁶ The First District Court of Appeal affirmed the ALJ's order, noting that where the "government is to be given the right to conduct a warrantless search of a closely regulated business, the Fourth Amendment demands that the language of the statute delegating such power do so in clear and unambiguous terms."³⁷ Additionally, as the court stated, "highly regulatory laws are subject to strict construction and may not be extended by interpretation."³⁸ By applying the *Consolidated-Tomoka* reasoning, the court found that the Department did not have the statutory basis to adopt these rules because the enabling statute did not provide the specific law under which such a rule could be adopted.³⁹

Furthermore, in *St. Petersburg Kennel Club v. Department of Business and Professional Regulation*,⁴⁰ St. Petersburg Kennel Club appealed an ALJ final order validating Department rules defining the game of poker and a Department final order denying approval of three card games.⁴¹ The district court reversed both the ALJ's final order, which validated Department rules defining the game of poker, and reversed a final order of the Department denying approval of three particular card games.⁴² In applying section 120.536(1), *Florida Statutes*, the court noted that the enabling statute did not specifically authorize the Department to adopt rules defining poker.⁴³ The court concluded that the Department could not administratively

32. *Id.* at 80.

33. *Id.* at 81.

34. *See id.*

35. 724 So. 2d 100 (Fla. 1st DCA 1998).

36. *See id.* at 101.

37. *Id.* at 104.

38. *Id.*

39. *See id.* at 104-05.

40. 719 So. 2d 1210 (Fla. 2d DCA 1998).

41. *See id.* at 1211.

42. *See id.* at 1212; *see also* FLA. STAT. § 120.536(1) (Supp. 1996).

43. *See* 719 So. 2d at 1211.

define the game of poker and, therefore, could not deny approval of card games because the denial was based upon application of an invalid rule.⁴⁴

This judicial interpretation of the rulemaking standard was not well received in the Legislature. Representative Ken Pruitt made his displeasure clear in an e-mail sent to Legislators and staff.⁴⁵ He was highly critical of the *Consolidated-Tomoka* decision and found fault with the court's analysis of the rulemaking standard and the conflicting application of the standard in *Consolidated-Tomoka*, *Calder*, and *St. Petersburg Kennel Club*.⁴⁶ In response to *Consolidated-Tomoka* and the resulting interpretation of the rulemaking standard, Representative Pruitt sponsored House Bill 107.

3. *The 1999 Amendments to the Rulemaking Standard*

(a) *Clarifying the Standard*

Revisions to the standard were in response to the appellate construction of the standard⁴⁷ and incorporated arguments from the *Consolidated-Tomoka* appellant's brief.⁴⁸ The main issue concerning the rulemaking standard's revisions was the proposal's impact on existing rules. However, much of the effort expended on the bill involved both managing the effects on existing rules and negotiating the wording of the revisions to the standard.

Initially, House Bill 107⁴⁹ amended the rulemaking standard to read:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make more specific the detailed particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation or is within the agency's class of powers and duties and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language

44. *See id.*

45. *See* E-mail from Rep. Ken Pruitt, to members and staff of the Fla. S. and Fla. H.R. (Aug. 5, 1998) (on file with author); *see also* Fla. H. R. Comm. on Water & Resource Mgmt. tape recording of proceedings (Jan. 7, 1999) (on file with the committee) (comments of Rep. Pruitt on House Bill 107).

46. *See sources cited supra* note 45.

47. *See supra* Part II.A.2.

48. *See* Brief for Appellant at 13, *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998) (No. 97-02996).

49. Fla. CS for HB 107 (1999) (First Engrossed) (Act effective June 18, 1999, ch. 99-379, 1999 Fla. Laws 3788).

granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the detailed ~~particular~~ powers and duties conferred by the same statute.⁵⁰

In the second and fourth sentences, the word "detailed" was substituted for "particular," tracking an argument made in the *Consolidated-Tomoka* appellant's brief: If the Legislature meant for the standard to demand citation to a power or duty that is "detailed" in the enabling statute, then the Legislature should use that word.⁵¹ Furthermore, including the phrase "is within the agency's class of powers and duties" makes clear that it is a disapproved method of statutory analysis.⁵²

Opponents questioned the need to revise the second sentence of the standard. One opponent contended that the words had synonymous meanings.⁵³ The concern was that the amendments would unnecessarily narrow the gauge by which adequate statutory authority is judged.⁵⁴ This gauge had been sufficiently narrowed by the 1996 amendments, greatly reducing agencies' ability to adopt rules.⁵⁵ Proponents countered that what was at issue was the need to clarify, to the executive agencies and the courts, that the Legislature intended to limit executive branch discretion when implementing statutory mandates through administrative rulemaking.⁵⁶ Taken together, revising the rulemaking standard and prohibiting the use of the class of powers analysis would reaffirm the intent of the 1996 Legislature to limit agency discretion in administrative rulemaking.⁵⁷

An alternative wording of the second sentence was offered at the first workshop held on the bill.⁵⁸ The alternative substituted the word

50. See Fla. HB 107, §§ 1, 2 (1999). Stricken words are deletions; underlined words are additions.

51. See Brief for Appellant at 13-24, *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72 (Fla. 1st DCA 1998) (No. 97-02996).

52. Fla. H. R. Comm. on Water & Resource Mgmt., tape recording of proceedings (January 7, 1999) (on file with the comm.) (comments of Rep. Ken Pruitt).

The original placement of the phrase was between the two prongs of the "reasonably related test" that was disapproved in the 1996 legislation. Subsequent amendments to the bill corrected the scrivener's error and placed the phrase after the two prongs of the test.

53. See *id.* (comments of David Gluckman); Fla. H.R. Comm. on Govtl. Ops., tape recording of proceedings (Jan. 21, 1999) (on file with comm.) (comments of David Gluckman); Fla. H.R. Comm. on Govtl. Rules & Regs., tape recording of proceeding (Feb. 1, 1999) (on file with comm.) (comments of David Gluckman). Mr. Gluckman made essentially the same comments before each of these committees.

54. Letter from Terrell Arline, Legal Dir., 1000 Friends of Florida, to Rep. Bill Posey (Jan. 20, 1999) (on file with author).

55. See *id.*

56. See Fla. H.R., tape recording of proceedings (Mar. 4, 1999) (on file with comm.) (comments of Rep. Ken Pruitt on Fla. CS for HB 107 during second reading).

57. See *id.*

58. To facilitate discussion of the issues, Representative Pruitt asked those interested in the legislation to meet between scheduled committee meetings. Two workshops were

*specific for particular*⁵⁹ and removed the awkward phrasing of authorizing an agency to "make specific the particular powers and duties granted by the enabling statute."⁶⁰ This alternative, set out below, was adopted as an amendment to the bill by the House Governmental Operations Committee and was eventually incorporated into the committee substitute by the House Committee on Governmental Rules and Regulations.⁶¹

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or-interpret the ~~or make specific the particular~~ powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific ~~the particular~~ powers and duties conferred by the same statute.⁶²

(b) Impact of the Clarified Standard on Existing Rules

Although opponents of the 1999 legislation were concerned about the clarification of the standard, they were more concerned about the impact the clarification would have on existing rules. This issue was at the core of comments made by representatives of environmental groups and select state agencies before the committees that heard the bill.⁶³ The bill's opponents argued that applying the clarified standard retroactively would unnecessarily impact state agency operations.⁶⁴ Amending the standard would imperil over 1400 environmental rules and call into question the statutory legitimacy of rules

held: one on January 13, 1999 and one on January 29, 1999. These workshops allowed those interested in the 1999 legislation to develop alternative language to address the issues in the bill.

59. See Fla. CS for HB 107 §§ 1, 2 (1999).

60. *Id.*

61. See sources cited *supra* note 13.

62. Fla. CS for HB 107, §§ 1, 2 (1999).

63. See Letter from Terrell Arline, *supra* note 54; see also Fla. H.R. Comm. on Water & Resource Mgmt., tape recording of proceedings (Jan. 7, 1999) (on file with comm.) (comments of Perry Odom, General Counsel, Dep't of Env'tl. Prot. (DEP)); Fla. H.R. Comm. on Gov'tl. Ops., tape recording of proceedings (Jan. 21, 1999) (on file with comm.) (comments of Stephanie Gehres Kruer, General Counsel, Dep't of Comm'y Affs. (DCA)); Fla. H.R. Comm. on Gov'tl. Rules & Regs., tape recording of proceedings (Feb. 1, 1999) (on file with comm.) (comments of David Gluckman, Florida Wildlife Federation; and Terrell Arline, Legal Dir. 1000 Friends of Florida).

64. See sources cited *supra* note 63.

in a broad range of areas, because these rules would not be based upon a detailed statute as would be required by the 1999 legislation.⁶⁵ Moreover, by specifically disapproving the class-of-powers test, the bill would not only disapprove of the interpretation but would also overturn the *Consolidated-Tomoka* decision itself.⁶⁶ The impact of overturning the case would have the practical effect of undermining over four hundred rules that cite the underlying statute as implementing authority.⁶⁷ Proponents countered that the clarification would not adversely affect existing rules unless such rules were already exceeding the authority granted under the rulemaking standard.⁶⁸ The sponsor's stated purpose in filing the bill was not to overturn the *Consolidated-Tomoka* case but to express his displeasure with the interpretation of the rulemaking standard.⁶⁹ Further, proponents of the changes to the rulemaking standard emphasized that the "law of the case"⁷⁰ would not be affected and that only the analysis was being disapproved by the 1999 legislation.⁷¹ The issue remained unresolved until the April 21, 1999, Senate Fiscal Policy committee meeting.⁷² At that committee meeting, Senator Laurent offered an amendment to Senate Bill 206, which explicitly stated the Legislature's intent to disapprove the analysis of the standard but not the *Consolidated-Tomoka* decision.⁷³ The statement of legislative intent also reaffirmed the desire to have agency rulemaking conform to the 1996 legislation.

(c) *Creation of the 1999 Rule Review and Authorization Process*

Opponents also publicly voiced concerns that any clarification of the standard would affect existing rules and that it was essential for agencies to have an opportunity to review existing rules.⁷⁴ House Bill 107 originally did not have a provision for the review of existing rules

65. See Letter from Arline, *supra* note 54.

66. See *id.*

67. See *id.*

68. See Fla. H.R. Comm. on Govtl. Rules & Regs., tape recording of proceedings (Feb. 1, 1999) (on file with comm.) (comments of Rep. Pruitt on HB 107).

69. See Fla. H.R., tape recording of proceedings (Mar. 4, 1999) (on file with comm.) (comments of Rep. Ken Pruitt on Fla. CS for HB 107 (1999) (during second reading)).

70. The position was, perhaps, another way of stating the legislative intent found in the bill that "it is not the intent of the Legislature to reverse the result of any specific judicial decision." Ch. 99-379, § 1, 1999 Fla. Laws 3788, 3789.

71. See Fla. S. Comm. on Fiscal Policy, tape recording of proceedings (Apr. 21, 1999) (on file with comm.) (comments of Sen. John Laurent, Repub., Bartow).

72. See *id.*

73. See Fla. CS for CS for SB 206, § 1 (1999) (Act effective June 18, 1999, ch. 99-379, § 1, 1999 Fla. Laws 3788, 3789).

74. See sources cited *supra* note 63 and accompanying text; see also *supra* note 58. The workshop participants also discussed the impact of a clarified standard on existing rules.

regarding validity.⁷⁵ In response to concerns voiced at the Water and Resource Management Committee meeting, Representative Ken Pruitt requested that those interested in the bill meet prior to the next hearing on the bill to address the issue.⁷⁶ At the first workshop, agency representatives reiterated the concern expressed at the committee meeting: If the rulemaking standard is to be changed, state agencies must have the chance to review existing rules under the clarified standard.⁷⁷ As a result, the bill was amended to include new rule review and authorization process.⁷⁸ The amendment initially provided for the review and shielding of those rules adopted after October 1996 and before October 1999, which are identified as exceeding the standard for rulemaking, and for an opportunity to seek legislation that would authorize those rules.⁷⁹

The three-year period then became an issue. Opponents argued that rules existing prior to October 1996 would be held to the original standard, and the post-October 1996 rules would be held to the revised standard.⁸⁰ This inconsistency would cause confusion as to which standard would apply when an amendment to a pre-October 1996 rule was challenged. Although discussed at each committee meeting, the issue was not actively addressed until the Senate Fiscal Policy Committee heard Substitute for Senate Bill 206. At that meeting, Senator Ron Klein, (Dem., Delray Beach) offered an amendment that struck the rule review and authorization process and substituted the statement that “[t]he changes to the grant of rulemaking authority contained in this subsection apply to all rules adopted after the effective date of this act.”⁸¹ The intent of this amendment was to “grandfather in” all existing rules and thereby apply the revised standard to those rules adopted after the act’s effective date.⁸² The amendment was adopted and incorporated into a committee substitute.⁸³ However, on the Senate floor, Senator John Laurent offered an amendment that reinstated the rule review and authorization process and expanded the eligibility to all rules adopted prior to the bill’s

75. See Fla. HB 107, § 2 (1999).

76. See Fla. H.R., tape recording of proceedings (Mar. 4, 1999) (on file with clerk) (comments of Rep. Ken Pruitt).

77. See *id.*

78. See Fla. CS for HB 107, § 3 (1999) (Act effective June 18, 1999, ch. 99-379, § 3, 1999 Fla. Laws 3788, 3792) (codified at FLA. STAT. § 120.536(2)(b) (1999)).

79. See Fla. CS for HB 107, §§ 1, 2 (1999). See *infra* Part II.B. for discussion of the 1999 rule review and authorization process.

80. See *supra* note 69 and accompanying text.

81. Fla. S. Comm. on Fiscal Policy, CS for CS for SB 206, § 3 (1999) (on file with comm.).

82. Fla. S. Comm. on Fiscal Policy, tape recording of proceedings (Apr. 21, 1999) (on file with comm.) (comments of Sen. Klein).

83. See Fla. CS for CS for SB 206, § 3 (1999).

effective date.⁸⁴ The amendment was adopted, and the language of CS/CS/SB 206 was amended into CS/HB 107.⁸⁵

Notably, the 1999 legislation not only held the attention of many in the legislature, but also the attention of those who report and comment on legislative action. For a bill addressing an "inside-the-Capital Circle" issue,⁸⁶ newspapers wrote an extraordinary number of articles and editorials across the state.⁸⁷ Representative Ken Pruitt, in an op-ed letter in the *Stuart News*,⁸⁸ argued that HB 107 would rein in agencies and stated:

My proposed legislation states that the agencies can only write new rules and regulations when given specific legislative authority. This will serve a twofold purpose: First, it will force legislators to be more definitive when writing new laws, thereby giving agencies clear direction. Second, it will stop the phantom governments that currently exist within agencies where unelected bureaucrats try to assume the role of policy makers by writing new rules and regulations without legislative authorization Its intent is to clearly outline that the Legislative Branch is responsible for writing the laws; the Executive Branch is responsible for implementing those laws; and the Judicial Branch's role is limited only to judgment and specific interpretation of those laws.⁸⁹

Another proponent wrote:

[T]he proposed amendments to Chapter 120 renew the Legislature's explicit desire to narrow agency authority and to limit the deference that ALJs and courts provide to agency decision-making. The Legislature appears dedicated to 'leveling the playing field' and making the APA a meaningful forum for citizens to air their grievances against government.⁹⁰

Opponents were quoted frequently in articles about the 1999 legislation. Much was made of the impending demise of over 400 environmental rules.⁹¹ Additionally, many of the editorials stressed the

84. See *id.* (codified at FLA. STAT. § 120.536(2)(b) (1999)).

85. See Fla. CS for HB 107, § 3 (First Engrossed) (1999).

86. Stephen T. Maher, *How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act*, 25 FLA. ST. U. L. REV. 235, 238 (1998) (commenting on how issues concerning the APA seem to resonate only within the limits of Tallahassee's Capital Circle, not unlike the "inside the Beltway" scenarios of Washington D.C.).

87. See Letter from Henderson, *supra* note 15 and accompanying text.

88. See Pruitt, *supra* note 5.

89. *Id.*

90. Frank E. Matthews, *APA Reform Refined*, ADMIN. L. SEC. NEWSL., (The Fla. Bar, Tallahassee, Fla.) Mar. 1999, at 2.

91. See, e.g., David Cox, *2 Lawmakers Target Agencies' Rulemaking*, ORLANDO SENT., Mar. 5, 1999 (explaining that House Bill 107 gives the legislature greater power to suspend agency rules it does not like, concerning environmentalists greatly); Date, *supra* note 6 (discussing legislation allowing property owners to challenge some 400 existing environmental rules); Gary Fineout, *House Moves to Limit Power of Water Districts*, NEWS-JOURNAL (Daytona Beach, Fla.), Mar. 11, 1999 (stating that the bill was approved with "lit-

limitations that the 1999 legislation would put on Governor Bush.⁹² Many of those editorials were published in an effort to sway Governor Bush to veto the bill.⁹³ The effort appeared to be for naught because the Governor signed the bill on June 18, 1999.⁹⁴

4. *The 1999 Amendments to the Rulemaking Standard—The Phantom Menace?*

The opponents of the 1999 legislation made much hay claiming that enacting the amendments to the rulemaking standard would invalidate over 400 rules.⁹⁵ They repeatedly argued that by disapproving the *Consolidate-Tomoka* decision, and the underlying analysis, the Legislature would, in fact, be invalidating the hundreds of environmental rules adopted pursuant to rulemaking authority provided by section 373.413, *Florida Statutes*.⁹⁶ They further argued that by disapproving the *Consolidated-Tomoka* decision, the underlying statutes of rules in many areas would be placed in jeopardy.⁹⁷

tle opposition and hardly any debate," alarming Florida's environmental groups). These articles state that over 400 rules would be imperiled by the 1999 legislation. This figure originally appeared in a letter from Terrell Arline to Rep. Ken Pruitt in which Mr. Arline argued that to statutorily overturn the *Consolidated-Tomoka* decision would call into question the validity of section 373.413 of the Florida Statutes, the statutory basis for over 400 rules, as specific authority upon which to base a rule. See Letter from Terrell Arline, Legal Dir., 1000 Friends of Florida, to Rep. Ken Pruitt 1 (Jan. 5, 1999) (on file with the author).

92. See *supra* note 15 and accompanying text.

93. See *id.*

94. See Act effective June 18, 1999, ch. 99-379, 1999 Fla. Laws 3788, 3794.

95. See *supra* notes 15, 54, 58, 63 and accompanying text.

96. See FLA. STAT. § 373.413 (1999). In an interesting turn of events, the Save the Manatee Club, Inc., challenged portions of a rule of the Southwest Florida Water Management District that provides exemptions to the permitting requirements of the district as not having the specific authority required under the provisions of chapter 99-379, Florida Laws. These exemptions grandfather-in certain projects that received all governmental approvals prior to October 1, 1984 and met district criteria for the particular type of project. In part, these exemptions cite section 373.413, *Florida Statutes* (1997), as implementing authority. The ALJ held the portions of the rule providing these exemptions to be invalid exercises of delegated legislative authority because "[t]here is, quite simply, no specific power or duty cited as 'law implemented' by the rule for the exemptions at issue in this case that satisfies the command of the legislature in the 1999 amendments to section 120.52(8), *Florida Statutes* (1997): 'An agency may only adopt rules that implement or interpret the specific powers and duties granted by the enabling statute'". See Final Order, Save the Manatee Club, Inc. v. Southwest Florida Water Mgmt. Dist. and South Shores Properties Partners, Ltd., DOAH Case No. 99-3885RX, at 50 (Dec. 8, 1999). This and all other DOAH cases referenced herein are available at the State of Florida Division of Administrative Hearings web page. *State of Florida Division of Administrative Hearings, DOAH Case Search* <<http://www.doah.state.fl.us/>> (visited April 7, 2000).

97. See Letter from Terrell Arline, *supra* note 54. Mr. Arline rhetorically asks Rep. Posey whether, for example, section 320.011, *Florida Statutes* would continue to provide authority for the rules regulating administration of motor vehicle licensing, and whether section 240.209(3), *Florida Statutes* would still provide adequate authority for regulating hospital licensing, after the enactment of the 1999 legislation. Mr. Arline argues in his letter that these and other sections might not be sufficiently detailed to provide the legal basis for existing rules if the changes to the rulemaking standard are enacted. The existing

B. The Rule Review and Authorization Process

The rule review and authorization process enacted in 1996 provided agencies an opportunity to determine if existing rules had a valid legal basis under the rulemaking standard and to shield those rules identified as lacking legal authority until addressed through legislation.⁹⁸ The 1999 rule review and authorization process is based on the same process developed in the 1996 legislation.⁹⁹ The time for review of rules for submittal to the Joint Administrative Procedures Committee (JAPC) is shorter,¹⁰⁰ but in all other aspects the process is identical to that of the original process.¹⁰¹

1. The 1996 Rule Review and Authorization Process

Under the 1996 rule review process, state agencies identified 2,236 rules and local school districts identified 3614 rules that, in their determination, exceeded statutory authority.¹⁰² The Legislature passed forty-eight bills, identified as rule authorization bills (RABs), that specifically addressed the legal basis of rules identified in this process, and at least one other bill included language addressing the identified rules under the process.¹⁰³ These RABs provided substantive, statutory authorization for the activities addressed in the rules, rather than merely providing a grant of rulemaking authority.¹⁰⁴

rules would then be subject to same challenge faced in the *Consolidated-Tomoka* case. See *id.*

98. See FLA. STAT. § 120.536(2) (1999).

99. Compare FLA. STAT. §§ 120.536(2)(a) and 120.536(2)(b) (1999).

100. See *id.*

101. See Letter from Arline, *supra* note 54, at 2.

102. See Letter from Carroll Webb, Exec. Dir., Jt. Admin. Procs. Comm., to Sen. Charles Williams, Dem., Live Oak (Oct. 31, 1997) (on file with author); see also Martha C. Mann, Note, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.: Defining Agency Rulemaking Authority Under the 1996 Revisions to the Florida Administrative Procedure Act*, 26 FLA. ST. U. L. REV. 517, 543 (1999) (discussing policy implications of the new rulemaking standard and its impact on state agencies' ability to implement laws); Memorandum from David M. Greenbaum, Staff Dir., Fla. H.R. Comm. on Govtl. Rules & Regs., to R. Phillip Twogood, Council Dir., Govtl. Resp. Council (Nov. 20, 1997) (on file with author).

103. See Memorandum from David M. Greenbaum, Staff Dir., Fla. H.R. Comm. on Govtl. Rules & Regs., to Rep. Rob Wallace, Repub., Tampa (Sept. 8, 1998) (on file with author).

104. In its memorandum describing the 1998 Senate RAB process, the Senate used an example to explain the level of statutory detail for a RAB:

For example, a rule that details a program for and the procedures pertaining to painting fences is in violation of s. 120.536, [*Florida Statutes*], unless there is a specific law conferring on the agency powers or duties pertaining to painting fences. Painting fences cannot be implied from the enabling language of the statute, nor is it sufficient that painting fences is reasonably related to the subject matter of the statute. A statute relating to minimizing children's exposure to lead does not authorize a rule requiring that fences be painted even if this would minimize exposure by eliminating paint chips. In order to comply with the new rulemaking standard, the law must specifically reference fence paint-

2. The 1999 Rule Review and Authorization Process

On October 1, 1999, agencies submitted to the JAPC rules, or portions thereof, determined to exceed the standard rulemaking authority permitted by section 120.536(1), *Florida Statutes*.¹⁰⁵ The JAPC submitted a cumulative listing of these rules to the President of the Senate and the Speaker of the House November 2, 1999.¹⁰⁶ The rules, or portions thereof, identified and reported to the JAPC are shielded from challenge until July 1, 2001, on the grounds that the rule exceeds the rulemaking authority or law implemented as described by section 120.536(1), *Florida Statutes*.¹⁰⁷ The Legislature will consider this legislation in the 2000 Regular Session.¹⁰⁸

ing, for example, the lack of fence painting as a contributing to the problem or fence painting as a means of correcting the problem. A rule from this scheme would implement, interpret or make specific the specific law pertaining to fence painting (e.g. what type of paint to use, what constitutes a fence, what constitutes painting, etc.).

Memorandum from Sen. Toni Jennings, Pres., Fla. Senate, to members and staff, Fla. S. (Jan. 22, 1998) (on file with the author).

These bills would give an indication of the direction that legislators are traveling in providing the specific statutory authority for agency powers and duties under the standard as it is currently clarified in the 1999 legislation. For example:

▪ Ch. 98-195, Florida Laws, relating to rulemaking authority of the Florida Department of Business and Professional Regulation:

Section 4. Subsection (6) is added to section 718.301, *Florida Statutes*, (to read:

718.301 Transfer of association control.—

(6) The division has authority to adopt rules pursuant to the Administrative Procedure Act to ensure the efficient and effective transition from developer control of a condominium to the establishment of a unit owner-controlled association.

Section 5. Subsection (8) is added to section 718.403, *Florida Statutes*, to read:

718.403 Phase condominiums.—

(8) Upon recording the declaration of condominium or amendments adding phases pursuant to this section, the developer shall file the recording information with the division within 30 working days on a form prescribed by the division.

Act effective May 24, 1998, Ch. 98-195, 1998 Fla. Laws 1729, 1730 (codified at FLA. STAT. § 718.301(6), 718.403(8) (1999)).

105. See Act effective June 18, 1999, ch. 99-379, § 3, 1999 Fla. Laws 3788, 3792 (codified at FLA. STAT. § 120.536(2)(b) (1999)). The Committee initially reported that over 125 agencies had identified 1130 rules. See Fla. Jt. Admin. Procs. Comm., tape recording of proceedings (October 5, 1999) (on file with comm.) (comments of Carroll Webb, Exec. Dir.).

106. The Committee reported to the Senate President and Speaker of the House that approximately 66 state agencies (of approximately 141 reporting) has identified 1402 rules. Four local school districts identified an additional 1718 rules. See Letter and attached cumulative listing from Senator Walter "Skip" Campbell, Chair, and Rep. Bill Posey, Vice Chair, Jt. Admin. Procs. Comm., to the President of the Senate and the Speaker of the House (November 2, 1999) (on file with comm.).

107. See Act effective June 18, 1999, Ch. 99-379, § 3, 1999 Fla. Laws 3788, 3792 (codified at FLA. STAT. § 120.536(3) (1999)). At the time this Article was written, agencies were preparing legislation for member sponsors which would authorize the identified rules.

108. See *id.* § 3, 1999 Fla. Laws at 3792 (amending FLA. STAT. § 120.536(2)(b) (1997)).

For those rules not authorized in the 2000 Regular Session, including those identified rules for which agencies chose not to seek authorization, agencies must initiate repeal proceedings by January 1, 2001.¹⁰⁹ By February 1, 2001, the JAPC is to submit to the President of the Senate and the Speaker of the House, a report identifying those rules that an agency previously identified as exceeding the rulemaking authority permitted by section 120.536(1), *Florida Statutes*, for which repeal had not been initiated.¹¹⁰ On July 1, 2001, the shield is removed and JAPC or any substantially affected persons may petition the agency to repeal the identified rule on the grounds that it exceeds the rulemaking authority permitted by section 120.536(1).¹¹¹ If such a petition is filed, the agency must initiate the repeal or deny the petition no later than thirty days after filing, if the agency is headed by an individual, or forty-five days after filing, if the agency is headed by a collegial body.¹¹²

3. Results of 1999 Rule Review—Much Ado About Nothing?

On November 1, 1999, the JAPC forwarded a compilation of these reports to the President of the Senate and the Speaker of the House.¹¹³ The few rules identified by reviewing agencies suggest that the protestations over the 1999 limitations on rulemaking authority may have been *much ado about nothing*.

Agencies identified 834 fewer rules than under the 1996 rule review and authorization process.¹¹⁴ The 1402 rules identified in the 1999 rule review and authorization process represent about eight percent of the rules in the Florida Administrative Code.¹¹⁵ Although the water management districts identified rules that cite section 373.413, *Florida Statutes*, to date, no RAB has been proposed to amend that section.

The rulemaking standard in section 120.536(1) has had an effect. Statutes have been amended to provide authority for rules, that, while in and of themselves were reasonable and necessary, were too far removed from the implementing statute to demonstrate a direct nexus. Agencies had the opportunity, in the 1998 Session as well as

109. *See id.*

110. *See id.*

111. *See Act effective June 18, 1999, ch. 99-379, § 3, 1999 Fla. Laws 3788, 3792 (amending FLA. STAT. §§ 120.536(2)(b), (3) (1997)).*

112. *See id.* § 3, 1999 Fla. Laws, at 3792 (amending FLA. STAT. § 120.536(2)(b) (1997)).

113. *See supra* note 106. At the time this Article was written, agencies were preparing legislation for member sponsors that would authorize rules that the respective agencies wish to continue.

114. In 1996, state agencies reported 2236 rules, or portions thereof, that exceeded the standard. *See supra* note 106.

115. At the time of reporting, the Florida Administrative Code has 20,976 rules. The 1402 rules reported to the Committee, pursuant to section 120.536(2)(b), *Florida Statutes*, represent 6.68% of the existing rules.

in the 2000 Session, to add specificity to the powers and duties that exist in the statute. Additionally, legislation is now drafted with clearer direction to agencies regarding agencies' power and duties and when it is necessary to adopt rules to implement such powers and duties. If there is a fear that the *phantom menace* has arrived, that fear is belated. The creation of the statutory rulemaking standard in the 1996 legislation wrought far more change in the manner agencies regulate than the 1999 legislation. The attacks on the 1999 legislation appear to have been over what was settled in 1996, and were, in the end, *much ado about nothing*.¹¹⁶

III. LEVELING THE PLAYING FIELD

In addition to clarifying the limits on agency rulemaking authority, the 1999 legislation continues the Legislature's efforts to "level the playing field" in disputes between citizens and their government.¹¹⁷

A. Order of Presentation in Proposed Rule Challenges

In 1996, the Legislature enacted several changes to the APA that were designed to "level the playing field" in cases involving challenges to proposed rules.¹¹⁸ The 1996 amendments expressly provided that a proposed rule is not presumed to be valid or invalid.¹¹⁹ The 1996 amendments also eased the burden on the challenger by simply requiring the challenger to "state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority."¹²⁰ The agency then has the burden to prove the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.¹²¹ How-

116. Those interested in the outcome of the 1999 legislation have continued arguing about the impact of the bill well after Legislature's adjournment and the bill's passage into law. See Terrell Arline, *The Environmental Impacts of the Administrative Procedures Act Bill*, ENVTL. & LAND USE L. SEC. REP., (Fla. Bar, Tallahassee, Fla.) June 1999, at 1. ("Under the [1999] APA bill, existing environmental rules, as well as all future rules proposed by state environmental agencies that are not based upon a 'specific' statute, are subject to a rules challenge under section 120.56, [Florida Statutes], (1997) . . . Given that the 1996 amendments to the APA also guaranteed the challengers an award of attorney's fees of up to \$15,000, the [1999] APA bill will also have a fiscal impact on the agencies, as they focus their resources on defending their rules."); see also Kent Wetherell, *Sour Grapes Make Sweet Wine*, ENVTL. & LAND USE L. SEC. REP., (Fla. Bar, Tallahassee, Fla.) Dec. 1999 ("In sum the 1999 legislation sends a clear message to the courts and ALJs that agency rule-making activities should be closely scrutinized to ensure that the rules implement but do not exceed the specific powers delegated to the agencies by the Legislature.")

117. Pruitt, *supra* note 5, at A9; Pruitt, *State Agencies Abuse Rule-Making Authority*, *supra* note 12, at A11.

118. Sellers, *supra* note 9, at 123-30.

119. See FLA. STAT. § 120.56(2)(c) (1999).

120. *Id.* § 120.56(2)(a).

121. See *id.*

ever, in *Consolidated-Tomoka v. St. Johns River Water Management District*, the ALJ interpreted this procedure to mean that, although the agency has the ultimate burden of establishing the validity of the proposed rule, the *petitioner* has the burden of going forward with evidence to support the objections.¹²² The ALJ thought it was "burdensome and time-consuming to require an agency to carry the initial burden of disproving all allegations, good or bad, cited in the initial petition."¹²³ He therefore, concluded that, "[a]bsent an agreement by the parties, the better and more efficient practice is to place the burden of production on the challenger, and to then require the agency to carry the ultimate burden of persuasion as to the validity of the proposed rules."¹²⁴ In *dictum*, a panel of the First District Court of Appeal indicated its approval of this interpretation.¹²⁵ The panel agreed that a party challenging a proposed rule has the burden of establishing a factual basis for the objection to the rule, and then the agency has the ultimate burden of persuasion to show that the proposed rule is a valid exercise of delegated legislative authority.¹²⁶

This interpretation appeared to be at odds with the clear language of the statute.¹²⁷ Initially, the 1999 legislation would have clarified that this interpretation was incorrect by expressly providing that the *agency* has *both* the burden of going forward *and* the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority.¹²⁸ In the end, however, the bill was amended to reflect

122. DOAH Case No. 97-0870RP (Final Order entered June 27, 1997).

123. *Id.* at 42.

124. *Id.*

125. See *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d at 76-77 (Fla. 1st DCA 1998). For a discussion of the order of presentation in proceedings involving challenges to proposed rules, see Edwin A. Bayo & John R. Rimes, *Who Goes First and What is "Competent Substantial Evidence" in a Proposed Rule Challenge?*, FLA. B.J., Jan. 1999, at 62-64 and Kent Wetherell, *What is the Burden of Proof in Cases Involving Challenges to Proposed Rules, and Who Has it?*, ADMIN. L. SEC. NEWSL., (Fla. Bar, Tallahassee, Fla.) Sept. 1998, at 2.

126. See *Consolidated-Tomoka*, 717 So. 2d at 77.

127. The statute provides in part:

The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The agency then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.

FLA. STAT. § 120.56(2)(a) (1999); see also Wetherell, *supra* note 125, at 2 ("The burden shifting approach adopted by the panel in *Consolidated-Tomoka* is not apparent on the face of [s]ection 120.56(2)(a), [*Florida Statutes*]. The only burden that the statute places on the petitioner is a *pleading* requirement to 'state with particularity' the objections to the proposed rule and the grounds for invalidity. It does not impose a burden of production on the petitioner.").

128. See Fla. HB 107, § 3 (1999); Fla. SB 206, § 3 (1999). One commentator criticized this burden-shifting provision, stating that it would "take resources away from agency efforts to ensure effective public participation, develop policies and secure compliance." *Ken Pruitt's Bill*, *supra* note 15, at A7.

the interpretation suggested by the ALJ and approved by the court.¹²⁹ The 1999 legislation now expressly provides that the *petitioner* bears the burden of going forward and that the *agency* continues to bear the ultimate burden of establishing the validity of the proposed rule.¹³⁰

B. Standard of Proof in Proposed Rule Challenges

Administrative law judges and appellate courts agreed that the 1996 amendments to the APA impose on the agency the ultimate burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.¹³¹ However, in *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks*, a panel of the First District Court of Appeal suggested that the standard of proof was not clear.¹³² The panel held that the ALJ erred in requiring the agency to prove the validity of its proposed rule by a preponderance of the evidence. However, the panel did not clearly indicate what it considered to be the proper standard of proof.¹³³ The 1999 legislation addresses this apparent confusion by expressly providing that the standard of proof in these cases is a preponderance of the evidence.¹³⁴

129. See Fla. H.R. Comm. on Govtl. Ops., Amendment 2 to HB 107 at 5, tape recording of proceedings (Jan. 21, 1999) (on file with comm.) (testimony of Rep. Ken Pruitt).

130. See Act effective June 18, 1999, ch. 99-379, § 5, 1999 Fla. Laws 3788, 3793 (amending FLA. STAT. § 120.56(2)(a) (1997)).

131. See, e.g., *Consolidated-Tomoka v. St. Johns River Water Mgmt. Dist.*, DOAH Case No. 97-087RP (Final Order entered June 27, 1997); *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 76-77 (Fla. 1st DCA 1998); *Board of Clinical Lab. Personnel v. Florida Ass'n of Blood Banks*, 721 So. 2d 317, 318 (Fla. 1st DCA 1998); *Agency for Health Care Admin. v. Florida Coalition of Prof'l Lab. Orgs.*, 718 So. 2d 869, 871 (Fla. 1st DCA 1998).

132. 721 So. 2d 317, 318 (Fla. 1st DCA 1998). For a discussion of the burden of proof in proceedings involving challenges to proposed rules, see Wetherell, *supra* note 125 and Bayo & Rimes, *supra* note 125, at 62-64.

133. See *Board of Clinical Lab. Personnel*, 721 So. 2d at 318. The court concluded that the AJL erroneously applied a preponderance-of-the-evidence standard in reaching its decision to invalidate the proposed rule, when it appeared that the only evidentiary burden statutorily required of the agency is to show that the rule is based upon "competent, substantial evidence." However, "competent, substantial evidence" generally has been recognized as a standard of review, and not an evidentiary standard. Bayo & Rimes, *supra* note 125, at 63-64.

134. See Act effective June 18, 1999, ch. 99-379, § 5, 1999 Fla. Laws 3788, 3793 (amending FLA. STAT. § 120.56(2)(a) (1997)).

*C. Agency Authority to Reject or Modify Recommended
Conclusions of Law*

The changes to the order of presentation and to the standard of proof apply only in cases involving challenges to proposed rules¹³⁵ where the ALJ enters a final order.¹³⁶ The 1999 legislation also seeks to level the playing field in other cases where the ALJ enters a recommended order and the agency—often a party litigant—enters the final order. The 1999 legislation attempts to accomplish this by limiting an agency's authority to reject an administrative judge's recommended conclusions of law in two respects. One commentator characterized these limitations as the "most sweeping changes in years to adjudication under Florida's APA."¹³⁷

*1. Limited to Conclusions Over Which Agency Has Substantive
Jurisdiction*

Prior to 1996, the APA provided administrative agencies with broad authority to reject the conclusions of law in a recommended order.¹³⁸ In 1996, the APA was amended to limit the administrative agency's authority to reject conclusions of law:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules ~~in the recommended order over which it has substantive jurisdiction.~~¹³⁹

In *Department of Children and Families v. Morman*,¹⁴⁰ Judge Ervin and Judge Benton disagreed as to the effect of this change. In his dissenting opinion, Judge Benton interpreted the amendment as limiting the agency's authority to reject or modify both the "conclusions of law" and the "interpretation of administrative rules" over

135. See *id.* The allocation of burdens remains the same for challenges to existing rules and agency statements defined as rule. See FLA. STAT. § 120.56(3), (4) (1999); *Consolidated-Tomoka*, 717 So. 2d at 76.

136. See ch. 99-397, § 6, 1999 Fla. Laws 3788, 3793-94 (amending FLA. STAT. § 120.57(1) (Supp. 1998)).

137. Jim Rossi, *Florida's Legislature Redoubles its Efforts to Restrict Rulemaking Authority*, ADMIN. & REG. L. NEWS, (A.B.A., Washington, D.C.), Fall 1999, at 7, 16; Jim Rossi, *Hamstringing State Agency Authority to Promulgate Rules: A Questionable Way to Improve Environmental Regulation*, 29 ELR News & Analysis 10735, 10740 (Dec. 1999).

138. See FLA. STAT. § 120.57(1)(b)10 (1995); see also, e.g., *Alles v. Department of Prof'l Regulation*, 423 So. 2d 624, 626 (Fla. 5th DCA 1982) (concluding that the Board may reject or modify conclusions of law, without limitation).

139. Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147, 189 (codified at FLA. STAT. § 120.57(1)(j) (1997)); see also Dan R. Stengle & S. Curtis Kiser, *Adjudicatory Proceedings and Pending Proceedings*, FLA. B.J., Mar. 1997 at 40, 41.

140. 715 So. 2d 1076, 1077-79 (Fla. 1st DCA 1998).

which the agency has substantive jurisdiction.¹⁴¹ In his concurring opinion, Judge Ervin interpreted the 1996 amendment more narrowly to limit the agency's review powers only to the ALJ's "interpretation of administrative rules over which the agency has substantive jurisdiction," but not to limit the agency's authority to reject other "conclusions of law."¹⁴² Judge Ervin said he found it very difficult to believe that the Legislature intended, by the revised language, "to restrict an agency's appellate powers to only those conclusions over which it has substantive jurisdiction."¹⁴³ He thought that if the Legislature had indeed intended such a "substantial and profound change," it could have far more effectively expressed its purpose.¹⁴⁴

The 1999 legislation grants Judge Ervin's request; it makes clear that the agency in its final order may reject or modify only those conclusions of law "over which the [agency has] substantive jurisdiction."¹⁴⁵

2. Agency Must State Reasons for Rejecting or Modifying Conclusions of Law

The 1999 legislation further narrows an agency's authority to reject or modify an ALJ's recommended conclusions of law by imposing certain requirements on the agency when it seeks to reject or modify even those conclusions of law within its substantive jurisdiction.

Florida courts have held that an agency may reject "without limitation" an ALJ's recommended conclusions of law.¹⁴⁶ As originally

141. *Id.* at 1079 (Benton, J., dissenting); *see also* *Shaker Lakes Apartments Co. v. Dolinger*, 714 So. 2d 1040, 1042 (Fla. 1st DCA 1998) (Benton, J., concurring); *Florida Power & Light Co. v. State*, 693 So. 2d 1025, 1028 (Fla. 1st DCA 1997) (Benton, J., concurring).

142. *Morman v. Department of Child. & Fam. Servs.*, 715 So. 2d 1076, 1078 (Ervin, J., concurring). In other words, Judge Ervin thought that the limiting phrase "over which the agency has substantive jurisdiction" modified only the phrase "interpretation of administrative rules over which the agency has jurisdiction," but not the phrase "conclusions of law." *Id.*

143. *Id.* at 1077-78.

144. *Id.*

145. Act effective June 18, 1999, ch. 99-379, § 6, 1999 Fla. Laws 3788, 3793-94 (amending FLA. STAT. § 120.57(1) (Supp. 1998)).

The court recently recognized that "the legislature has stated its preference for departure from this long-standing law of the state effective June 18, 1999," but refused to apply it to the particular case. *L.B. Bryan & Co. v. School Bd. of Broward County*, 746 So. 2d 1194, 1197 (Fla. 1st DCA 1999). Thus, the court interpreted the 1999 legislation as *changing* the law effective June 18, 1999, rather than simply *making clear* that the 1996 legislation was in fact intended to change the law three years earlier. *Cf.* Fla. H.R. Comm. on Govtl. Rules & Regs., CS for House Bill 107 (1st engrossed) (1999) Final Bill Analysis 8 (June 30, 1999) (on file with comm.) (stating that this section "makes clear" an agency's authority to reject or modify a conclusion of law over which it has jurisdiction).

146. *Alles v. Department of Prof'l Regulation*, 423 So. 2d 624, 626 (Fla. 5th DCA 1982). In some cases, the reviewing court appeared to require the reviewing agency to sufficiently explain the reasons for rejecting or modifying the recommended conclusions of law. *See, e.g., McDonald v. Department of Banking & Finance*, 346 So. 2d 569, 583 (Fla. 1st DCA

filed, the 1999 legislation would have severely restricted the agency's authority to reject or modify conclusions of law by permitting the agency to reject or modify only those "clearly erroneous" conclusions of law and interpretations of administrative rules.¹⁴⁷ This provision proved controversial, especially with representatives of state agencies who complained that this language would be virtually impossible to overcome and would essentially make the ALJ's decision a final order.¹⁴⁸ In the end, the 1999 legislation simply limits the agency's authority by requiring the agency to state with particularity its reasons for rejecting or modifying the recommended conclusion of law and by requiring that the agency find that its substituted conclusion of law is as, or more, reasonable than the rejected or modified conclusion.¹⁴⁹

D. *Judicial Review of Interpretations of Law*

Some other efforts to "level the playing field" ultimately were not adopted. These attempts include a provision clarifying that a reviewing court is not to defer to an agency's interpretation of law.

The APA provides for judicial review of agency action, and it requires the reviewing court to remand a case to the agency or to set aside agency action when it finds that the agency "has erroneously interpreted a provision of law."¹⁵⁰ Nothing in the APA expressly requires the court to defer to the agency's interpretation, and the plain language in the APA does not limit the reviewing court's authority to reverse or remand those cases in which the court determines that the agency's interpretation is "clearly" erroneous. Indeed, it has been said that the court is to review the agency's interpretation of law *de novo*.¹⁵¹ Nonetheless, some courts have held that a reviewing court must give "great deference" or "great weight" to an agency's construc-

1977) (holding that "[t]he final order . . . must address countervailing arguments developed in the record and urged by [the ALJ's] recommended findings and conclusions.")

147. Fla. HB 107, § 4 (1999); Fla. SB 206, § 4 (1999).

148. See Fla. H.R. Comm. on Water & Resource Mgmt., tape recording of proceedings (Jan. 7, 1999) (on file with comm.) (testimony of Perry Odom, General Counsel, Florida Dep't of Env'tl. Prot.); see also Fla. H.R. Comm. on Gov'tl. Rules & Regs., tape recording of proceedings (Feb. 1, 1999) (on file with comm.) (testimony of Perry Odom, General Counsel, Florida Dep't of Env'tl. Prot.). This provision also was criticized by one commentator as creating a "mysterious and confusing standard of review" and as "severely constrain[ing] the ability of the executive branch to make final decisions for which it can be held accountable." *Ken Pruitt's Bill*, *supra* note 15, at A7.

149. See Act effective June 18, 1999, ch. 99-379, § 6, 1999 Fla. Laws 3788, 3793 (amending FLA. STAT. § 120.57(1) (Supp. 1998)).

150. FLA. STAT. § 120.68(7)(d) (Supp. 1998); see also *Perdue v. T. J. Palm Associates, Ltd.*, 24 Fla. L. W. D1399 (Fla. 4th DCA 1999).

151. See, e.g., F. Scott Boyd, *A Traveler's Guide for the Road to Reform*, 22 FLA. ST. U. L. REV. 247, 261 (1994). Federal courts of appeal also generally review the lower tribunal's interpretation of law *de novo*. See *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991).

tion of a statute or rule that the agency is charged with enforcing,¹⁵² while other courts have held that an agency's interpretation will not be overturned unless the interpretation is "clearly erroneous."¹⁵³

Florida courts have even developed exceptions to this judge-made rule of deference. For example, a reviewing court will not defer to "unreasonable" interpretations of the agency's rule.¹⁵⁴ Likewise, a reviewing court will afford great weight to an agency's interpretation of a statute or rule only when it involves a matter of agency expertise,¹⁵⁵ and the court will not defer to the agency's interpretation if the wording of a statute does not require any particular agency expertise.¹⁵⁶

Some legislators disapproved of this judge-made rule of deference because it gave the governmental agencies, which enter the final order, an advantage in disputes with citizens.¹⁵⁷ Accordingly, the 1999 legislation was amended at one point to make it clear that a reviewing court is *not* to defer to an agency's construction of a statute or rule, or to otherwise afford any special weight to the agency's interpretation of a statute or rule.¹⁵⁸ This provision, however, proved to be

152. *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st DCA 1994); *Harloff v. City of Sarasota*, 575 So. 2d 1324, 1327 (Fla. 2d DCA 1991), *rev. denied*, 583 So. 2d 1035 (Fla. 1991); *Department of Env'tl. Reg. v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985). For a brief discussion of the development of the deference doctrine in Florida administrative law, see Segundo J. Fernandez & M. Christopher Bryant, *McDonald Revisited: The Development of the Deference Doctrine in Florida Administrative Law*, FLA. B.J., Dec. 1992, 70, 70-74.

153. *Chiles v. Department of State*, 711 So. 2d 151, 155 (Fla. 1st DCA 1998); *D.A.B. Constructors, Inc. v. Department of Transp.*, 656 So. 2d 940, 944 (Fla. 1st DCA 1995); *Orange Park Kennel Club, Inc. v. Department of Bus. and Prof'l Reg.*, 644 So. 2d 574, 576 (Fla. 1st DCA 1994).

154. *Southpointe Pharmacy v. Department of HRS*, 596 So. 2d 106, 110 (Fla. 1st DCA 1992).

155. *See P.W. Ventures, Inc. v. Nichols*, 533 So. 2d 281, 283 (Fla. 1988); *see also Department of Env'tl. Reg. v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985) (stating that courts should give "great deference" to statutory interpretations made by the agency required to enforce such statutes); *Save the St. Johns River v. St. Johns River Water Mgmt. Dist.*, 623 So. 2d 1193, 1202 (Fla. 1st DCA 1993) (stating that, as a general rule, administrative construction of a statute by the responsible agency is given "great weight" when it involves the agency's expertise).

156. *See Zopf v. Singletary*, 686 So. 2d 680, 682 (Fla. 1st DCA 1996); *Board of Trustees v. Department of Mgmt. Servs.*, 651 So. 2d 170, 172-73 (Fla. 1st DCA 1995).

157. *See Fla. H.R. Comm. on Water & Resources Mgmt.*, tape recording of proceedings (January 7, 1999) (on file with comm.) (testimony of Rep. Ken Pruitt).

158. *See Fla. H.R. comm. on Water & Resource Mgmt.*, Amendment 1 to HB 107 (on file with comm.) (providing that the "court shall not defer to an agency's construction of a statute or rule or otherwise afford any special weight to the agency's interpretation of a statute or rule"); *see also Fla. CS for SB 206*, § 3, at 11 (1999).

A similar effort was made to revise the Federal APA. The so-called Bumpers Amendment, which passed the U.S. Senate in 1979, would have required the reviewing court to "independently" decide all relevant questions of law, and it would have provided that in determining questions of law, "the court shall not accord any presumption in favor of or against agency action." James T. O'Reilly, *Deference Makes a Difference: A Study of the Impacts of the Bumpers Judicial Review Amendment*, 49 U. CIN. L. REV. 739, 741 (1980).

objectionable to some, and it was removed from the bill prior to final passage.¹⁵⁹

E. Limitation on Retroactive Rules

Florida courts traditionally have recognized that an administrative rule has only prospective application.¹⁶⁰ The federal courts also

159. Representatives of some state agencies objected to the provision; they argued that courts should defer to the agency's interpretation of statutes and rules. See Fla. H.R. Comm. on Water & Resource Mgmt., tape recording of proceedings (January 7, 1999) (on file with comm.) (testimony of Stephanie Gehres Kruer, General Counsel, Florida Dep't of Comm'y Aff.; testimony of Perry Odom, General Counsel, Florida Dep't of Env'tl. Prot.). One commentator argued that the provision conflicts with separation-of-powers principles because it prohibits the use of a principle of statutory construction. See *Ken Pruitt's Bill*, *supra* note 15, at A7.

Others expressed the view that this provision was not necessary, because courts only defer to the agency's interpretation of law when it suits them. See Fla. H.R. Comm. on Water Resource & Mgmt., tape recording of proceedings (Jan. 7, 1999) (on file with comm.) (testimony of David Gluckman); Fla. H.R. Comm. on Gov'tl. Ops., tape recording of proceedings (Jan. 21, 1999) (on file with comm.) (testimony of David Gluckman); see also KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29.16, at 403 (2d ed. 1984) (stating that the court has the discretion to adopt or to reject a rule of statutory construction that affords deference to the agency's interpretation, and the choice it makes usually depends on which way it wants to resolve the substantive question); Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 3 n.18 (1983) (suggesting that judges frequently interpret statutes and regulations independently, giving deference only when it suits them).

A court might take one of three approaches when reviewing interpretations of law. See MICHAEL ASIMOW, ARTHUR E. BONFIELD & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW*, § 9.2, at 557-58 (2d ed. 1998). Under the traditional view (referring to what is sometimes called "substitution of judgment," "rightness" or "independent judgment"), a court decides the interpretative issue for itself. See *id.* When substituting judgment on questions of law, courts usually grant at least some weight (sometimes referred to as "deference" or "weak deference") to the agency's interpretation. See *id.* A second approach also employs substitution of judgment, but the court gives no deference to the agency's view. The agency's view about questions of statutory interpretation receives no more weight than the court gives to the review of the private litigants. A third approach (sometimes referred to as the "reasonableness" or "strong deference" approach) requires courts to treat interpretative issues the same as they treat findings of basic fact under the substantial evidence test. Under this approach, a court must accept an agency's interpretation of an ambiguous statute or other text if the interpretation is "reasonable," it cannot substitute its own preferred interpretation for that of the agency. See *id.*

160. See *Gulfstream Park Racing Ass'n, Inc. v. Department of Bus. Reg.*, 407 So. 2d 263, 265 (Fla. 3d DCA 1981). In Florida, a substantive law cannot be applied retroactively absent a clear directive from the Legislature. See *Hassen v. State Farm Mutual Auto Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996) ("It is a well established rule of statutory construction that, in the absence of an express legislative statement to the contrary, an enactment that affects substantive rights or creates new obligations or liabilities is presumed to apply prospectively."); see also *Arrow Air, Inc. v. Walsh*, 645 So. 2d 422, 425 (Fla. 1994) ("The presumption against retroactive application of a law that affects substantive rights, liabilities, or duties is a well established rule of statutory construction, . . . which comes into play in the absence of an express statement of legislative intent."); *Alamo Rent-a-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994) ("This [presumption] is especially true when retrospective operation of a law would impair or destroy existing rights.").

Although a substantive law cannot be applied retroactively, a merely remedial or procedural statute can be applied retroactively. See *Alamo*, 632 So. 2d at 1358 ("Procedural or

apply this principle: a federal rule or regulation is retroactive¹⁶¹ only if the enabling legislation contains a valid grant of authority specifically allowing the agency to apply the rule retroactively.¹⁶² However, in *Environmental Trust v. Department of Environmental Protection*,¹⁶³ the First District Court of Appeal created an exception when it held that a rule that "merely clarifies another existing rule and does not establish new requirements" may be applied retroactively.¹⁶⁴ The Legislature disapproved of this decision,¹⁶⁵ and the 1999 legislation provides that an agency may *not* adopt retroactive rules, including those intended to clarify existing law, unless expressly authorized by statute.¹⁶⁶

This limitation on retroactive rules was not included in the bill as originally filed, but was added when the bill was considered in committee. The initial amendment to the House bill simply provided that "no rule may be retroactive."¹⁶⁷ This amendment evoked some controversy,¹⁶⁸ and it was revised to take the form ultimately approved by

remedial statutes, on the other hand, are to be applied retrospectively and are to be applied to pending cases."); see also *Gupton v. Village Key & Saw Shop, Inc.*, 656 So. 2d 475, 477 (Fla. 1995) ("Statutes that relate only to procedure and or remedy generally apply to all pending cases."); *Life Care Ctrs. of Am., Inc. v. Sawgrass Care Ctr., Inc.*, 683 So. 2d 609, 613-14 (Fla. 1st DCA 1996) (determining that certain sections of the 1996 amendments to the APA were procedural and therefore applicable to pending cases).

161. Some courts use "retroactive" and "retrospective" interchangeably, while others distinguish between the two terms. See, e.g., *Joyner v. Monier Roof Tile, Inc.*, 784 F. Supp. 872, 874 n.3 (S.D. Fla. 1992) (explaining the difference between retroactive and retrospective); *Serna v. Milanes, Inc.*, 643 So. 2d 36, 38 n.3 (Fla. 3d DCA 1994) (defining "retroactive" as "the application of a new law or case to matured rights, that is, to a case that has gone to final judgment" and defining "retrospective" as the "application of a new law or case to pending controversies").

162. See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 270 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 207 (1988); see also *Richard Pierce, Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 76 (1995).

After *Georgetown*, Congress can confer that power only by stating explicitly that the agency can issue rules with retroactive effects. Since Congress rarely addresses retroactivity one way or another, the *Georgetown* rule of construction has the effect of denying most agencies the power to issue any rule with a retroactive effect.

Id. For a critical analysis of the *Bowen* decision, including a discussion of some of the practical problems it creates for agencies, see RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW & PROCESS* § 6.4, at 285-88 (3d ed. 1999).

163. 714 So. 2d 493, 500 (Fla. 1st DCA 1998).

164. *Id.* at 500. For a more detailed discussion of the court's ruling on this point, see Ralph A. DeMeo, *Environmental Trust v. Department of Environmental Protection: Who Do You Trust?*, ADMIN. L. SEC. NEWSL. (Fla. Bar., Tallahassee, Fla.) Mar. 1999, at 3.

165. See Fla. H. R. Comm. on Govtl. Ops., tape recording of proceedings (Jan. 21, 1999) (on file with comm.) (explanation of Amendment 11 by Rep. Bill Posey).

166. See Act effective June 18, 1999, ch. 99-379, § 4, 1999 Fla. Laws 3788, 3793 (amending FLA. STAT. § 120.54(1)(f) (Supp. 1998)).

167. Fla. H.R. Comm. on Govtl. Ops., Amendment 11 to HB 107 (Jan. 21, 1999) (on file with comm.).

168. See Fla. H.R. Comm. on Govtl. Rules & Regs., tape recording of proceedings (Feb. 1, 1999) (on file with comm.) (testimony of Perry Odom, General Counsel, Florida DEP).

the Legislature.¹⁶⁹ In its final form, the language expressly provides that an agency may not adopt even those retroactive rules that are intended to clarify existing law,¹⁷⁰ thus effectively overruling the decision in *The Environmental Trust v. Department of Environmental Protection*.¹⁷¹ However, it recognizes that there may be occasions when the Legislature wishes to specifically authorize an agency to adopt retroactive rules.¹⁷²

Although there was no debate about the limitation on retroactive rules when the bill was approved by the full House and Senate,¹⁷³ apparently, this provision was the reason that the Secretary of the Department of Environmental Protection (DEP) initially recommended that the Governor veto the bill.¹⁷⁴ The DEP raised concerns that resulted from correspondence received from the U.S. Environmental Protection Agency (EPA) after the conclusion of the legislative session.¹⁷⁵ In this correspondence, the EPA questioned whether the language limiting an agency's authority to adopt retroactive rules would prohibit the DEP from adopting EPA rules that are necessary for

169. See Fla. H. R. Comm. on Govtl. Rules & Regs., Amendment 1 to strike-everything Amendment 2 (Feb. 1, 1999) (on file with comm.); Fla. CS for HB 107, § 4 (1999) (First Engrossed); Act effective June 18, 1999, ch. 99-399, § 4, 1999 Fla. Laws 3788, 3793 (amending FLA. STAT. § 120.54(1)(f) (Supp. 1998)). Apparently, representatives of the Governor's Office requested that the language be further revised, and, accordingly, an amendment was drafted to read as follows: "An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing laws, *unless the statute has a retroactive effect.*" (emphasis provided by author). See Fla. CS for SB 206 (draft on file with author). This language would have authorized an agency to adopt retroactive rules if the statute "has a retroactive effect," whereas the enacted language requires the statute to expressly authorize the agency to adopt retroactive rules. However, this additional revision was never formally considered by the Legislature, and it is not included in the final version of the legislation.

170. See Act effective June 18, 1999, ch. 99-379, § 4, 1999 Fla. Laws 3788, 3793 (amending FLA. STAT. § 120.54(1)(f) (Supp. 1998)).

171. 714 So. 2d 493, 500 (Fla. 1st DCA 1998).

172. In this fashion, the language is consistent with the U.S. Supreme Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988). See *supra* note 162 and accompanying text.

173. However, as noted, there was considerable discussion of the earlier version of this language when House Bill 107 was considered in the committee. See *supra* note 159 and accompanying text.

174. Although subsequent developments suggest that DEP Secretary David Struhs originally recommended that the Governor veto the bill because of the limitations on retroactive rules, a memorandum from Secretary Struhs urged Governor Bush to veto the bill because it "will cloud rather than clarify the respective roles and responsibilities of the Legislature and the Executive Branch, therefore making our governance less efficient and potentially less effective." Memorandum from David Struhs to Gov. of Florida, Jeb Bush, (June 11, 1999) (on file with author) (regarding veto recommendations for the amendments to the Administrative Procedure Act); see also Julie Hauserman, *DEP Chief Warns Against Rules Bill*, ST. PETE. TIMES, June 17, 1999, at B1; Julie Hauserman, *New Law Will Ease State Rules Battles*, ST. PETE. TIMES, June 18, 1999, at B1.

175. See Letter from Carol F. Baschon, Associate Regional Counsel, Env'tl. Prot. Ag., to F. Perry Odom, General Counsel, Fla. Dep't of Env'tl. Prot. (May 25, 1999) (on file with author); Letter from Phyllis P. Harris, Regional Counsel, Env'tl. Prot. Ag., to Carol Licko, General Counsel, Office of the Gov. (May 25, 1999) (on file with author).

Florida to maintain its authorized or delegated environmental programs.¹⁷⁶ Ultimately, the DEP determined that this provision would not interfere with its authority to adopt any necessary EPA rules because the adoption of such rules was "expressly authorized by statute" and therefore was not subject to the new limitation on retroactive rules.¹⁷⁷ Florida law "expressly" authorizes the Secretary of the DEP to adopt rules substantively identical to regulations adopted by EPA.¹⁷⁸ In particular, subsection (2) of section 403.8055, *Florida Statutes*, specifically authorizes the Secretary of the DEP to establish an effective date, so long as that date is not earlier than the effective date of the substantively identical EPA rule.¹⁷⁹ The section of the APA that authorizes adoption of federal standards also contains a similar provision.¹⁸⁰ The DEP, therefore, withdrew its request for the Governor's veto.¹⁸¹

176. See *id.*

177. Julie Hauserman, *New Law Will Ease State Rules Battles*, ST. PETE. TIMES, June 18, 1999, at B1. Representative Ken Pruitt, the sponsor of the 1999 legislation, also advised the Governor's legal counsel that he did not believe that the restriction on retroactive rules would in any way interfere with DEP's authority to adopt those rules, including retroactive rules, that are necessary for Florida to maintain its authorized or delegated environmental programs. See Letter from Rep. Ken Pruitt, to Frank Jiminez, Deputy General Counsel, Office of the Gov., (June 15, 1999) (on file with author).

178. See FLA. STAT. § 403.8055 (1999).

179. Section 403.8055 provides in pertinent part:

Notwithstanding ss. 120.54 and 403.804, the secretary is empowered to adopt rules substantively identical to regulations adopted in the Federal Register by the United States Environmental Protection Agency pursuant to federal law, in accordance with the following procedures:

Any rule adopted pursuant to this section shall become effective upon the date designated in the rule by the secretary; however, no such rule shall become effective earlier than the effective date of the substantively identical United States Environmental Protection Agency regulation.

FLA. STAT. § 403.8055 (1999).

The DEP frequently cites section 403.8055, *Florida Statutes*, as authority to adopt EPA rules by reference. Indeed, the DEP cited section 403.8055, *Florida Statutes*, as providing the necessary statutory authority for adopting the very EPA rules that EPA cited as an example of retroactive rules. See Approval and Promulgation of State Plans for Designated Facilities and Pollutants: Florida, 64 Fed. Reg. 29,961 (June 4, 1999) (recording EPA approval of a plan, submitted by Florida, for implementing and enforcing the emission guidelines applicable to existing municipal solid waste landfills). For a discussion of the retroactive application of new source performance standards, see John H. Turner, *The Retroactive Application of New Source Performance Standards*, J. ENVTL. L. & PRAC. July-Aug. 1997, at 3-7.

180. See FLA. STAT. § 120.54(6) (1999). Indeed, the provision regarding retroactive rules may not even apply to rules adopted by DEP pursuant to section 403.8055, *Florida Statutes*. That statute authorizes the Secretary of DEP to adopt rules substantively identical to regulations adopted by EPA "notwithstanding s. 120.54." As the provision restricting retroactive rules is to be codified in section 120.54, this provision apparently would not apply to EPA rules adopted by DEP pursuant to section 403.8055, *Florida Statutes*. See Letter from Ken Pruitt, *supra* note 177.

181. See Julie Hauserman, *New Law Will Ease State Rules Battles*, ST. PETE. TIMES, June 18, 1999, at B1.

IV. MISCELLANEOUS REVISIONS

Several miscellaneous provisions merit mention, including changes in the definition of "agency" and revisions to the rulemaking authority provided to school districts.

A. Definition of "Agency"

The 1999 legislation amends the definition of the term "agency" to expressly include a regional water supply authority.¹⁸² The definition also is amended to delete reference to entities described in chapter 298 (water control districts)¹⁸³ and to expressly exclude any "multi-county special district with a majority of its governing board comprised of elected persons."¹⁸⁴

In addition, the 1999 legislation reorganizes the definition of "agency" for clarity. Prior to this revision, the definition of agency¹⁸⁵ identified approximately twenty different governmental entities, and did so in one unwieldy run-on sentence. The definition was restructured by the 1999 Legislature simply to clarify the type of governmental entities are controlled by the APA.¹⁸⁶

However, it has been suggested that the result of this restructuring conflicted with a 1977 Attorney General's Opinion,¹⁸⁷ which determined the word "state" modified not only the word immediately proceeding it ("department"), but all the types of agencies described after the comma.¹⁸⁸ The final bill analysis states that the definition

182. See Act effective June 18, 1999, ch. 99-379, § 2(1)(b)(2), 1999 Fla. Laws 3788, 3789 (amending FLA. STAT. § 120.52(1)(b)(2) (Supp. 1998)). This language was designed to clarify that regional water supply authorities are agencies for purposes of the APA. See Fla. S. Comm. on Govtl. Ops., CS for SB 206 (1999) Staff Analysis 9 (Mar. 11, 1999) (on file with comm.).

183. See ch. 99-379, § 2(1)(b)(8), 1999 Fla. Laws at 3790. Chapter 298 water control districts are limited-purpose local governmental units administratively separate from state and other local governments. These units are created to provide financing or to construct or maintain infrastructure or provide services. Chapter 298 was significantly revised in 1997 to create a circuit court process for adjudicating disputes resulting from *ad valorem* assessments. This revision also repealed the authority of water control districts to adopt rules. See Fla. S. Comm. on Govtl. Ops., CS for CS for SB 206 (1999) Staff Analysis 9-10 (Apr. 21, 1999) (on file with comm.).

184. Act effective June 18, 1999, ch. 99-379, § 2, 1999 Fla. Laws 3788, 3790 (amending FLA. STAT. § 120.52(1)(c) (Supp. 1998)). Prior to 1999, the definition of "agency" expressly included a "multicounty special district with a majority of its governing board comprised of *non-elected* persons." (emphasis added) FLA. STAT. § 120.52(1)(b) (1997). The 1999 legislation simply clarifies that a "[m]ulticounty special district with a majority of its governing board comprised of *elected* persons" is excluded from the definition of "agency." (emphasis added). Ch. 99-379, § 2, 1999 Fla. Laws at 3789.

185. See FLA. STAT. § 120.52(1)(b) (1997).

186. See Act effective June 18, 1999, ch. 99-379, § 2, 1999 Fla. Laws 3788, 3789.

187. 77-142 Fla. Op. Att'y Gen. 307 (1977).

188. Prior to the 1999 legislation, section 120.52 (1)(b) read:

(1) "Agency" means: . . .

was simply rewritten for clarity.¹⁸⁹ Amendments to the definition addressed specific types of agencies.¹⁹⁰

B. Definition of "Agency Action"

As originally filed, the 1999 legislation also included language that would have amended the definition of "agency action" to expressly exclude from that definition "an agency's confirmation or affirmation of a statutory exemption."¹⁹¹ This language was designed to address the decision in *Friends of the Hatchineha, Inc. v. Department of Environmental Regulation*,¹⁹² where the court held that DEP's decision that a driveway qualified for an agricultural exemption was final agency action from which an environmental group could seek a formal administrative hearing.¹⁹³ The language proved very controversial, especially with representatives of environmental interest groups,¹⁹⁴ and it was deleted early in the legislative process.¹⁹⁵

C. School Districts Authorized to Implement General Powers

Finally, district school boards are authorized to adopt rules to implement their general powers under section 230.22, *Florida Statutes*, notwithstanding the new limitations on rulemaking authority.¹⁹⁶

(b) Each state officer and state department, departmental unit described in s. 20.04, commission, regional planning agency, board, multicounty special district with a majority of its governing board comprised of nonelected persons, and authority, including, but not limited to, the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature, educational units, and those entities described in chapters 163, 298, 373, 380, and 582 and s. 186.504, except any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.

FLA. STAT. § 120.52(1)(b) (Supp. 1998).

189. See Fla. H.R. Comm. on Govtl. Rules & Regs., CS for HB 107 (1st engrossed) (1999) Final Bill Analysis 5 (June 30, 1999) (on file with comm.).

190. See *id.*; see also *supra* notes 179-83 and accompanying text.

191. Fla. SB 206, § 1, at 2, lines 16-18 (1999).

192. 580 So. 2d 267 (Fla. 1st DCA 1991).

193. See *id.* at 271; see also Fla. H.R. Comm. on Water & Resource Mgmt., HB 107 (1999) Staff Analysis 4 (December 21, 1998) (on file with comm.) (summarizing that House Bill 107 restricts agencies to the detailed powers and duties granted by the enabling statute and that an agency has the ultimate burden of showing a proposed rule is not an invalid exercise of delegated legislative authority).

194. See, e.g., Fla. H. R. Comm. on Water & Resource Mgmt., tape recording of proceedings (January 7, 1999) (on file with comm.) (testimony of David Gluckman).

195. See Fla. H.R. Comm. on Govtl. Ops., Amendment 1 to HB 107, (January 21, 1999) (on file with comm.) (testimony of Rep. Ken Pruitt).

196. See Act effective June 18, 1999, ch. 99-379, § 7, 1999 Fla. Laws 3788, 3794 (amending FLA. STAT. § 120.81(1)(a) (1997)).

School districts discovered to their discomfort that the new rule-making standard called into question many existing rules. In the rule review process authorized in 1996, the local school districts identified 3614 rules exceeding statutory authority.¹⁹⁷ Although a number of districts submitted identical rules, the number remains significant.¹⁹⁸ The Legislature provided the local school districts with specific authority for not only the rules identified under the rule review and authorization process, but for all local school district activities.¹⁹⁹

However, the school districts were not satisfied with this result, for in 1999, the Boards sought an exemption to the rulemaking standard. In a letter to Representative Ken Pruitt, the school districts argued that the 1998 bill did not cure the problem. That bill gave the local school districts the authority to develop policies in particular areas but only to those areas identified in negotiations over the bill.²⁰⁰ And while the districts wished to remain under the APA for the purposes of adjudication, an exception to the rulemaking standard would return to the local school districts the authority to regulate the "health, safety, and welfare of students" within the state education statutes.²⁰¹

The districts offered several reasons for the exemption. First, the school districts claimed a constitutional mandate to operate the local school systems.²⁰² Second, the school districts argued that as locally accountable agencies, the districts should be treated more like municipalities and counties, neither of which is included under the APA.²⁰³ Finally, the districts noted that two constitutionally created agencies, the Florida Game and Fresh Water Commission and the Commission on Ethics, are only accountable under the APA when operating under statutory authority.²⁰⁴ The districts argued that they too should be provided the same consideration when operating under their constitutional authority.²⁰⁵

To address the school district concerns, the initial amendments struck the local school districts from the definition of educational

197. See *supra* note 106 and accompanying text.

198. See Letter from Dr. Wayne Blanton, Exec. Dir., Florida School Boards Ass'n, to Rep. Ken Pruitt, Repub., Port St. Lucie, 1 (Feb. 9, 1999) (on file with the author).

199. See Act effective Oct. 1, 1999, ch. 99-153, 1999 Fla. Laws 864.

200. See Letter from Dr. Wayne Blanton, *supra* note 198, at 2. While representatives of the local school districts worked to ensure that the bill encompassed as many areas as possible, they made it clear that the bill did not provide the necessary authority to address areas not identified at that time and that this arrangement would necessitate regularly revisiting the relevant sections to amend those sections to include additional authority.

201. *Id.* at 1.

202. See *id.* at 2.

203. See *id.*

204. See *id.* at 3.

205. See *id.*

units, but included the local school districts, where the actions of the district were statutorily controlled, in the portion of the definition addressing local government actions under the APA.²⁰⁶ This appeared to create an internal conflict; the definition *excluded* the districts from the APA but then *included* the districts to the extent the districts were operating under a statutory mandate.

The subsequent amendment provided the precise exemption desired by the districts.²⁰⁷ The amendment exempts the districts from the rulemaking standard provisions of section 120.536.²⁰⁸ This addresses the concern of the districts by ensuring that they may use the adjudicatory procedures of the APA and, in the view of the local school districts, adopt rules that do not run afoul of the rulemaking standard in the APA.²⁰⁹

V. CONCLUSION

Much of the 1999 legislation was designed to address several appellate decisions interpreting the 1996 amendments. The legislation clarifies the limitations on agency rulemaking and specifically rejects the "class of powers and duties" test enunciated in *Consolidated-Tomoka*. The legislation also seeks to "level the playing field" in disputes between citizens and their government by clarifying the order of presentation and the standard of proof in proposed rule challenges, by limiting the agency's authority to reject or modify recommended conclusions of law, and by prohibiting an agency from adopting retroactive rules, including those intended to clarify existing law, unless expressly authorized by statute. Finally, the 1999 legislation changes the definition of "agency" and revises the rulemaking authority provided to school districts.

206. See Fla. CS for SB 206, § 1(b)(7), (c) (1999).

207. See Fla. SB 206 (1999); Act effective June 18, 1999, ch. 99-379, § 7, 1999 Fla. Laws 3788, 3794 (amending FLA. STAT. § 120.81(1)(a) (1997)).

208. See *id.* When the issue of the local school board rulemaking authority was discussed, representatives of the local school boards indicated that providing additional authority within the substantive statutes would help support school board rules. To that end, the original language of HB 4335 (1998) was resurrected. This language would amend section 230.22, *Florida Statutes*, to provide authority under which, "school boards may adopt rules pursuant to the Administrative Procedure Act for governance and operations, general school administration, fiscal management, support services, facilities management, personnel, instructional programs, student management, parent relations, school-community relations, court orders, and federal mandates." However, the school boards ultimately decided that sufficient authority existed in the statutes, when coupled with the exemption from the rulemaking standard, to provide a legal basis for local school boards' rules, and this language was not considered by the Legislature.

209. The question this exemption leaves open is to what standard a local school district rule should be judged, as the 1996 amendments to the APA disapproved the reasonably related standard, and this exemption would preclude the use of the statutory standard in a rule challenge to the legal basis for the rule.

There already is considerable disagreement regarding the potential effect of these amendments. The appellate courts soon will have ample opportunity to interpret these latest amendments, and they no doubt will provide fodder for others to debate whether the 1999 legislation is in fact the *phantom menace* or *much ado about nothing*.²¹⁰

210. Indeed, two cases interpreting the 1999 amendments to the rulemaking standard have already arrived at the First District Court of Appeal. *See Day Cruise Ass'n, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, DOAH Case No. 88-5303R (Feb. 17, 2000) (invalidating proposed rules prohibiting use of sovereignty submerged lands for anchoring or mooring of so-called "cruises to nowhere"), *appeal docketed*, *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, Docket No. 1D00-1058; *see also Save the Manatee Club, Inc. v. Southwest Fla. Water Mgmt. Dist.*, DOAH Case No. 99-3885RX (Dec. 9, 1999) (invalidating rule granting exemptions from environmental permitting requirements), *appeal docketed*, *Southwest Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, Docket No. 99-4819.