Administrative Law

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Abstract

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EDITOR'S NOTE

The Third Annual Survey of Florida Law* provides an overview and analysis of significant developments in Florida law from December 1, 1986 through November 30, 1987. The Editors are grateful to the many authors who contributed to the Survey.

The entire Law Review staff must be commended for their contribution to this project. Of special assistance were the following staff members: Alex Clark, Gale Collins, Sherri Cohen, Joseph Goldstein, Keith Metcalf, Pam Lund, Margaret Pressotti, Howard Poznanski, Patricia Shub, Connie Stevens and Robert Tardif.

* The Survey Editor for this issue was Louis D'Agostino. Louie D. dedicates his efforts to his parents Frank and Nina D'Agostino of Naples, Florida. A special dedication is extended to Nina DeGenova. Special thanks are extended to my fellow board members, and particularly to Gary S. Gaffney, Stephanie Arna Kraft, and Johnny Clogs for their support and help throughout the publication of this issue.

Burris: Administrative Law

Johnny C. Burris*

Introduction

Administrative law is a difficult and essential subject matter which touches most, if not all, areas of the modern lawyer's practice. It is virtually impossible to think of any substantive area of the law which remains unaffected by administrative law.1 There are literally thousands of agencies on the local, state and federal levels which have power to act in a most diverse array of substantive areas.2

Florida has not escaped this phenomenal growth of administrative law.3 This article focuses on the decisions of Florida's appellate courts

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4. The significance of administrative law can be seen in the sheer volume of cases decided in the area by the Florida appellate courts. Between 1979 and 1987, Florida's Appellate Courts wrote over 4,000 opinions giving plenary consideration to administrative law issues. An even greater number of cases concerning administrative law issues were disposed of by the generally unenlightening per curiam affirmed or reversed opinion, offering little or no citation to authority or other explanation of the decision by the court. See, e.g., A.G. Ennis Realty, Inc. v. Department of Professional Regulation, 457 So. 2d 1052 (Fla. 2d Dist. Ct. App. 1984) reh'g denied (per curiam); Caputo v. Florida Unemployment Appeals Comm'n, 493 So. 2d 1121 (Fla. 3d Dist. Ct. App. 1986) (per
from January 1, 1979 to December 31, 1987\textsuperscript{7} which concerned procedural and substantive matters generic to the decision processes of most state administrative agencies.\textsuperscript{8} It is a continuation of earlier efforts\textsuperscript{9} designed to assist members of the bar in dealing with the wealth of new information generated each year in the area of administrative law. The goal is to provide a manageable, yet comprehensive and critical, overview of recent significant developments in Florida caselaw\textsuperscript{10} dealing with curiam; City of Fort Lauderdale v. Public Employees Relations Comm'n, 381 So. 2d 257 (Fla. 4th Dist. Ct. App. 1980) rek'd den'd (per curiam); Crawford v. Division of Retirement, 369 So. 2d 689 (Fla. 1st Dist Ct. App. 1979) (per curiam); Griffin v. School Bd. of Dade County, 497 So. 2d 913 (Fla. 3d Dist. Ct. App. 1986) (per curiam); Kojali v. Department of Health and Rehabilitative Serv., 460 So. 2d 985 (Fla. 3d Dist. Ct. App. 1984) (per curiam); Valparaiso Bank and Trust Co. v. Department of Labor and Employment Security, 381 So. 2d 1096 (Fla. 1st Dist Ct. App. 1980) (per curiam); Village Zoo, Inc. v. Department of Health and Rehabilitative Serv., 462 So. 2d 839 (Fla. 4th Dist. Ct. App. 1985) rek'd den'd (per curiam); Winfield v. Department of Business Regulation, 458 So. 2d 1171 (Fla. 3d Dist. Ct. App. 1984) rek'd den'd (per curiam).

5. The decisions discussed in the article appear in volumes 365-515 of the Southern Reporter, Second Series. Because of the large number of cases decided since the publication of the last article surveying administrative law, I have limited the discussion to what I consider the most significant opinions. See supra note 4; infra note 7. Where feasible in the footnotes, I have briefly commented on or cited some of the cases not receiving plenary discussion. Some decisions of the United States Supreme Court and United States Court of Appeals for the Fifth and Eleventh Circuits are also briefly discussed or mentioned.

6. This article does not discuss the development of specific aspects of the substantive law of any agency except as it relates to the discussion of the administrative and judicial review processes.


8. This is admittedly just a small part of the flood of information, as developments occur not just in the context of judicial decisions, but on a variety of other levels such as agency adjudicatory decisions, agency informal adjudicatory decisions, agency licensing, Florida's compensation practice, Florida workers' compensation practice, and Florida's compensation practice. See gener-
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administrative law."

The article is divided into three sections. Section one is a discussion of developments under the Florida and United States Constitutions concerning administrative law. Section two is a discussion of developments under the Administrative Procedure Act and other statutes of particular importance to administrative law. Section three is a discussion of the standards of judicial review applied to agency action, primarily as set forth in the APA.


10. See infra pp. 302-35.

11. FLA. STAT. § 120.50-73 (1987) (hereinafter the APA). (For convenience and when it is not misleading, the 1987 codification of Florida Statutes is cited in addition to or instead of the codification in effect at the time the opinion was rendered). This discussion does not include the topic of the standards of judicial review which are discussed in section III of the article. FLA. STAT. § 120.68 (1987).


13. See infra pp. 357-84. The subject of workers’ compensation law and administrative process is beyond the scope of this article. See generally Florida Bar’s Florida Workers’ Compensation Practice (3d ed. 1986); J. ALPERT AND P. MURPHY, FLORIDA WORKERS’ COMPENSATION LAW (3d ed. 1978). While many of the procedures and processes are similar or identical to the APA, the legislature has continued to exclude from the scope of the APA, proceedings conducted by deputy commissioners under the workers’ compensation statute. FLA. STAT. § 120.53(1)(c) (1987). See generally Levinson, supra note 7, at 616-37, 679-81; England and Levinson, supra note 7, at 751 n.2, 770-72.

Constitutional and Jurisdictional Issues

The Delegation Doctrine

The delegation doctrine has its roots in the concept of separation of powers. Separation of powers was used by the framers of the United States and Florida Constitutions as a fundamental structural device to minimize the threat of corruption of the government into a tyranny. It created a dichotomy in the governmental system between those who make the laws in the [legislature] and those who are responsible for administering the laws in the executive branch. The judicial branch was assigned the task of policing the boundary between the two spheres to assure that neither the executive nor legislative branch would usurp authority which was reserved to the other or to the judiciary. The "delegation of quasi-legislative and quasi-judicial authority to the executive branch political officeholders, agencies, or independent agencies was contrary to the [primary purpose of] the separation of powers" principle.

If the principle of separation of powers was taken seriously, then the aggregation of legislative, executive and judicial functions and power in the modern administrative agency, while convenient or necessary, was not on sound constitutional footing. Early on, the federal courts recognized that the principle of separation of powers, prohibiting the delegations of authority generally found in administrative agencies, was a doctrine of "more constitutional" bark than bite. The result was a doctrinal idol to which the federal courts chanted in ritualistic fashion that delegations were prohibited, but ignored in practice. Rather than declare delegations unconstitutional, the federal courts focused primarily on assuring that Congress performed its role as primary policymaker and that statutes contain "some standard[s] by which the courts can determine if the agency is acting within the bounds of authority Congress granted to it. Under this approach, a statute [was] a form of ... unconstitutional delegation only if the grant of authority is so broad and vague that in effect the ... legislature has delegated unfettered legislative authority to the agency." It was an inquiry the federal courts did not take very seriously, for as it was applied, almost any language was sufficient to satisfy this standard. "The lesson of modern ... [delegation] doctrine was that [federal] courts should intervene to declare agency actions illegal as either ultra vires or inconsistent with the statutory purpose, not to hold the statute unconstitutional as a violation of the ... delegation doctrine." In recent years, there was a pronounced trend by state courts toward the federal approach to delegation doctrine questions.

21. Id. at 993 n.13.
23. Burton, supra note 9, at 994.
24. Burton, supra note 9, at 993-1001. See also 1 K. Davis, ADMINISTRATIVE LAW TREATISE 166-70, 175-77 (1978). The federal courts were even willing to accept no standards as long as an agency had discretion by exercise of its rule making authority. E.g., Yakus v. United States, 321 U.S. 414 (1944); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (requiring the adoption of regulations to save the statute from being declared unconstitutional). See also Zemel v. Rusk, 381 U.S. 1 (1965) (using past administrative practice which narrowed the scope of standardless statutory language to save the statute from being declared unconstitutional).
25. Burton, supra note 9, at 995.
26. 1 K. Davis, supra note 24, at § 3:14 & (Supp. 1980); W. Fox, supra note 9, at 26-27. See generally Buns, Irwin and Sido, No Regulation Without Representation: Would Judicial Enforcement of a Stricter Nondelegation Doctrine Limit Administra-
Constitutional and Jurisdictional Issues

The Delegation Doctrine

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If the principle of separation of powers was taken seriously, then the aggregation of legislative, executive and judicial functions and power in the modern administrative agency, while convenient or necessary and perhaps efficient, was not on sound constitutional footing. Early on, the federal courts recognized that the principle of separation of powers, prohibiting the delegations of authority generally found in administrative agencies, was a doctrine of "more [constitutional] bark than bite." The result was a doctrinal idol to which the federal courts chanted in ritualistic fashion that delegations were prohibited, but ignored in practice. Rather than declare delegations unconstitutional, the federal courts focused primarily on assuring that Congress performed its role as primary policymaker and that statutes contain "some standard[s] by which the courts can determine if the agency is acting within the bounds of authority Congress granted to it. Under this approach, a statute [was] a form of . . . unconstitutional delegation only if the grant of authority is so broad and vague that in effect the [legislature] has delegated unfettered legislative authority to the agency." It was an inquiry the federal courts did not take very seriously, for as it was applied, almost any language was sufficient to satisfy this standard. The lesson of modern . . . delegation doctrine cases was that [federal] courts should intervene to declare agency actions illegal as either ultra vires or inconsistent with the statutory purpose, not to hold the statute unconstitutional as a violation of the . . . delegation doctrine.

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15. Traditionally this doctrine was labeled the nondelegation doctrine. This clearly was a misnomer as courts almost never found the delegation of quasi-legislative or quasi-judicial authority, or the aggregation of legislative, executive and judicial functions in one body to be constitutionally flawed. "The designation of the doctrine by this name occurred because strongly worded dictum in the early Supreme Court cases on the issue indicated a hostility in principle to such actions by Congress, even though all the delegations in these cases were held constitutionally sound." Burris, supra note 9, at 993 n.13 (citing Brig Aurora, 11 U.S. (7 Cranch) 382 (1813); Shankland v. Washington, 30 U.S. (5 Pet.) 390, 395 (1831) ("The general rule of law is, that a delegated power cannot be delegated."); Field v. Clark, 143 U.S. 649, 692 (1892) ("that Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution"). In keeping with the national reality, rather than the myth, I have labeled this section as delegation doctrine. The irony of course is that Florida remains one of the few states where delegation arguments are on occasion taken seriously. See infra text accompanying notes 27-81.


18. Burris, supra note 9, at 993.

19. Id.

20. Id.
Askew v. Cross Key Waterways, the Florida Supreme Court resoundingly rejected the federal approach to delegation issues - in language which often resembled it - but with a tone that established a fundamental difference in meaning. In Cross Key, the court found that the statutes at issue were "so lacking in guidelines that neither the agency nor the courts ... [could] determine whether the agency ... was carrying out the intent of the legislature." The court opined that such a statute in effect prevents the courts from performing their constitutional role of determining "whether the administrative agency ... had performed consistently with the mandate of the legislature." The constitutional flaw in these statutes was not that the legislature failed to adequately articulate the criteria the agency was to apply, but that the legislature failed to adequately delineate how these criteria were to be weighed in deciding "priorities among competing areas and resources." Contrary to the federal approach, the court also held that this failure could not be cured by the agency's subsequent adoption of rules detailing the weight to be given to each factor. The agency was

27. 372 So. 2d 913 (Fla. 1979) (clarified on rehearing denial).
29. The court also rejected the suggestion by Professor Davis that delegation analysis should be abandoned as futile and instead the courts should focus on "proce-

30. Fla. STAT. §§ 380.05(1)-(2), (5)-(10), (12) (1975).
31. Cross Key, 372 So. 2d at 918-19.
32. Id. at 918, 925. See also Florida State Bd. of Architecture v. Wasserma, 377 So. 2d 653, 656 (Fla. 1979).
34. This is one of the critical distinctions between the Cross Key approach and that of the federal courts. The federal courts have permitted gap filling by administr-
\n\nive regulations in order to avoid holding a statute was an unconstitutional delegation. E.g., Yakus v. United States, 321 U.S. 414 (1944); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (requiring the adoption of regulations to save the statute from being declared unconstitutional). See also Zemmel v. Russ, 381 U.S. 1 (1965) (using past administrative practice which narrowed the scope of standard statutory language to save the statute from being declared unconstitutional).

not "fleshing out" policy choices already determined by the legislature; it was making such choices as an initial matter, and such action constituted an unconstitutional forfeiture of the legislative role to the agency. In Cross Key, the court noted the material difference between an agency "administer[ing] a legislatively articulated policy ... [and] an administrative body [exercising] the power to establish fundamental policy." Under the Florida Constitution, the former was constitutionally permissible, while the latter was not.

In the aftermath of Cross Key, the delegation issue gained a re-

newed vitality in Florida. For example, in Florida Home Builders As-

sociation v. Division of Labor, the court held that the legislature had

35. Cross Key, 372 So. 2d at 920-21. See also Wasserman, 377 So. 2d at 77.
36. Cross Key, 372 So. 2d at 924. Distinguishing between these two types of administrative acts is not always an easy one to perceive. Compare infra text accompanying notes 39-52 with text accompanying notes 53-76.
37. In part the court rejected adopting the federal or Davis approaches to the delegation question because the Florida Constitution provided an express textual com-

mand concerning delegation of powers. Cross Key, 372 So. 2d at 925; Id. at 925-26 (England, C.J., concurring). "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appurtenant to either of the other branches unless expressly pro-

vided therein." FLA. CONST. ART. II, § 3.
38. See, e.g., In re Advisory Opinion to the Governor, 509 So. 2d 292, 311-12 (Fla. 1987) (unsuccessfully). Orr v. Trask, 464 So. 2d 131, 134-35 (Fla. 1985) reh'g denied (unsuccessful). Sanicola v. State, 384 So. 2d 152, 153 (Fla. 1980) (unsuccess-

fully); Transgulf Pipeline Co. v. Board of County Comm'rs of Garden City, 438 So. 2d 876, 880 (Fla. 1st Dist. Ct. App. 1983) reh'g denied (in part upholding delegation of quasi-judicial authority because of article V section 1 of the Florida Constitution). Even in cases where the issue was not raised, courts began noting possible constitu-

tional flaws in statutes based upon delegation doctrine concerns. In Freedman v. State Board of Accountancy, the court noted in dicta that the provision of the statute granting the Board discretion to determine whether a school which granted a degree was accredited for purposes of determining whether a person was eligible to become a certi-

fied public accountant was arguably an unconstitutional delegation of legislative authority. 370 So. 2d 1168, 1169-70 (Fla. 4th Dist. Ct. App. 1979). In Rogers v. Board of Medical Examiners, the court noted in dicta that the power of the Board to deter-

mine that certain medical practices were unprofessional involved a constitutionally imper-

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Askew v. Cross Key Waterways, 27 the Florida Supreme Court resoundingly rejected the federal approach, 28 to delegation issues - in language which often resembled it - but with a tone that established a fundamental difference in meaning. 29 In Cross Key, the court found that the statute at issue was "so lacking in guidelines that neither the agency nor the court ... [could] determine whether the agency ... [was] carrying out the intent of the legislature." 30 The court opined that such a statute in effect prevents the courts from performing their constitutional role of determining "whether the administrative agency ... [had] performed consistently with the mandate of the legislature." 31 The constitutional flaw in these statutes was not that the legislature failed to adequately articulate the criteria the agency was to apply, but that the legislature failed to adequately delineate how these criteria were to be weighed in deciding "priorities among competing areas and resources." 32 Contrary to the federal approach, the court also held that this failure could not be cured by the agency's subsequent adoption of rules detailing the weight to be given to each factor. 33 The agency was

27. 372 So. 2d 913 (Fla. 1979) (clarified on rehearing denial).
29. The court also rejected the suggestion by Professor Davis that delegation analysis should be abandoned as futile and instead the courts should focus on "procedural safeguards." Cross Key, 372 So. 2d at 922-23. Cross Key actually reaffirmed the continuing validity of a line of cases dating back to the turn of the century. E.g., State v. Atlantic Coastline Ry. Co., 56 Fla. 617, 47 So. 969 (1908); Bailey v. Van Peursem, 31 Fla. 337, 82 So. 789 (1919). See generally Martin, Legislative Delegations of Power and Judicial Review - Preventing Judicial Impotence, 8 Fla. St. U.L. Rev. 43 (1980).
31. Cross Key, 372 So. 2d at 918-19.
32. Id. at 918, 925. See also Florida State Bd. of Architecture v. Wasserman, 377 So. 2d 653, 656 (Fla. 1979).
34. This is one of the critical distinctions between the Cross Key approach and that of the federal courts. The federal courts have permitted gap filling by administrative regulations in order to avoid holding a statute was an unconstitutional delegation. E.g., Yakus v. United States, 321 U.S. 414 (1944); Amalgamated Meat Cutters v. Connally, 327 F. Supp. 737 (D.D.C. 1971) (requiring the adoption of regulations to save the statute from being declared unconstitutional). See also Zemel v. Rusk, 381 U.S. 1 (1965) (using past administrative practice which narrowed the scope of standardless statutory language to save the statute from being declared unconstitutional).

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In the aftermath of Cross Key, the delegation issue gained a renewed vitality in Florida. 38 For example, in Florida Home Builders Association v. Division of Labor, 39 the court held that the legislature had

35. Cross Key, 372 So. 2d at 920-21. See also Wasserman, 377 So. 2d at 77.
36. Cross Key, 372 So. 2d at 924. Distinguishing between these two types of administrative acts is not always an easy one to perceive. Compare infra text accompanying notes 39-52 with text accompanying notes 53-76.
37. In part the court rejected adopting the federal or Davis approaches to the delegation question because the Florida Constitution provided an express textural command concerning delegation of powers. Cross Key, 372 So. 2d at 924, Id. at 925-26 (England, C.J., concurring). "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided therein." Fla. Const. art. II, § 3.
38. See, e.g., In re Advisory Opinion to the Governor, 509 So. 2d 292, 311-12 (Fla. 1987) (unsuccessfully); Orr v. Trask, 464 So. 2d 131, 134-35 (Fla. 1985)rehg denied (successfully); Sanscola v. State, 384 So. 2d 152, 153 (Fla. 1980) (unsuccessfully); Transgulf Oil Co. v. Board of County Comrs' of Gadsden County, 438 So. 2d 876, 880 (Fla. 1st Dist. Ct. App. 1983)rehg denied (in part upholding delegation of quasi-judicial authority because of article V section 1 of the Florida Constitution). Even in cases where the issue was not raised, courts began noting possible constitutional flaws in statutes based upon delegation doctrine concerns. In Freedman v. State Board of Accountancy, the court noted in dicta that the provision of the statute granting the Board discretion to determine whether a school which granted a degree was accredited for purposes of determining whether a person was eligible to become a certified public accountant was arguably an unconstitutional delegation of legislative authority. 370 So. 2d 1168, 1169-70 (Fla. 4th Dist. Ct. App. 1979). In Rogers v. Board of Medical Examiners, the court noted in dicta that the power of the Board to determine that certain medical practices were unprofessional involved a constitutionally impermissible delegation of legislative power. 371 So. 2d 1035, 1042 (Fla. 1st Dist. Ct. App. 1979)rehg denied. But see Bryan v. State Bd. of Medical Examiners, 381 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1980) (The court held the statute did not involve an unconstitutional delegation of authority, because as interpreted by the board, it properly restricted its authority.). See generally Martin, supra note 29; Comment, Florida's Adherence to the Doctrine of Nondelegation of Legislative Power, 7 Fla. St. U.L. Rev. 541 (1979) (commenting favorably on the Florida position).
improperly delegated legislative power to an administrative agency. The legislature had authorized the Division of Labor's Bureau of Apprenticeship to grant a request for registration of an apprenticeship program whenever the Bureau determined there was a need for such a program and the employer making the request had complied with all the appropriate state regulations. The court found the statute was constitutionally flawed because it delegated undefined discretion to the Bureau to determine what constituted "need" under the statute. The court reasoned that the concept of separation of powers under the Florida Constitution required the legislature to limit delegated discretionary authority by establishing in the statute "an appropriately detailed legislative statement of standards and policies to be followed" in exercising the delegated discretion. The statute did not provide a sufficient statement of standards and policies to guide the Bureau in exercising the discretion delegated to it by the legislature because the term "need" was so vague and encompassed so many possible definitions. This made it impossible for the court to determine if the Bureau was acting consistent with the legislative mandate in administering the apprenticeship registration program.

Similarly, in Department of Business Regulation v. National Manufacturing Federation, Inc., the court held that a statute, which created the State Mobile Home Tenant-Landlord Commission and delegated to it the power to regulate rents charged in mobile home parks, was an unconstitutional delegation of legislative authority because it was so lacking in guidelines that the courts could not determine whether the Commission was carrying out the intent of the legislature in implementing the statute. Such statutes must be declared unconstitutional, because to do otherwise would permit administrative agencies to form public policy independent of the legislature. Here, the legislature was attempting to balance the competing interests of the owners and tenants of mobile home parks. The legislature may adopt a policy balancing those interests, but it cannot - as it did here - delegate to an administrative agency the task of "striking this balance between mobile home park owner and mobile home park tenant, without any meaningful guidance." The guidelines provided in two parts of the statute used general terms which were subject to a variety of meanings. The flaw was that the legislature failed to specify which of the possible diverse meanings should be used by the agency in administering the statute. Thus, the critical decision of what balance between the competing interests the legislature intended to impose was left to the unbounded discretion of the agency.

Cases such as Florida Home Builders and National Manufacturing Federation, which focused on definitional vagueness or the failure to adequately specify the precise balancing process an agency should use in applying a statute, threatened the continued efficacy of administrative agencies. In subsequent cases, courts were reading Cross Key as requiring the legislature to precisely define the scope of agency authority even when impractical to do so or inconsistent with the flexibility the legislature believed the agency needed to deal with a problem.
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48. Id. at 1137.
49. Id. at 1135.
51. National Mfg. Fed’n, 370 So. 2d at 1136. The court noted in dicta that the failure of the legislature to limit the duration of this extraordinary statutory scheme was also a constitutional flaw. Id. at 1137.
52. These cases functionally read the pith of Cross Key as requiring “[t]he reasons of the statute as to the lawful existence of a particular power that is being exercised by an administrative agency is to be resolved against its exercise.” Fraternal Order of Police v. City of Miami, 492 So. 2d 1122, 1223 (Fla. 3d Dist. Ct. App. 1986)reh’g denied.
53. See In re Advisory Opinion to the Governor, 509 So. 2d 292, 311-12 (Fla. 1987); Solimena v. Department of Business Regulation, 402 So. 2d 1240, 1243 (Fla. 3d Dist. Ct. App. 1987)reh’g denied. It also was an approach at war with the court’s basic presumption that all doubts as to constitutionality of a statute should be resolved in favor of the holding the statute constitutional.

While it is an essential element in the character of an independent judiciary firmly to maintain and resolutely to exercise its appropriate powers when properly invoked, it is equally its duty to be careful not rashly and inconsiderately to trench upon or invade the precincts of the other departments of the government. [T]he [judicial] power to determine whether a statute be or not be constitutional . . . is a most grave and important power, not to be exercised lightly or rashly, nor in any case where it cannot

41. Fla. Const. art. II, § 3.
42. Florida Home Builders, 367 So. 2d at 220 (citing Askew v. Cross Key Waterway, 372 So. 2d 913 (Fla. 1979)reh’g denied. See also Bigler v. Department of Banking & Finance, 368 So. 2d 449, 450-51 (Fla. 1st Dist. Ct. App. 1979).
43. Florida Home Builders, 367 So. 2d at 220.
44. Id.
45. 370 So. 2d 1132 (Fla. 1979).
47. National Mfg. Fed’n, 370 So. 2d at 1135.
The courts were not insensitive to these concerns, but the question was how to harmonize them with the approach to delegation issues dictated by Cross Key and its progeny. In Florida State Board of Architecture v. Wasserman, the court limited the impact of its definition of vague interpretation of the Cross Key decision. It held that "when the legislature established the requirement that an applicant be a "graduate of a school or college of architecture," it did so with reference to a definite conception of what a school or college of architecture is." This implied incorporation-by-reference of generally agreed upon standards for a professional school saved the admittedly vague language from transgressing the delegation doctrine.

In such a case, it was possible to determine to a reasonable degree of certainty what the legislature intended. In other cases, the court noted that the legislature did not offend the delegation doctrine when it incorporated by implicit or explicit reference - a provision of existing federal law as part of a state statute. Such an incorporation, like generally

be made to appear plainly that the Legislature has exceeded its powers. If there exists upon the mind of the court a reasonable doubt, that doubt must be given in favor of the law.

Cotten v. County Comm'n of Leon County, 6 Fla. 610, 613 (Fla. 1856). See, e.g., Transgulf Pipeline Co. v. Board of County Comm'n of Garden City, 438 So. 2d 876, 878 (Fla. 1st Dist. Ct. App. 1983)rehg'd denied.


55. 377 So. 2d 653 (Fla. 1979).

56. Justices Sundberg and England dissented from the reading of the statute as not offending the delegation doctrine. Id. at 657 (Sundberg, J., dissenting).

57. Id. at 657.

58. Id. at 656-57. See also Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So. 2d 815, 819-20 (Fla. 1983)rehg'd denied; Moorehead v. Department of Professional Regulation, 503 So. 2d 1319, 1320-21 (Fla. 1st Dist. Ct. App. 1987).


61. It also permitted the court to apply a clarified principle of statutory construction in cases which questioned the constitutional validity of a statute. "[I]f the statute is susceptible to more than one interpretation, courts must adopt the constitutional construction. State v. Deese, 495 So. 2d 286, 287 (Fla. 2d Dist. Ct. App. 1986).


63. Florida Home Builders, 367 So. 2d at 220.

64. Bigler, 368 So. 2d at 450-51. See also Gulfstream Park Racing Assoc. v. Department of Business Regulation, 441 So. 2d 627 (Fla. 1983) (licensing as one of these circumstances); Burgas v. Department of Commerce, 436 So. 2d 356, 358 (Fla. 1st Dist. Ct. App. 1983)rehg'd denied.

65. Bigler, 368 So. 2d at 451. See also Miccosukee, Inc. v. Public Serv. Comm'n, 483 So. 2d 415, 419 (Fla. 1986) (Court found the legislature "made the fundamental and primary decision" and left implementation to the Public Service Commission.; Rosado v. State, 401 So. 2d 1107 (Fla. 1981); State v. Cain, 381 So. 2d 1361, 1367-68 (Fla. 1980) (The court rejected the argument the the delegation of authority to a prosecutor to decide whether to try a juvenile as an adult in light of a public interest standard was an unconstitutional delegation of legislative authority. While it is not entirely clear from the opinion, this decision appears to be based on finding the prosecutorial function is an executive department power.).

66. 490 So. 2d 142 (Fla. 1st Dist. Ct. App. 1986).
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60. Riggins v. State, 369 So. 2d 948, 949 (Fla. 1979); Capeletti Bros. v. Department of Transp., 490 So. 2d 855, 857 (Fla. 1st Dist. Ct. App. 1987)reh'g denied (Reference to federal law in state statute held to allow agency to adopt its authority in adopting a rule). See Department of Revenue v. Skop, 383 So. 2d 678, 679-80 (Fla. 5th Dist. Ct. App. 1980)reh'g denied (incorporation by reference of federal law in agency rule). Cf. Okaloosa-Walton Jr. College Bd. of Trustees v. Florida Public Employees Relations Comm'n, 372 So. 2d 1378, 1381 (Fla. 1st Dist. Ct. App. 1979) (The court approved of the use of precedent from other jurisdictions in guiding administrative interpretation and application of a similar statute in Florida.).

61. It also permitted the court to apply a cherished principle of statutory construction in cases which questioned the constitutional validity of a statute. "[I]f the statute is susceptible to more than one interpretation, courts must adopt the constitutional construction." State v. Deese, 495 So. 2d 286, 287 (Fla. 2d Dist. Ct. App. 1986).


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unconstitutional. The court found that "[t]he statutes confer[red] permissible administrative discretion on the Department of Education ... to administer ... [the] programs, they d[id] not enable ... [it] to 'say what the law is.'" The statutes contained an adequate statement of policy and criterion and in conjunction with the rules adopted by the Department of Education insured that there was no "arbitrary exercise of discretion." This signaled the adoption of a malleable reading of the Cross Key position that subsequent agency regulations should not be considered in determining whether an act transgressed the delegation doctrine. At least in some circumstances, the courts were willing to take subsequent agency regulations into account when resolving the delegating issue.

The final example of the shift in reading of Cross Key is Florida Canners Association v. Florida Department of Citrus. In Florida Canners, the court held constitutional the legislature's delegation of the responsibility to advertise Florida Citrus to the Department of Citrus. The legislature had also delegated to the Department the power to promulgate rules necessary and proper to the implementation of its advertising duties and powers. The court held that this vague and general rule-making power did not violate the delegation doctrine because of the emphasis the legislature placed on limiting the advertising power to Florida grapefruit or citrus. In doing so, the legislature merely delegated to the Department of Citrus the power necessary to carry out its duties under the statute. This power was executive or ministerial in nature and for the purpose of "accomplish[ing] ... clearly stated legislative objective[s]." This delegation of general authority to promulgate rules and regulations did not offend the concept of separation of powers because the legislative objectives for which the power was used were clearly defined in other sections of the statute, in "an appropriately detailed legislative statement of standards and policies to be followed."

What emerged from these cases was a rejection by the courts of the formalistic approach to resolving delegation issues apparently endorsed in Florida Home Builders and National Manufacturing Federation. In its place, the courts substituted a more pragmatic inquiry: "whether ... the legislature ha[d] 'legislated as far as practicable'" from the court's perspective. This is a perspective which has turned

75. Id. at 512.
76. Florida Canners, 371 So. 2d at 512-13. The court also rejected challenges to the rule based upon the constitutional principles of substantive due process, dormant commerce clause and freedom of expression. Id. at 513-19.
77. Florida Home Builders, 367 So. 2d at 230.
78. How far this new pragmatism extends is not entirely clear. The First District Court of Appeals has suggested on several occasions that it may be limited to two categories of cases: (1) when the subject of the statute relates to licensing and the determination of the fitness of an applicant to be licensed, and (2) when the statute regulates businesses operated as a privilege rather than a right which are potentially dangerous to the public. Florida Waterworks Ass'n v. Florida Public Serv. Comm'n, 473 So. 2d 237, 245 (Fla. 1st Dist. Ct. App. 1985). See also Burgos v. Department of Commerce, 416 So. 2d 356 (Fla. 1st Dist. Ct. App. 1983) review denied, 447 So. 2d 885 (Fla. 1984); Department of Business Regulation v. Jones, 474 So. 2d 359 (Fla. 1st Dist. Ct. App. 1985).

Even under this less rigid application of the delegation doctrine, there remain certain legislative powers which - no matter how detailed the guidelines - may not be delegated by the legislature. For example, only the legislature - through the exercise of its legislative power - can create a tax. Hausman v. VTSI, Inc., 482 So. 2d 428, 430 (Fla. 5th Dist. Ct. App. 1986) reh'g denied. This power may not be delegated to an agency. See id. at 430; Anderson v. Department of Revenue, 381 So. 2d 1083, 1086 (Fla. 3d Dist. Ct. App. 1980) reh'g denied. Of course, taxing statutes may be interpreted or implemented by an administrative agency. Anderson, 381 So. 2d at 1087. See also Pioneer Oil Co. v. Department of Revenue, 381 So. 2d 263, 264 (Fla. 1st Dist. Ct. App. 1980) (per curiam) reh'g denied. In Winfield v. Division of Part-Mutuel Wagering, the court noted that the delegation of subpoena power to an agency to conduct investigations into misconduct in the part-mutuel industry was not "an impermissible
unconstitutional. The court found that "[i]t is the states' prerogatives to permit or prohibit administrative discretion on the part of the regulation and to establish programs and to 'say what the law is.'" The statutes contained an adequate statement of policy and criterion in conjunction with the rules adopted by the Department of Health. It was noted that there was no "arbitrary exercise of discretion." This signaled the adoption of a more realistic reading of the Cross Key position that subsequent agency regulation should not be considered in determining whether an act was consistent with the delegation doctrine. At least in some circumstances, the courts were willing to take subsequent agency regulations into account when resolving the delegation issue.

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the delegation doctrine from the course suggested in *Cross Key* and aligned it more closely with the approach used by the federal courts.\(^8\)

However, it is important to note that the spirit of the *Cross Key* decision remains alive and well in Florida jurisprudence, and still may be used to strike down legislative acts delegating authority to administrative agencies with inane standards.\(^9\)

**Subdelegation and Delegation to Private Persons**

As a general rule, an agency may not delegate to another entity the duties and responsibilities assigned to it by the legislature absent express authorization from the legislature to do so.\(^8\) Representative of how this approach is rigorously applied by the courts is *Gulfstream Park Racing Association v. Department of Business Regulation*, where the court held even subdelegation within a department may require an express authorization by the legislature.\(^\) In *Gulfstream*, the court found the legislature had not authorized the Florida Pari-mutuel Commission to delegate its authority over racing dates to a division of the Department of Business Regulation.\(^\) Absent an express legislative authorization for such an act, the court viewed such subdelegation as beyond the powers delegated to the commission. Despite the general rule requiring express legislative authorization of subdelegation, the courts on rare occasions found it was provided for by implication. In *Osceola County v. St. Johns River Water Management District*,\(^\) the court held that the legislature implicitly authorized the Department of Environmental Regulation to delegate its authority to the water management districts to order inter-district transfers of water.\(^\) The court found any other reading of the statutes would have effectively deprived the department of its authority over statewide water management decision contrary to the clear intent of the statutory scheme.

It is a generally accepted principle of administrative law that the legislature may not delegate legislative authority to nongovernmental entities or persons.\(^\) In *Tribune Company v. School Board of Hillsborough County*,\(^\) the court quite correctly distinguished between the delegation of legislative function to a private person and the legislative creation of a right or privilege to be exercised by a private person: the former would violate the delegation doctrine; the latter would not. The court determined that a special legislative act governing teacher disciplinary proceedings in Hillsborough County did not involve an improper delegation of legislative authority to the teacher subject to a disciplinary action. The statute provided that a teacher subject to disciplinary proceedings under the statute could opt to have the disciplinary hearing open or closed to the public. The court found that the discretion granted the teacher did not involve any exercise of law-making authority. The teacher was merely exercising a specific right conferred by the legislature.\(^\) Justices Adkins\(^\) and Boyd,\(^\) however, in dissenting opinions, argued this was an unconstitutional delegation of authority over a public matter to a private person.

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80. Changes in the membership of the Florida Supreme Court over the years may account for this. Justices Atkins, Boyd, England and Sundberg, who often wrote opinions expressing their concerns over questions of power issues and the delegation problem in particular, have retired or resigned from the bench. E.g., supra note 36, 90-91. Cf. Atkins, Samuel and Crockett, *Eighteen Years in the Judicial Cathedral*, 11 NOVA L. REV. 1, 15-17 (1986).

81. See *Orr v. Trask*, 464 So. 2d 131, 134-35 (Fla. 1985) *reh'd* denied.

82. *School Bd. of Pinellas County v. Noble*, 384 So. 2d 205, 206 (Fla. 1st Dist. Ct. App. 1980). See also *Fraternal Order of Police v. City of Miami*, 492 So. 2d 1122, 1223 (Fla. 3d Dist. Ct. App. 1986) *reh'd* denied. (The court held the legislature never authorized the Public Employees Relations Commission to delegate any of its functions or duties to an arbitration process.) "we'd an other grounds," City of Miami v. *Fraternal Order of Police*, 511 So. 2d 549 (Fla. 1987) (viewed as a contract matter, not implicating the statutory duties of the commission concerning unfair labor practices and thus involving no issue of subdelegation); *Upjohn Healthcare Serv., Inc. v. Department of Health and Rehabilitative Servs.*, 496 So. 2d 147, 149 (Fla. 1st Dist. Ct. App. 1986) *reh'd* denied; *Knight v. Wright*, 381 So. 2d 733, 733-34 (Fla. 3d Dist. Ct. App. 1980) (The court held the duties of county tax collector could only be delegated to a deputy county tax collector. Because there was no such office in this county the delegation was improper.)

83. 441 So. 2d 627 (Fla. 1983).

84. Id. at 629. In fact it had expressly prohibited it. See also Fla. Stat § 550.011(1) (1987).
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85. 486 So. 2d 616 (Fla. 1st Dist. Ct. App. 1986)rehg denied.
86. Id. at 619-20.
87. E.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936); Allen v. California Bd.
1972).
88. 367 So. 2d 627 (Fla. 1979).
89. Id. at 628.
90. Id. at 629-30 (Adkins, J., dissenting).
91. Id. at 630 (Boyd, J., dissenting.)
Separation of Powers Prohibiting the Usurpation of Functions

It is a traditional maxim of administrative law that certain core functions of the executive and judiciary cannot be delegated to administrative agencies, just as the legislature may not delegate its law making function. In Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, the court, in dicta, noted that the resolution of a dispute over the meaning of a private contract was an inherently judicial function which cannot be constitutionally delegated to an administrative agency. In Phillips v. Board of Pardons, the court held that the APA did not apply to the exercise of the executive branch’s constitutional power to “commute sentences.” The legislature may not invade this executive function by imposing the requirements of the APA on its exercise.

Florida Bar v. Moses presented an interesting question in this area concerning the extent of the Florida Supreme Court’s authority over the practice of law. The court found that representing individuals in an agency proceeding constituted the practice of law. The critical question was whether the legislature could authorize non-lawyers to practice law before agencies or whether this constituted an unlawful invasion of the judicial power to regulate the legal profession. The resolution of this question involved clarifying the line dividing the judicial and legislative powers. On the one hand, the court was constitutionally authorized to regulate the legal profession and prohibit the unauthorized practice of law. On the other, the legislature created and controlled the practices and procedures of administrative agencies. The court noted that separation of powers principles prohibited it from interfering with the legislature’s control over agencies. In light of the principles and the nature of the legislative authority under the Florida Constitution, the court held the legislature may authorize non-lawyers to practice law before administrative agencies.

A second issue in Moses was whether this rule-making power was lawfully invoked by the Public Employees Relations Commission. The court noted that the legislature, in enacting Florida Statutes Section 120.62(2), authorized agencies to adopt rules providing for non-lawyers to represent others before agencies. The Public Employees Relations Commission had promulgated a rule, pursuant to legislative authority, that permitted non-lawyers to represent individuals in...
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93. The Florida Constitution explicitly distinguishes between judicial and quasi-judicial authority. FLA. CONST. art. V, § 1. The precise nature of the distinction between the two powers is unclear. E.g., Florida Motor Lines, Inc. v. Railroad Comm'n, 100 Fla. 534, 129 So. 876 (1930).

94. It is clear the Florida courts do not consider the aggregation of executive, legislative and judicial functions in one body as a violation of the separation of powers principle or due process. E.g., Kochler v. Florida Real Estate Comm'n, 390 So. 2d 731 (Fla. 1980).


96. 371 So. 2d 152 (Fla. 1st Dist. Ct. App. 1979) (reh'g denied).

97. Id. at 154. See also Buchanan v. State, 483 So. 2d 537 (Fla. 2d Dist. Ct. App. 1986) (The court held that the determination of the restitution amount was an inherent judicial function which could not be delegated.). But cf. Brevard Federation of Teachers, Local 2098 v. School Bd. of Brevard County, 372 So. 2d 169 (Fla. 4th Dist. Ct. App. 1979) (The court approved a statute which authorized parties to use an arbitrator to interpret a contract.).


99. FLA. CONST. art. IV § 8.


101. 380 So. 2d 412 (Fla. 1980) (per curiam).

102. Id. at 416.

103. "The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." FLA. CONST. art. V, § 15.

104. Moses, 380 So. 2d at 417.

105. Id. While the court's statement was quite broad, it obviously did not mean that the courts were excluded from reviewing the constitutionality of the legislature's decisions concerning administrative agencies. An interesting point is why did it not hold this was an invasion of the court's powers by the legislature. Nothing in the language of Article V prohibits such a result; Article V § 1 merely authorizes the legislature to create non-court entities which exercised quasi-judicial power. FLA. CONST. art. V § 1.

106. Id.

107. "Any person compelled to appear, or who appears voluntarily, before any hearing officer or agency in an investigation or in any agency proceeding has the right, at his own expense, to be accompanied, represented, and advised by counsel or other qualified representatives." FLA. STAT. § 120.62(2) (1987).

108. Moses, 380 So. 2d at 418.
commission proceedings. The court found the commission, in promulgating its rule, failed to establish the standards by which it would judge whether a non-lawyer was a "qualified" representative. This lack of standards proved fatal to the validity of the rule. In promulgating such a rule, the agency acted beyond the scope of its delegated authority, because the legislature never authorized the commission to adopt such a standardless rule governing the practice of law before it by non-lawyers.

Accountability: Was the Agency Acting Within the Scope of its Authority?

Even if the delegation of authority to an agency was constitutionally valid, the issue still remains, as indicated by Moses, of whether the actions of the agency are within the scope of its delegated authority. The courts, through their judicial review function, ensure that the rule making or adjudicatory power of agencies is used only for purposes approved by the legislature. Actions by an agency inconsistent with legislative purposes or beyond the scope of the agency's authority are considered ultra vires and without legal effect. With the decline of the delegation doctrine as a constitutional check, the court's role in holding agencies accountable through the enforcement of the statutory limitations on their power, is extraordinarily important.

109. Id.
111. Moses, 380 So. 2d at 418.
115. See, e.g., Department of Revenue v. Silver Springs Shores, Inc., 376 So. 2d 849, 850 (Fla. 1979) (per curiam).
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Generally, in determining the scope of powers delegated to agencies, the courts are willing to use a pragmatic implied powers approach to statutory interpretation. Such an approach avoids an unnecessarily cramped reading of the legislative intent which, in many cases, would cripple an agency's ability to perform its delegated task. In Florida Canners Association v. Florida Department of Citrus, the court, in addition to holding that the delegation of authority to the Department of Citrus did not violate the delegation doctrine, also decided that the Department of Citrus had not exceeded its delegated authority in promulgating rules which required the word "Florida" or the words "A Product of the Florida Sunshine Tree" to appear on all retail containers of 100% Florida grapefruit products packed in Florida. The act granted the Department of Citrus the power to conduct advertising campaigns to promote Florida citrus. The legislature delegated to the Department of Citrus the power to promulgate rules necessary and proper to the implementation of its advertising duties and powers.

The court held that the rule-making power impliedly authorized the Department of Citrus to adopt the labeling requirement so it could properly fulfill its assigned advertising duties. Thus, the scope of the overall power of the Department of Citrus was not exceeded when it adopted the labeling rule.

Similarly, in State Board of Education v. Nelson, the court held the granting by the legislature of the power to establish standards for the issuance of a teaching certificate included the implied power to

https://nsuworks.nova.edu/nlr/vol12/iss2/2
commission proceedings. The court found the commission, in promulgating its rule, failed to establish the standards by which it would judge whether a non-lawyer was a "qualified" representative. This lack of standards proved fatal to the validity of the rule. In promulgating such a rule, the agency acted beyond the scope of its delegated authority, because the legislature never authorized the commission to adopt such a standardless rule governing the practice of law before it by non-lawyers.

Accountability: Was the Agency Acting Within the Scope of Its Authority?

Even if the delegation of authority to an agency was constitutionally valid, the issue still remains, as indicated by Moses, of whether the actions of the agency are within the scope of its delegated authority. The courts, through their judicial review function, ensure that the rule making or adjudicatory power of agencies is used only for purposes approved by the legislature. Actions by an agency inconsistent with legislative purposes or beyond the scope of the agency's authority are considered ultra vires and without legal effect. With the decline of the delegation doctrine as a constitutional check, the court's role, in holding agencies accountable through the enforcement of the statutory limitations on their power, is extraordinarily important.

Generally, in determining the scope of powers delegated to agencies, the courts are willing to use a pragmatic implied powers approach to statutory interpretation. Such an approach avoids an unnecessarily cramped reading of the legislative intent which, in many cases, would cripple an agency’s ability to perform its delegated task. In Florida Canners Association v. Florida Department of Citrus, the court, in addition to holding that the delegation of authority to the Department of Citrus did not violate the delegation doctrine, also decided that the Department of Citrus had not exceeded its delegated authority in promulgating rules which required the word "Florida" or the words "A Product of the Florida Sunshine Tree" to appear on all retail containers of 100% Florida grapefruit products packed in Florida. The act granted the Department of Citrus the power to conduct advertising campaigns to promote Florida citrus. The legislature delegated to the Department of Citrus the power to promulgate rules necessary and proper to the implementation of its advertising duties and powers. The court held that the rule-making power impliedly authorized the Department of Citrus to adopt the labeling requirement so it could properly fulfill its assigned advertising duties. Thus, the scope of the overall power of the Department of Citrus was not exceeded when it adopted the labeling rule.

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109. Id.
110. FLA. STAT. § 120.62(2) (1987).
111. Moses, 380 So. 2d at 418.
112. Florida Canners; 371 So. 2d at 512-13.
114. See, e.g., Department of Revenue v. Silver Springs Shores, Inc., 376 So. 2d 849, 850 (Fla. 1979) (per curiam).
115. See Hausman v. VTSI, Inc., 482 So. 2d 428, 430 (Fla. 5th Dist. Ct. App. 1986) reh’g denied (act beyond taxing authority delegated); Raben v. Board of Polk Comm’n, 497 So. 2d 1245, 1248-49 (Fla. 1st Dist. Ct. App. 1986) reh’g denied.
116. Supra text accompanying notes 53-81.
117. The courts characterize this accountability inquiry as requiring [to] successfully challenge a rule promulgated by an agency in the exercise of its delegated legislative authority the challenger must make [one of these] three showings: (1) that the agency adopting the rule has exceeded its authority, [or] (2) that the requirements of the rule are inappropriate to the ends specified in the legislative act, . . . [or] (3) that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation but are arbitrary and capricious.

118. 371 So. 2d 503 (Fla. 2d Dist. Ct. App. 1979).
119. Supra text accompanying notes 71-77.
120. Id. at 506-07. The rule was promulgated to assist in increasing the demand for Florida grapefruit of which there was an oversupply. Id. at 507.
121. Id. at 508-09; FLA. STAT. § 601 (1977) and FLA. STAT. § 601 (Supp. 1978).
123. This conclusion turned on the emphasis the legislature placed on the advertising power as limited to Florida grapefruit or citrus. Florida Canners, 371 So. 2d at 510.
124. Id. at 512.
125. 372 So. 2d 114 (Fla. 1st Dist. Ct. App. 1979) reh’g denied.
mulgate rules regarding the revocation of such a certificate. The court noted that implied powers will be found only where necessary to the achievement of the legislative purpose by "fair implication." The implied powers concept was applied to procedural matters in Hall v. Career Service Commission, where the court held that agencies, under the APA adjudication procedures, had the implied authority to grant extensions of time on matters which were not jurisdictional in nature.

The implied powers view of the scope of delegated authority should not be read as judicial approval of an open ended perspective on the scope of agency powers. It should be viewed as a doctrine with limited impact on the scope of legislatively delegated authority if not, it would run afoul of the delegation doctrine. In a series of cases, the courts have demonstrated the limits of the implied powers view of delegated authority, particularly where the agencies are perceived to be attempting to expand their jurisdiction.

From the court's perspective, Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, involved an agency's attempt to expand its jurisdiction beyond that authorized by the legis-

126. Id. at 115-16.
127. Id. at 116. In Osceola County v. St. Johns River Water Management District, the court held that the legislature impliedly authorized the Department of Environmental Regulation to authorize inter-district transfer of water: 486 So. 2d 416, 419 (Fla. 1986). See also Orlando Utilities Comm'n v. State, 478 So. 2d 341 (Fla. 1985) (scope of bonding authority); Department of Professional Regulation v. Florida Assoc. of Professional Land Surveyors, 481 So. 2d 58 (Fla. 1st Dist. Ct. App. 1985) (per curiam). But see Osceola County, 486 So. 2d at 620-22 (Sharp, J., dissenting) (no implied power for such transfers).
129. Id. at 1112-13.
130. E.g., Lee v. Department of Transp., 366 So. 2d 116 (Fla. 1st Dist. Ct. App. 1979) reh'g denied (The court held the Department of Transportation promulgated a rule which was beyond the scope of its statutory authority); Commission on Ethics v. Sullivan, 500 So. 2d 553, 554-55 (Fla. 1st Dist. Ct. App. 1986) (An agency had no inherent rule-making authority on substantive matters where it had been authorized to promulgate only procedure and practice rules). See also Fla. STAT. § 120.54(15)(1987). ("No agency has inherent rulemaking authority.")
131. See supra text accompanying notes 27-76.
132. E.g., Department of Transportation v. James, 403 So. 2d 1066, 1068 (Fla. 4th Dist. Ct. App. 1981); City of Jacksonville v. Altec, 434 So. 2d 271 (Fla. 1st Dist. Ct. App. 1984) reh'g denied.
133. 371 So. 2d 152 (Fla. 1st Dist. Ct. App. 1979) reh'g denied.
134. Id. at 154. See also Roth v. State, 378 So. 2d 794, 796 (Fla. 2d Dist. Ct. App. 1980) reh'g denied (The court held the Department of Resources acted beyond its delegated authority in adopting a rule which established a standard of less than probable cause for marine partot searches of a boat.)
135. 382 So. 2d 1280 (Fla. 1st Dist. Ct. App. 1980).
136. Id. at 1282.
137. Id. at 1284.
138. Id.
139. Id. at 1285. The court found that the existence of other statutes concerning the regulation and licensing of mental health care facilities reinforced this conclusion. See also Department of Health and Rehabilitative Serv. v. Florida Assoc. of Academic Nonpublic Schools, 510 So. 2d 1028 (Fla. 1st Dist. Ct. App. 1987) (rejected attempts to modify child care licensing standards on a similar basis). But see Florida Psychiatric Soc., 382 So. 2d at 1286 (Ervin, J., dissenting) (read the statutes as authorizing this type of regulation).
mulate rules regarding the revocation of such a certificate. The court noted that implied powers will be found only where necessary to the achievement of the legislative purpose by "fair implication." The implied powers concept was applied to procedural matters in Hall v. Career Service Commission, where the court held that agencies, under the APA adjudication procedures, had the implied authority to grant extensions of time on matters which were not jurisdictional in nature.

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From the court's perspective, Peck Plaza Condominium v. Division of Florida Land Sales and Condominiums, involved an agency's attempt to expand its jurisdiction beyond that authorized by the legislature. The court held the legislature had never authorized the Division to resolve disputes involving the interpretation of provisions in condominium agreements. The Division could not expand its jurisdiction by promulgation of a rule to engage in such regulatory activity. In Department of Health and Rehabilitative Services v. Florida Psychiatric Society, Inc., the court affirmed the order of a hearing officer that HRS lacked authority to promulgate rules regulating "'crisis stabilization' and 'intensive residential treatment' facilities as alternatives to inpatient care under the Florida Mental Health Act." HRS was "granted broad authority to carry out the purposes and intent of the legislature with respect to mentally ill persons . . .[but] nothing in the statutes authorizing programs or facilities" authorized the adoption of these rules. The rules adopted did not implement provisions of the Florida Mental Health Act, but amended it "by diverting persons eligible for services and treatment under the Act into an entirely different evaluation and treatment program." "Administrative regulations must be consistent with the statutes under which they are promulgated, and they may not amend, add to, or repeal the statute. The . . .[HRS] has no inherent authority, in the mental health field or any other, but only those powers specifically granted by statute." The rigorous enforcement of jurisdictional limits has changed the outcome of a variety of cases where an implied powers reading of the delegated statutory authority and would have saved the agency's action from being held ultra vires. In these cases, the courts treated the language as such a clear expression of legislative intent that there was no discretion left for an expansive reading of the delegated authority through the implied powers approach.

126. Id. at 115-16.
127. Id. at 116. In Osceola County v. St. Johns River Water Management Distri-
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ronmental Regulation to authorize inter-district transfer of water. 486 So. 2d 416, 419
(Fla. 3d Dist. Ct. App. 1986) aff'd, 504 So. 2d 385 (Fla. 1987). See also Orlando Utilities Comm'n v. State, 478 So. 2d 341 (Fla. 1985) (scope of bonding authority); Department of Professional Regulation v. Florida Assoc. of Professional Land Survey-
ors, 481 So. 2d 58 (Fla. 1st Dist. Ct. App. 1985) (per curiam). But see Osceola County, 486 So. 2d at 620-22 (Sharp, J., dissenting) (no implied power for such transfers).
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120.54(15) (1987). ("No agency has inherent rulemaking authority.").
131. See supra text accompanying notes 27-76.
132. E.g., Department of Transportation v. James, 403 So. 2d 1066, 1068 (Fla.
4th Dist. Ct. App. 1981); Grove Isle, Ltd. v. Department of Env'l Regulation, 454 So.
2d 571 (Fla. 1st Dist. Ct. App. 1984) reh'g denied.
133. 371 So. 2d 152 (Fla. 1st Dist. Ct. App. 1979) reh'g denied.
134. Id. at 154. See also Roth v. State, 378 So. 2d 794, 796 (Fla. 2d Dist. Ct.
App. 1980) reh'g denied (The court held the Department of Resources acted beyond its delegated authority in adopting a rule which established a standard of less than proba-
ble cause for marine patrol searches of a boat.).
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139. Id. at 1285. The court found that the existence of other statutes concerning the regulation and licensing of mental health care facilities reinforced this conclusion. Id. See also Department of Health and Rehabilitative Serv. v. Florida Assoc. of Acad-
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thorizing this type of regulation).
In Redford v. Department of Revenue,\(^{148}\) the court noted in dicta that the appraiser adjustment board "may hear appeals from the taxpayers on exemptions which the appraiser has denied and ... may review on its own volition or the motion of the appraiser any exemptions which have been granted. However, there is no provision in the law for the board on its own volition to review decisions of the appraiser not to grant exemptions."\(^{149}\) As a body exercising quasi-judicial power, the board could not lawfully expand its jurisdiction through the use of a review procedure not authorized by the statute. The board's attempted review of the appraiser's decision denying an exemption was viewed as an unlawful attempt by the board to expand its jurisdiction and was not permitted by the court.\(^{150}\) In Swebilius v. Florida Construction Industry Licensing Board,\(^{151}\) the court reversed the Florida Construction Industry Licensing Board's [FCILB] order suspending Swebilius's license as a construction contractor, because the FCILB lacked jurisdiction to hear the complaint against Swebilius. Under the statute governing construction contract licensing,\(^{152}\) the authority to investigate and hold hearings concerning alleged violations of the statutory standards for construction contractors is bifurcated between the FCILB and local contractor boards.\(^{153}\) If a local contractor board exists in an area, then such complaints must be heard by the local contractor board. The FCILB has jurisdiction in such cases only when no local board exists.\(^{154}\) In this case, because a local board existed, the FCILB improperly exercised jurisdiction over the complaint.\(^{155}\)

Administrative agencies are granted only the jurisdiction and powers conferred by the legislature. Neither an agency nor a party, through action or inaction, can expand the scope of the agency's jurisdiction.\(^{156}\)

149. Id. at 80. The court noted that "subject matter jurisdiction of the court [or agency] to hear a matter . . . may be attacked at any time." Id. at 1071 (quoting Pashkin v. Lombard, 279 So. 2d 79, 82 (Fla. 1st Dist. Ct. App. 1977) reh'g denied).
150. Seitz was discharged as a teacher in the Duval County School system for dereliction of duty. The discharge was affirmed as a valid exercise of the Board's authority over its employees. Seitz v. Duval County School Bd., 346 So. 2d 644 (Fla. 1st Dist. Ct. App. 1977). In its prior decision, the court specifically reserved for the PERC the determination of Seitz's claim that the Board had engaged in an unfair labor practice, but prohibited PERC from ordering Seitz reinstated even if it found the Board had engaged in an unfair labor practice. Id. at 647. Generally, if the PERC had jurisdiction, it would preempt the jurisdiction of the courts to resolve matters related to the issues before it. Local Union # 2135 v. City of Ocala, 371 So. 2d 583, 584 (Fla. 1st Dist. Ct. App. Ct. 1979).
151. Seitz, 366 So. 2d at 120-21. Seitz had also requested that the PERC award back pay as part of the reinstatement remedy. Id. at 121.
153. Seitz, 366 So. 2d at 121.
154. Id. at 121-22.
In Redford v. Department of Revenue, the court noted in dicta that the appraisal adjustment board "may hear appeals from the taxpayers on exemptions which the appraiser has denied and may review on its own volition or the motion of the appraiser any exemptions which have been granted. However, there is no provision in the law for the board on its own volition to review decisions of the appraiser not to grant exemptions." As a body exercising quasi-judicial power, the board could not lawfully expand its jurisdiction through the use of a review procedure not authorized by the statute. The board's attempted review of the appraiser's decision denying an exemption was viewed as an unlawful attempt by the board to expand its jurisdiction and was not permitted by the court. In Swethillius v. Florida Construction Industry Licensing Board, the court reversed the Florida Construction Industry Licensing Board's [FCILB] order suspending Swethillius's license as a construction contractor, because the FCILB lacked jurisdiction to hear the complaint against Swethillius. Under the statute governing construction contract licensing, the authority to investigate and hold hearings concerning alleged violations of the statutory standards for construction contractors is bifurcated between the FCILB and local contractor boards. If a local contractor board exists in an area, then such complaints must be heard by the local contractor board. The FCILB has jurisdiction in such cases only when no local board exists. In this case, because a local board existed, the FCILB improperly exercised jurisdiction over the complaint.

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140. 478 So. 2d 808 (Fla. 1985) (clarified on denial of rehearing).
141. Id. at 810.
142. Id.
143. 365 So. 2d 1069 (Fla. 1st Dist. Ct. App. 1979).
145. This is no longer the case. Under the current statutory system the FCILB has jurisdiction to hear all such complaints. Fla. Stat. § 489.129 (1987).
147. Swethillius, 365 So. 2d at 1070-71. The court also noted that the decision of the FCILB was not saved from reversal by the fact that Swethillius did not raise the jurisdictional issue during the FCILB hearing. Id. at 1070. Estoppel and waiver principles cannot bar the court from considering whether an agency had jurisdiction to issue an order.

148. In Seitz v. Duval County School Board, the court reviewed the validity of an order of the Public Employee Relations Commission (PERC). PERC found that the Duval County School Board (Board) had engaged in an unfair labor practice. The remedy imposed by PERC required the Board to post notices that it had so violated the law, but PERC declined to order the reinstatement of Seitz. The court reversed PERC's decision that the Board had engaged in an unfair labor practice, on the ground PERC lacked jurisdiction to hear Seitz's complaint. The Public Employee Relations Act restricted the power of PERC to hear complaints of unfair labor practices to only those complaints filed by an employer or an employee organization. In this case, Seitz, an employee, could not properly invoke jurisdiction. The rule promulgated by PERC which permitted employees to file unfair labor practices complaints was an invalid expansion of its jurisdiction. The court declined to give retroactive effect to a subsequent amendment of the act which permitted individual employees to file unfair labor practices complaints.

The courts have also refused to allow agencies to impose additional constraints on the activities of those they regulate through the promulgation of rules, at least absent some statutory authorization for such rules. In 4245 Corporation v. Division of Beverage, the court held...
that the legislature never delegated to the Division of Beverage the power to promulgate rules regulating "dress, or lack thereof" in licensed liquor establishments. The court noted that the power to promulgate rules was limited by the scope of authority granted an agency by the legislature. The court rejected the argument that the power to regulate dress was implied from the licensing provisions of the statute or from the statute which made it a criminal offense to appear at such establishments in the type of attire prescribed in the regulation. In Department of Professional Regulation v. Pariser, the court held that when the legislature expressly provided a method for implementation... of the statutory authority granted, it would be erroneous to additionally implicate the agency's authority to promulgate rules providing for another means of implementing this statutory authority. In such a case, the general rule making authority of the agency was limited by the legislature's exercise of its power to establish an exclusive method to carry out the legislative purposes. In Aola Utilities, Inc. v. Florida Public Service Commission, the court held that the Public Service Commission erred in refusing to grant a utility rate increase because it had failed to comply with the Commission's record keeping rules. The legislature never authorized the use of rate making authority to attain compliance with such rules. This order was beyond the scope of the Commission's authority.

sion of Fla. Land Sales and Condominiums, 474 So. 2d 282, 284 (Fla. 5th Dist. Ct. App. 1985) reh'g denied.

156. 371 So. 2d 1032 (Fla. 1st Dist. Ct. App. 1978).

157. Id. at 1034.

158. Id. But see id. at 1035-36 (Smith, J., dissenting).

159. 483 So. 2d 28 (Fla. 1st Dist. Ct. App. 1986) reh'g denied.

160. Id. at 29. But see id. at 30 (Ervin, J., dissenting) (Judge Ervin found the legislature delegated sufficient rule-making authority discretion to the agency so it was fair to imply it could adopt additional method of implementation in this area.).

161. Id. (The court in part relied upon the interpretive principle of expressio unum est exclusio alterius in reaching this result.).

162. 376 So. 2d 850 (Fla. 1979).

163. Id. at 851.

164. Id.

165. Id. See also Gulf Coast Motor Line, Inc. v. Hawkins, 281 So. 2d 227, 228 (Fla. 1973) reh'g denied. Cf. Teleprompter Corp. v. Hawkins, 384 So. 2d 648, 650 (Fla. 1980) (Commission had no authority to regulate pole attachment agreements).

166. U.S. CONST., amend. XIV § 1; Fla. CONST., art. I § 9. There is also a substantive dynamic to the due process clauses of the federal and state constitutions. The Florida Supreme Court has characterized this limitation on legislative power as one which prohibits the legislature from enacting a law which "clearly . . . is not in any way designed to promote the people's health, safety or welfare; or that the statute has no reasonable relationship to the statute's stated purpose." Department of Ins. v. Dale County Consumer Advocate's Office, 493 So. 2d 1032, 1034 (Fla. 1986) (hearing denied). See also ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146, 149-52 (Fla. 1st Dist. Ct. App. 1979). But see Dale County Consumer Advocate's Office, 493 So. 2d at 1035-43 (Boyd, J., dissenting) (disputes whether the courts can legitimately claim such extraordinary power). ABC Liquors, 366 So. 2d at 146, 152 (Fla. 1st Dist. Ct. App. 1979) (Smith, J., dissenting). This aspect of due process is not discussed in this article.

167. The courts have adopted no precise test to define what is a constitutionally protected liberty interest, but rather look to the provisions of the Bill of Rights in the United States Constitution, the Declaration of Rights in the Florida Constitution, "freedom from bodily restraint . . . right . . . to contract, to engage in any common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, . . . and to generally enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free persons." Board of Regents of State Colleges v. Roth, 408 U.S. 564, 572 (1977). The Florida courts have decided few cases in the administrative law area dealing with the existence of a liberty interest and the topic is not addressed in this article. In Clark v. Wainwright, the court noted that "where administrative procedures required for placing an inmate on administrative confinement and its subsidiary 'close management' generate a liberty interest in an inmate remaining in the general population." 480 So. 2d 1035, 1036 (Fla. 1st Dist. Ct. App. 1986); see also Thompson v. Dugger, 509 So. 2d 391, 392 (Fla. 1st Dist. Ct. App. 1987).

that the legislature never delegated to the Division of Beverage the power to promulgate rules regulating "dress, or lack thereof" in licensed liquor establishments.165 The court noted that the power to promulgate rules was limited by the scope of authority granted an agency by the legislature. The court rejected the argument that the power to regulate dress was implied from the licensing provisions of the statute, or from the statute which made it a criminal offense to appear at such establishments in the type of attire proscribed in the regulation.166 In Department of Professional Regulation v. Pariser,168 the court held that "when the legislature expressly . . . provided a method for imple- mentation . . . [of the statutory authority granted] it would be erroneous to additionally imply" the agency had authority to promulgate rules providing for another means of implementing this statutory authority.169 In such a case, the general rule making authority of the agency was limited by the legislature’s exercise of its power to establish an exclusive method to carry out the legislative purposes.170 In Aloha Utilities, Inc. v. Florida Public Service Commission,171 the court held that the Public Service Commission erred in refusing to grant a utility rate increase because it had failed to comply with the Commission’s record keeping rules.172 The legislature never authorized the use of rate making authority to attain compliance with such rules.173 This order was beyond the scope of the Commission’s authority.174

165. U.S. CONST, amend. XIV § 1; FLA. CONST, art. I § 9. There is also a substantive dynamic to the due process clauses of the federal and state constitutions. The Florida Supreme Court has characterized this limitation on legislative power as one which prohibits the legislature from enacting a law which "clearly . . . is not in any way designed to promote the people’s health, safety or welfare, or that the statute has no reasonable relationship to the statute's avowed purpose." Department of Ins. v. Dade County Consumer Advocate’s Office, 492 So. 2d 1032, 1034 (Fla. 1986) (hearing denied). See also ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146, 149-52 (Fla. 1st Dist. Ct. App. 1979). But see Dade County Consumer Advocate’s Office, 492 So. 2d at 1035-43 (Boyd, J., dissenting) (disputes whether the courts can legitimately claim such an extraordinary power); ABC Liquors, 366 So. 2d 146, 152 (Fla. 1st Dist. Ct. App. 1979) (Smith, J., dissenting). This aspect of due process is not discussed in this article.

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as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.168

Under this standard, the mere adoption of regulations binding the authority of a state agency does not itself create a constitutionally protected property interest. There must be a mutability of expectation before the courts will recognize the creation of a constitutionally protected property interest.169 The Florida courts broke no new conceptual ground in the application of this test, but it is instructive to examine the variety of cases in which the courts determined whether a constitutionally protected property interest was, or was not, at stake.

These cases serve to illustrate the circumstances where courts have found a constitutionally protected property interest was created by state conduct, rule or statute. For example, in School Board of Orange County v. Blackford,170 the court noted in dicta that the Florida Constitution created a constitutionally protected property interest in a free public education,171 but that the right did not extend to the attendance of a particular school.172 In West v. Department of Criminal Law Enforcement,173 the court held that a special agent had a constitutionally protected property interest in continued employment.174 In City of Riviera Beach v. Fitzgerald,175 the court found that a police officer's reasonable expectation of promotion constituted a constitutionally protected property interest.176 In Tweed v. City of Cape Canaveral,177 the court found that Florida Statute Section 166.021178 effectively authorizes municipal governments to enter into employment contracts of a longer term than the term of office for the contracting city council.179 By implication, the court found this created a constitutionally protected property interest in a contract for such a term.180 In Solar Energy Control, Inc. v. Department of Health and Rehabilitative Services,181 the court implicitly found a constitutionally protected property interest in the contracting procedures which entitled the petitioner to a hearing. Any property interest created through the adoption of a competitive bidding process is a creature of statute or specific provision in the Florida Constitution.182 In Cherry v. Bronson,183 the court found that a tenured teacher had a constitutionally protected property right in his job.184

Other cases illustrate circumstances where the courts have refused to find a constitutionally protected property interest created by state conduct, rule or statute. In Bryant v. Shands Teaching Hospital and Clinics, Inc.,185 the court held that the conversion of a private hospital to a public hospital did not mean the state had implicitly adopted the discharge-for-cause policy which had bound the discretion of the private hospital prior to the conversion. The policy of this state is that all public employment is at will, unless statutorily provided otherwise; nothing in the statute mandating the conversion contained an express alteration of this norm.186 In Florida High School Activities As-

169. Roth, 408 U.S. at 577.
171. 369 So. 2d 689 (Fla. 1st Dist. Ct. App. 1979).
173. Blackford, 369 So. 2d at 591.
175. Id. at 109.
176. 492 So. 2d 1382 (Fla. 4th Dist. Ct. App. 1986).
177. Id. at 1385 (city's promotion procedures established the mutuality of expec-
tation necessary to constitute a property right). The court noted that failure to fol-
low these procedures resulted in a violation of procedural due process principles for which the city may be sued in a civil rights action. Id. at 1385-87.
178. 373 So. 2d 408 (Fla. 4th Dist. Ct. App. 1979).
179. 373 So. 2d 408 (Fla. 4th Dist. Ct. App. 1979).
180. Ibid.
181. 377 So. 2d 746 (Fla. 1st Dist. Ct. App. 1979) reh'g denied.
182. See Volume Serv. Div. of Interstate United Corp. v. Canteen Corp., 369 So. 2d 391, 395 (Fla. 2nd Dist. Ct. App. 1979). See also Cunningham v. Adams, 808 F.2d 815, 821 (11th Cir. 1987) Cunningham argued that he was denied procedural due process because the Palm Beach Board of County Commissioners did not follow its own rules with regard to the awarding of the concession contract. The court found that the criteria established for evaluating bidders for the concession contract was insufficient to create a legitimate expectation of entitlement. The court characterized the expectation alleged by Cunningham as a unilateral one under the Roth test, because the criteria used to determine the award of concession contracts was subjective in nature and vested the Board with "considerable discretion." Cunningham, 808 F.2d at 821.
183. 384 So. 2d 169 (Fla. 5th Dist. Ct. App. 1980) reh'g denied.
184. 385 So. 2d 196 (Fla. 5th Dist. Ct. App. 1983).
185. But see Strange v. School Bd. of Citrus County, 471 So. 2d 90, 92 (Fla. 5th Dist. Ct. App. 1985) reh'g denied.
186. 479 So. 2d 165 (Fla. 1st Dist. Ct. App. 1985).
187. Id. at 167-68.
as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. 166

Under this standard, the mere adoption of regulations binding the authority of a state agency does not itself create a constitutionally protected property interest. There must be a mutuality of expectation before the courts will recognize the creation of a constitutionally protected property interest. 170 The Florida courts broke no new conceptual ground in the application of this test, but it is instructive to examine the variety of cases in which the courts determined whether a constitutionally protected property interest was, or was not, at stake.

These cases serve to illustrate the circumstances where courts have found a constitutionally protected property interest was created by state conduct, rule or statute. For example, in School Board of Orange County v. Blackford, 171 the court noted in dicta that the Florida Constitution created a constitutionally protected property interest in a free public education, 172 but that the right did not extend to the attendance of a particular school. 173 In West v. Department of Criminal Law Enforcement, 174 the court held that a special agent had a constitutionally protected property interest in continued employment. 175 In City of Riviera Beach v. Fitzgerald, 176 the court found that a police officer's reasonable expectation of promotion constituted a constitutionally protected property interest. 177 In Tweed v. City of Cape Canaveral, 178 the court found that Florida Statute Section 166.021 179 effectively authorizes municipal governments to enter into employment contracts of a longer term than the term of office for the contracting city council. 180 By implication, the court found this created a constitutionally protected property interest in a contract for such a term. 181 In Solar Energy Control, Inc. v. Department of Health and Rehabilitative Services, 182 the court implicitly found a constitutionally protected property interest in the contracting procedures which entitled the petitioner to a hearing. Any property interest created through the adoption of a competitive bidding process is a creature of statute or specific provision in the Florida Constitution. 183 In Cherry v. Bronson, 184 the court found that a tenure teacher had a constitutionally protected property right in his job. 185

Other cases illustrate circumstances where the courts have refused to find a constitutionally protected property interest created by state conduct, rule or statute. In Bryant v. Shands Teaching Hospital and Clinics, Inc., 186 the court held that the conversion of a private hospital to a public hospital did not mean the state had implicitly adopted the discharge-for-cause policy which had bound the discretion of the private hospital prior to the conversion. The policy of this state is that all public employment is at will, unless statutorily provided otherwise; nothing in the statute implementing the conversion contained an express alteration of this norm. 187 In Florida High School Activities As-
The precise nature of the procedural requirements varies depending on the circumstances of the case. As the court noted in Gordon v. Savage, "[a]n Administrative Accusation . . . is not a criminal proceeding because its purpose is to inquire into" whether an individual is entitled to continue to receive a constitutionally protected property interest. Once the court determines that a constitutionally protected property or liberty interest is at stake, then it must decide what process is due in light of that interest. The United States Supreme Court adopted a balancing approach to this question most succinctly characterized in Mathews v. Eldridge.

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In numerous cases, Florida courts have held that pre-deprivation hearings are the constitutionally preferred mode of decision making, and that a post-deprivation hearing will be considered constitutionally sufficient only when it is necessary to take summary action to protect

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197. Id. at 1003-04.
199. 383 So. 2d 646 (Fla. 5th Dist. Ct. App. 1980).
200. Id. at 648. In Thompson v. Department of Professional Regulation, the court noted that the due process clause of the Constitution did not require the state to furnish a party with counsel in a license revocation case. 488 So. 2d 103, 105 (Fla. 1st Dist. Ct. App. 1986) rehg denied.
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the court, without mentioning the Roth expectation standard, held that the opportunity to participate in interscholastic high school athletic teams was not a constitutionally protected property interest. In Grantham v. Gunther, the court indicated that a bail bondsman does not have a constitutionally protected liberty or property interest in his license, because any interest the licensee possessed was shaped and limited by weighing it against the state's interest in protecting the public. In Department of Transportation v. Durden, the court held that no constitutionally protected property interest was created when a party engaged in "a knowing violation of the law" by erecting an illegal outdoor advertising sign.

"What is amazing is not the results" in either of the above sets of cases, "but that the courts [generally] failed to engage in any sort of meaningful analysis in rejecting" or accepting the claims that a constitutionally protected property interest existed. This is not a problem or criticism which is limited to the opinions of Florida courts. Federal courts have also fallen short in this area.

Perhaps this should be expected given the failure of the Supreme Court to provide much in the way of consistent, meaningful guidance for lower courts as to when a property interest exists for which procedural due process protection is available. The result is that these cases provide little guidance for counsel in developing arguments for why property rights are or are not at stake. Guidance for resolving future cases is one of the primary goals judicial opinions should serve. In spite of the difficulty involved in providing meaningful analysis regarding whether a property interest is or is not present, the better course is for the court to actually engage in that process rather than use a conclusory approach.

**What Process Is Due?**

The precise nature of the procedural requirements varies depending on the circumstances of the case. As the court noted in Gordon v. Savage, "[a]n Administrative Accusation . . . is not a criminal proceeding because its purpose is to inquire into" whether an individual is entitled to continue to receive a constitutionally protected property interest. Once the court determines that a constitutionally protected property or liberty interest is at stake, then it must decide what process is due in light of that interest. The United States Supreme Court adopted a balancing approach to this question most succinctly characterized in Mathews v. Eldridge.

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188. 369 So. 2d 398, 403 (Fla. 2d Dist. Ct. App. 1979).
189. 498 So. 2d 1328 (Fla. 4th Dist. Ct. App. 1987) reh'g denied.
190. Id. at 1331.
191. The court found the licensee had a minimal constitutionally protected interest in his license because, unlike Goldberg v. Kelly, the deprivation of the license would not "deprive him at once of his necessities" of life. Id. at 1333.
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193. 471 So. 2d 1271 (Fla. 1985).
194. Id. at 1272.
195. Burris, supra note 9, at 1003.
196. Id. at 1002-05.
197. Id. at 1003-04.
199. 383 So. 2d 646 (Fla. 5th Dist. Ct. App. 1980).
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the public interest. Independent of when it is held, there is a general consensus on what constitutes a fair hearing for due process purposes absent an emergency or some other justification for a summary procedure. There must be adequate notice, an opportunity to hear the evidence against you, and an opportunity to present evidence in your defense; a chance to make arguments to a neutral decision-maker; and to have the decision rendered based upon the information in the record. All these procedural protections are required in the APA, so there are relatively few cases dealing with these issues in due process terms. The following discussion summarizes some of the more important cases on these points.

**Notice**

In *Florida Gas Company v. Hawkins*, the court held that prior to dismissing a facially sufficient application for a rate increase, the process required the Public Service Commission to hold a hearing. Prior to making its decision on a rate increase request, the Commission must "afford the company a fair hearing and an opportunity to explain or rebut those matters" which the Commission believes justify denying the request. In *West v. Board of County Commissioners*, the court noted in *dicta* that in the employment context, a minimum requirement of due process is that a person receive adequate notice of the charges against him. Similarly, in *Arnette v. Florida State University*, the court reaffirmed that due process requires an agency to provide a suspended employee with written notice of his right to appeal and of the time within which such an appeal must be filed. In *Cohn v. Department of Professional Regulation*, the court was asked to determine whether a pharmacist had received adequate notice in a license revocation action. The hearing officer had ruled that by facially acting in good faith in conducting his business, the pharmacist was protected from being charged with not acting in good faith or unprofessionally absent a more specific standard defining these terms. The Department attempted to introduce evidence through an expert witness that Cohn’s conduct was “not in ‘good faith’ or ‘in the course of professional practice.’” The court agreed with the Board of Pharmacy that the provisions of the statute concerning good faith and professional practice were standards which a pharmacist must comply with in addition to other specific standards of practice set forth in the statute. As such, the Board properly concluded that the hearing officer had erred in her interpretation of the law. The court rejected Cohn’s argument that this vague language provided insufficient notice of the permissible standards of conduct for a pharmacist. Establishing what consti-

203. *E.g.*, Savick v. Gunther, 375 So. 2d 1080, 1081-82 (Fla. 1st Dist. Ct. App. 1979); State v. Lake, 382 So. 2d 1265, 1267 (Fla. 1st Dist. Ct. App. 1980). *reh’r denied* (a hearing on the post-administrative confinement of a prisoner met the requirements of procedural due process); *West v. Board of County Comm’rs*, 373 So. 2d 83 (Fla. 3d Dist. Ct. App. 1979); *West v. Department of Criminal Law Enforcement*, 371 So. 2d 107 (Fla. 1st Dist. Ct. App. 1978) (per curiam). *Accord North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (Where an emergency threatens public health or safety, a post-deprivation hearing meets the requirements of due process). In many cases the statute or action taken is either explicitly or implicitly subject to the procedures provided for in the APA. *E.g.*, *Fla. Stat. § 120.52* (1987).


206. 372 So. 2d 1118 (Fla. 1979).

207. *Id. at 1120-21.*

208. *Id. at 1121.*

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ized provisions governing conduct were at issue and the agency had not defined them more precisely through the rule making process, the meaning of those provisions was an issue of fact "which not only must be established by 'conventional' proof, but as to which the agency bears a significantly enhanced burden." To this extent, the Board erred in not remanding the case to a hearing officer for an evidentiary hearing on this issue and the issue of whether Cohn's conduct violated the standard established at such a hearing. Judge Jorgenson, in his dissent, noted that these statutory provisions were never defined by the legisla-
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Another reason for rejecting the majority approach was not men-
tioned by Judge Jorgenson: the danger of inconsistent definitions. Where the scope of the statutory term is made wholly dependent on a factual determination made in each case, then it is possible that factually similar cases may result in different decisions when the expert wit-
esses do a better job of defining the scope of the statute in one case than in another. While it is generally true that agencies may select whether to develop interpretations of a statute through the rule making or adjudication process, it seems such freedom of choice should not be permitted where the statutory terms lack any specificity.

Neutral Decision Maker

In Cherry v. Bronson, the court indicated that due process re-
quires an administrative hearing be conducted by an impartial decision maker. In McIntyre v. Tucker, the court refused to permit a school board attorney to both act as prosecutor and to "advise[e] the Board in its capacity as hearing officer" in the administrative proceed-
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ently incompatible in the same person at the same time."

Present Evidence

In Spiegel v. Lavis Plumbing Service, the court held that in hear-
ings conducted by an appeals referee of the Unemployment Ap-
peals Commission, the applicant has "... the right to subpoena wit-
nesses to testify on his behalf." This right was not restricted by re-
quiring a showing of good cause, and the appeal referee erred in imposing such a requirement. In Jerry v. Wainwright, the court opined that a prisoner did "not have an absolute right to call witnesses in his behalf at a disciplinary hearing." The court indicated that the rule required such witnesses be called only if the prisoner named the witnesses and stated the nature of the evidence they would provide, in accordance with due process. Nor did due process require that the prisoner be advised of his right to call witnesses. Prisoners were enti-
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222. Id. at 1046.
223. Id. at 1046.
224. Id. at 1048-49.
Other Matters Effecting Hearing Adequacy

In McDaniel v. Career Service Commission, the court held that the where the original suspension order was of questionable facial validity, the Commission’s refusal to hear the appeal attacking that order was a violation of due process. The Commission must grant a hearing on the point. In Arnett v. Office of Sheriff, the court held that the failure [of an agency] to determine the rules or regulations pertinent to... its hearing process render[ed] its order defective and subject to reversal on due process grounds. The court noted in Gordon v. Savage, that, in general, delays in the administrative process which prejudices a person’s case in a significant manner constituted a denial of due process.

Improper Analysis of a Due Process Claim

Even when the courts avoid writing conclusory opinions on a procedural due process issue, a well reasoned opinion properly reflecting the current state of procedural due process jurisprudence is not guaranteed. Grantham v. Gunter involves a misapplication of the two part analysis dictated by the Roth and Eldridge cases, and illustrates the problem several courts have had with cases of this nature. The court in Grantham indicated that a bail bondsman did not have a constitutionally protected liberty or property interest in his license, because any interest of the licensee was shaped and limited by the procedures provided for by the statute. This confused the two step process envisioned by Roth and Eldridge by considering the two distinct questions jointly: (1) Does a constitutionally protected interest exist in this case; and (2) If a constitutionally protected interest exists, what procedures are required by due process in order to adequately protect this interest. In Arnett v. Kennedy, Justice Rehnquist argued that the existence and scope of any constitutionally protected property interest was linked to the type of hearing the government had agreed to provide in granting the property interest. "Where the grant of a substantive right is inextricably intertwined with the limitations on procedures which are to be employed in determining that right, a [person] must take the bitter with the sweet."

The United States Supreme Court rejected this approach in Cleveland Board of Education v. Loudermill.

"[T]he ‘bitter with the sweet’ approach misconceives the constitutional guarantee [of due process]. [T]he Due Process Clause provides that certain substantive rights - life, liberty, and property - cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedures are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology." The Supreme Court was clearly directing lower federal courts and the state courts to conceptually distinguish the question of whether a constitutionally protected liberty or property interest exists from the question of what process is due in light of that interest. The court thus erred in Grantham when it linked the two issues in its analysis.

241. 379 So. 2d 454 (Fla. 1980) (per curiam).
242. Id. at 455.
243. 507 So. 2d 145 (Fla. 1987). 244. Id. at 145.
245. 383 So. 2d 664 (Fla. 1980). 246. Id. at 669. See also Metropolitan Dade County v. Capurii, 466 So. 2d 1087 (Fla. 1985).
247. Supra text accompanying notes 166-97.
248. 498 So. 2d 1328 (Fla. 1987) reh’g denied.
249. E.g., Peoples Bank of Indian River County v. Department of Banking and Fin., 395 So. 2d 521 (Fla. 1981).
250. Both inquiries require the court to engage in detailed factual analysis of the claims made in each case in order to resolve the issues. See e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985).
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252. The court found the licensee had a minimal constitutionally protected interest in his license because (unlike Goldberg v. Kelly) the deprivation of the license would “deprive him at once of his necessities” of life. Id. at 1333.
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256. Id. at 152-53.
258. Id. at 541.
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256. Id. at 152-53.
258. Id. at 541.
Jurisdictional Issues Cannot Be Waived

As previously noted, an administrative agency cannot expand its legislatively delegated jurisdiction by exercising its rule making or adjudicatory authority. Nor can parties, by consent or waiver, confer jurisdiction on an agency when the legislature declined to do so.

"The lack of subject matter jurisdiction may properly be raised for the first time" at any stage in the administrative proceedings including as late as in the judicial review process. This approach to jurisdiction is designed to insure that agencies do not transgress the scope of their delegated authority and that courts do not invade the functions assigned to agencies.

Standing

There are two related yet different concepts of standing under the APA. One defines standing for purposes of agency jurisdiction, the other for purposes of invoking judicial review. Any party who is either "substantially affected" or whose "substantial interests" shall be determined by agency action has standing, and may seek administrative relief. While a party may have standing for purposes of agency jurisdiction, it might not be automatically entitled to standing for purposes of judicial review. Under the APA, "[a] party who is adversely affected by final agency action is entitled to judicial review." The APA does not define the terms "substantially affected," "substantial interest," or "adversely affected," so critical to a determination of standing. It has fallen to the courts and, to some extent, the agencies to give these concepts substantive meaning.

Courts have used a two-prong test to determine whether a party has standing before an agency. Generally, a party has agency standing if he is able to show that he suffered "(1) injury in fact of sufficient immediacy, and (2) the injury is of a type the proceeding is designed to protect, commonly referred to as the "zone of interest" test." Courts have noted that the two elements of this standing test serve different purposes. "The first aspect of the test deals with the degree of the injury. The second deals with the nature of the injury." The courts have used a three prong to

ongoing rule making proceeding. FLA. STAT. § 120.54(3)(a) (1987); (3) petition for an agency to engage in the rule making process, FLA. STAT. § 120.54(5) (1987); (4) request for an informal hearing, FLA. STAT. § 120.57(2) (1987); (5) request for a formal hearing, FLA. STAT. § 120.57(1) (1987).

265. See generally Dore, supra note 7; Dobbins and Dobbins, supra note 7. North Ridge General Hosp., Inc. v. NME Hosp., Inc., 478 So. 2d 1137, 1139 (Fla. 1st Dist. Ct. App. 1985). See also Village Park Mobile Home Assoc. v. Department of Business Regulation, 506 So. 2d 426, 430-34 (Fla. 1st Dist. Ct. App. 1987) reh'g denied. See generally Dubin and Dubin, supra note 7. In Florida Medical Center v. Department of Health and Rehabilitative Services the court clarified the limited role an agency may play in defining the concept of standing under the APA. 484 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1986) reh'g denied. The court noted that an agency may not restrict by rule the standing of a party "who otherwise . . . was a substantially interested party for purposes of . . . a hearing under section 120.57(1)." However, an agency "consistent with the regulatory statutory purpose" may by rule "define or identify those persons who have automatic standing." id. at 1294. See also Psychiatric Institutes of America, Inc. v. Department of Health and Rehabilitative Serv., 491 So. 2d 1199, 1200-01 (Fla. 1st Dist. Ct. App. 1986). In effect, the court rejected the policy of HRS which excluded from certificate of need proceedings parties whose standing was based upon only economic considerations.

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267. Agrico Chemical Co. v. Department of Envtl. Regulation, 406 So. 2d 478,
estingly, the Grantham court correctly reasoned that if a license is an interest entitled to due process protection, then under Eldridge, a post-deprivation hearing would be adequate to protect that interest.888

Jurisdictional Issues Cannot Be Waived

As previously noted, an administrative agency cannot expand its legislatively delegated jurisdiction by exercising its rule making or adjudicatory authority.889 Nor can parties, by consent or waiver, confer jurisdiction on an agency when the legislature declined to do so.889 The lack of subject matter jurisdiction may properly be raised for the first time at any stage in the administrative proceedings including u late as in the judicial review process.889 This approach to jurisdiction is designed to insure that agencies do not transgress the scope of their delegated authority and that courts do not invade the functions assigned to agencies.

Standing

There are two related yet different concepts of standing under the APA. One defines standing for purposes of agency jurisdiction, the other for purposes of invoking judicial review. Any party who is either "substantially affected"890 or whose "substantial interests" shall be determined891 by agency action has standing, and may seek administrative relief.891 While a party may have standing for purposes of agency jurisdiction, it might not be automatically entitled to standing for purposes of judicial review. Under the APA, "[a] party who is adversely affected by final agency action is entitled to judicial review."

The APA does not define the terms "substantially affected," "substantial interest," or "adversely affected."892 Courts have used a two prong test to determine whether a party has standing before an agency. Generally, a party has agency standing if he is able to show that he suffered "(1) injury in fact of sufficient immediacy, and (2) the injury is of a type the proceeding is designed to protect, commonly referred to as the "zone of interest" test.893 Courts have noted that these two elements of this standing test serve different purposes. "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.894 The courts have used a three prong to ongoing rule making proceeding, FLA. STAT. § 120.54(3)(a) (1987); (3) petition for an agency to engage in the rule making process, FLA. STAT. § 120.54(5) (1987); (4) request an informal hearing, FLA. STAT. § 120.57(2) (1987); (5) request a formal hearing, FLA. STAT. § 120.57(1) (1987).


267. The APA does define "party" and "person" for purposes of administrative action in terms of these concepts, but leaves these critical descriptive terms undefined. FLA. STAT. § 120.52(12)-(13) (1987).

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269. See generally Dore, supra note 7; Dubbin and Dubbin, supra note 7.


271. Agridex Chemical Co. v. Department of Envrnl. Regulation, 406 So. 2d 478,
determine whether a party has standing for purposes of judicial review. Generally, a party has standing for purposes of judicial review when (1) there was final agency action, (2) he was a party to the proceeding which resulted in the final agency action, and (3) he was adversely affected by the final agency action. In most, but not all cases, if a party has standing before an agency, then he will also have standing for purposes of judicial review.

Standing Before An Agency

Traditionally, an allegation of economic injury was considered sufficient to satisfy the injury in fact aspect of standing doctrine, because it was easy to perceive how an economic injury was "both real and immediate, not conjectural or hypothetical." Florida courts have been fairly liberal in finding a party suffered an economic injury which qualified him for standing. For example, in Hemisphere Equity Realty Company v. Key Biscayne Property Taxpayers Association, the court held that individual property owners had standing to challenge the validity of a zoning ordinance. The property owners alleged that they would suffer special damages from the zoning authority's failure to grant them an exemption from the ordinance. In Albright v. Hensley, the court noted that the requirements for standing to chal-

lege a zoning decision varied depending upon the type of claim. Non-economic injuries have often been sufficient to establish the injury in fact element of standing, but courts are generally hostile to such claims. School Board of Orange County v. Blackford exemplifies the limited hostility of the courts to standing based on non-economic injuries. In Blackford, the court held that the mere transfer of a child from one school to another, because of redistricting of the school attendance zones, was not a circumstance which substantially affected the interests of the child and parents so as to give them standing to challenge the redistricting decision. The child and the parents were not "substantially affected" even though friendships were lost and the child had to walk a little farther to school.

Courts are also reluctant to find a party has standing based upon an alleged non-economic injury or a putative economic injury, even though other parties clearly had a sufficient economic or non-economic injury for purposes of agency standing. An example of this is Department of Health and Rehabilitative Services v. Alice P. In Alice P., the court reversed a hearing officer's final order which held invalid a proposed rule change in Medicaid funding of abortions. The rule

279. Id. at 855.
280. Id.
281. Montgomery, 468 So. 2d at 1016.
283. Id. at 691. There is a split in the district courts of appeal over this issue. See Cortese v. School Bd. of Palm Beach County, 425 So. 2d 554, 555 (Fla. 4th Dist. Ct. App. 1983) reh'g denied (parents with children attending school which was closed had standing, non-parents did not have standing); School Bd. of Broward County v. Constant, 363 So. 2d 859 (Fla. 4th Dist. Ct. App. 1978).
284. Blackford, 369 So. 2d at 691. The court also held that the parent-teacher association lacked standing because it was not substantially affected. Id.
285. 367 So. 2d 1045 (Fla. 1st Dist. Ct. App. 1979) reh'g denied.
286. Id. at 1047.
determine whether a party has standing for purposes of judicial review. Generally, a party has standing for purposes of judicial review when (1) there was final agency action, (2) he was a party to the proceeding which resulted in the final agency action, and (3) he was adversely affected by the final agency action. In most, but not all cases, if a party has standing before an agency, then he will also have standing for purposes of judicial review.

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222. See Daniels v. Florida Parole and Probation Comm'n, 401 So. 2d 135 (Fla. 1981); Orange County v. Game Fish Water Fish Comm'n, 397 So. 2d 411 (Fla. 3d Dist. Ct. App. 1981) ("It is a fundamental principle of appellate law that appeal jurisdiction is only available to parties.").
274. 369 So. 2d 996 (Fla. 3d Dist. Ct. App. 1979).
275. Id. at 1001. The same cannot be said in the case of associational standing, as in this case, the court held the taxpayers' association lacked such an adversely affected interest and did not have standing. Id. See also Centrust Savings Bank v. City of Miami, 491 So. 2d 576, 577 (Fla. 3d Dist. Ct. App. 1986) (modified opinion on rehearing) (per curiam); Sullivan v. Northwest Florida Water Management Dist., 490 So. 2d 140 (Fla. 1st Dist. Ct. App. 1986); Suwannee River Area Council Boy Scouts of America v. Department of Community Affairs, 384 So. 2d 1369, 1372-74 (Fla. 1st Dist. Ct. App. 1980).
276. Id. at 855.
277. See generally Dubbin and Dubbin, supra note 7, at 845-50.
change was designed to modify state policy to reflect the recent federal
policy change restricting the use of federal Medicaid funds for abor-
tions to situations where "the attending physician certifies the abor-
tion is necessary because the life of the mother would be endangered if
the fetus were carried to term or if the procedure is necessary to termi-
nate an ectopic pregnancy." In response to the publication of notice
of the proposed rule change, Alice P. and Susan A. filed a petition
challenging the proposed rule change on behalf of themselves and
others similarly situated. The Department objected to the petition
because Alice P. and Susan A. lacked standing because section
120.54(3)(a) did not provide for a class action type petition. The
hearing officer found that Alice P. and Susan A. had standing and per-
mitted the subsequent intervention of other parties. On the issue of
standing the court summarily held that the hearing officer erred in
holding that "all women of childbearing age who are Medicaid recipi-
ents . . . have adequate standing to challenge" the proposed rule. The
hearing officer's ruling was "much too

287. Id. at 1048 (quoting recent change in the federal law).

288. Numerous petitions for intervention were subsequently filed and the Depart-
ment objected to all of them on a variety of grounds. Id. at 1048.

289. F.P.L. STAT. § 120.54(3)(a) (1987) ("the agency shall on the request of any
affected person . . . give the affected persons an opportunity to present evidence and
argument on all issues under consideration appropriate to inform of it their conten-
ions").

290. Alice P., 367 So. 2d at 1048. The court held that the hearing officer was
correct in finding that it was permissible to file a class action petition under section
120.54. However, the court also noted that such petitions must meet the requisites for
a class action established in Cordell v. World's Insurance Company. 355 So. 2d 479, 480
(Fla. 1st Dist. Ct. App. 1978). While class action petitions were filed, the hearing
officer erred in certifying the class action petition in this case because it did not meet
most of the criteria established in Cordell. Alice P., 367 So. 2d at 1050. In dicta the
court opined that it was impossible to meet the Cordell standards in the context of
a challenge to a proposed rule. Id. at 1050-51. But see Medley Investors, Ltd. v. Iowa,
465 So. 2d 1305, 1307 (Fla. 1st Dist. Ct. App. 1985) (rejecting the idea that the APA
authorized class action petitions or interventions).

291. The hearing officer ultimately held the proposed rule invalid for two rea-
sons. First, it improperly impounded funds properly appropriated by the legislature,
something an agency cannot do. Second, in promulgating the rule the Department had
grossly underestimated the economic impact of the proposed change. This was in the
rule making process which made the rule change substantively untenable. Alice P.,
367 So. 2d at 1049.

292. Id. at 1051.

293. Id. The court reached this conclusion by an unexplained reliance upon the
case of Department of Offender Rehabilitation v. Jerry. 353 So. 2d 1230 (Fla. 1st Dist.
Ct. App. 1978). It assumed the citation to the opinion was sufficient to explain why a
prisoner no longer subject to the operation of the rule he challenged was just like
women who may, but currently do not, find themselves in the group subject to the
funding cutoff proposed in the rule. Alice P., 367 So. 2d at 1051.

294. Alice P., 367 So. 2d at 1052. The court also accepted that a doctor who had
suffered a decline in business at his clinic as a result of the proposed rule change had
standing. Id.

295. See Humane of Fla., Inc. v. Department of Health and Rehabilitative Serv.,
500 So. 2d 186 (Fla. 1st Dist. Ct. App. 1986) rev'd denied.

296. Alice P., 367 So. 2d at 1052. The court carefully noted that the interests of
the intervenors were not precluded from being raised in a challenge to any proposed
rule ultimately adopted by the Department.

297. Dore, supra note 7, at 1082-92 (argues cases which failed to recognize this
type of economic injury as sufficient to satisfy the zone of interest aspect of standing
were wrongly decided).


299. Id. at 1139.
change was designed to modify state policy to reflect the recent federal policy change restricting the use of federal Medicaid funds for abortions to situations where "...the attending physician certifies that the abortion is necessary because the life of the mother would be endangered if the fetus were carried to term or if the procedure is necessary to terminate an ectopic pregnancy." In response to the publication of notice of the proposed rule change, Alice P. and Susan A. filed a petition challenging the proposed rule change on behalf of themselves and others similarly situated. The Department objected to the petition because Alice P. and Susan A. lacked standing because section 120.54(3) did not provide for a class action type petition. The hearing officer found that Alice P. and Susan A. had standing and permitted the subsequent intervention of other parties. On the issue of standing the court summarily held that the hearing officer erred in holding that "all women of childbearing age who are Medicaid recipients...have adequate standing to challenge" the proposed rule. According to the court, the hearing officer’s ruling was "much too broad." It was not enough to allege that the funding cutoff would impair their constitutional right to privacy or their ability to receive benefits in the future for any abortion procedures they had performed. Although not clear from the opinion, it seems the court functionally, but not explicitly, adopted the position that a woman must allege she was a Medicaid recipient, pregnant and wanted an abortion in order to have standing. Neither of the original petitioners met this standard, but several of the intervenors did. Unfortunately for the intervenors, the petition upon which they based their intervention was dismissed in light of the standing and class action holdings of the court. With the dismissal of the petition, there was no longer a proceeding in which to intervene and their petitions were also dismissed. Some courts have also used the "zone of interest" prong of the test for standing to limit access to agency proceedings. Even where the economic injury arose from an agency decision to permit competition, the courts did not always hold that this type of economic injury met the zone of interest test.

The opinion in North Ridge General Hospital, Inc. v. NME Hospitals, Inc. is representative of the type of reasoning that courts used to deny standing based upon competitive economic injury. In North Ridge, the court held that the hospital’s potential economic injury from competition was not a relevant factor in the certificate of need decision process. The court found an allegation of economic harm insufficient

287. Id. at 1048 (quoting recent change in the federal law).

288. Numerous petitions for intervention were subsequently filed and the Department objected to all of them on a variety of grounds. Id. at 1048.

289. Fla. Stat. § 120.54(3)(a) (1987) ("the agency shall on the request of any affected person...give the affected person an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of the contentions").

290. Alice P., 367 So. 2d at 1048. The court held that the hearing officer was correct in finding that it was permissible to file a class action petition under section 120.54. However, the court also noted that such petitions must meet the requisites for a class action established in Cordell v. World Insurance Company. 355 So. 2d 479, 480 (Fla. 1st Dist. Ct. App. 1978). While class action petitions may be filed, the hearing officer erred in certifying the class action petition in this case because it did not meet most of the criteria established in Cordell. Alice P., 367 So. 2d at 1050. In dicta the court opined that it was impossible to meet the Cordell standards in the context of a challenge to a proposed rule. Id. at 1050-51. But see Medley Investors, Ltd. v. Lewis, 465 So. 2d 1305, 1307 (Fla. 1st Dist. Ct. App. 1985) (covering the idea that the APA authorized class action petitions or interventions).

291. The hearing officer ultimately held the proposed rule invalid for two reasons. First, it improperly impounded funds properly appropriated by the legislature, something an agency cannot do. Second, in promulgating the rule the Department had grossly underestimated the economic impact of the proposed change. This was a flaw in the rule making process which made the rule change substantively untenable. Alice P., 367 So. 2d at 1049.

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293. Id. The court reached this conclusion by an unexplained reliance upon the case of Department of Offender Rehabilitation v. Jerry. 353 So. 2d 1230 (Fla. 1st Dist. Ct. App. 1978). It assumed the citation to the opinion was sufficient to explain why a prisoner no longer subject to the operation of the rule he challenged was just like women who may, but currently do not, find themselves in the group subject to the funding cutoff proposed in the rule. Alice P., 367 So. 2d at 1051.

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299. Id. at 1139.
to grant the hospital standing to challenge the validity of a certificate of need decision concerning the facilities that another hospital should be permitted to operate. Such a claim did not meet the requirement that the interest harmed by agency action was within the zone protected by the regulatory system. The court focused exclusively on the language of the statutes and rules, which did not explicitly state that economic viability of current health care facilities was relevant in the certificate of need decision process. The court concluded that a currently existing facility had no standing to intervene in the agency decision process based solely on the possible economic impact that a new facility may have on its operations. This was a radical reading of the statutes and rules. The statutory system was designed by the legislature to protect the public interest by assuring that health care facilities were built where needed and those in operation remained economically viable so they could serve the public. While the effect of competition was never explicitly mentioned in the statutes or rules, it clearly was a factor within the purpose of the statutory system.

In *Florida Medical Center v. Department of Health and Rehabilitative Services*, the court abandoned the position adopted in *North Ridge*, and clarified the role of agencies in defining standing. The court effectively destroyed the presedential value of *North Ridge* on the question of whether competitive economic harm was sufficient to justify standing to intervene in the certificate of need decision process. The court in *Florida Medical Center* effectively rewrote the holding in *North Ridge* in the process of deciding that the statutes and rules regulating the certificate of need process did include the possibility of economic harm as a relevant factor. This result is more consistent with the statutory purpose of the certificate of need process and hopefully signals the acceptance by courts of recent scholarly criticism of the approach used in *North Ridge*. At least one scholar has quite sensibly concluded that a better approach to this type of standing issue under the APA is one that recognizes that generally "[c]ompetitive economic injury is a substantial interest, and if persons claiming economic injury will be affected by the proposed agency action, they are entitled to stand in the agency decision process.*

The zone of interest aspect of standing has not only been used to restrict parties' access to the administrative process. It has also been used by the courts to restrict the power of agencies to seek judicial action. In *South Florida Regional Planning Council v. Division of..."
to grant the hospital standing to challenge the validity of a certificate of need decision concerning the facilities that another hospital should be permitted to operate. Such a claim did not meet the requirement that the interest harmed by agency action was within the zone protected by the regulatory system. The court focused exclusively on the language of the statutes and rules, which did not explicitly state that economic viability of current health care facilities was relevant in the certificate of need decision process. The court concluded that a currently existing facility had no standing to intervene in the agency decision process based solely on the possible economic impact that a new facility may have on its operations. This was a radical reading of the statutes and rules. The statutory system was designed by the legislature to protect the public interest by assuring that health care facilities were built where needed and those in operation remained economically viable so they could serve the public. While the effect of competition was never explicitly mentioned in the statutes or rules, it clearly was a factor within the purpose of the statutory system.

In Florida Medical Center v. Department of Health and Rehabilitative Services, the court abandoned the position adopted in North Ridge, and clarified the role of agencies in defining standing. The court effectively destroyed the precendental value of North Ridge on the question of whether competitive economic harm was sufficient to justify standing to intervene in the certificate of need decision process. The court in Florida Medical Center effectively rewrote the holding in North Ridge in the process of deciding that the statutes and rules regulating the certificate of need process did include the possibility of economic harm as a relevant factor. This result is more consistent with the statutory purpose of the certificate of need process and hopefully signals the acceptance by courts of recent scholarly criticism of the approach used in North Ridge. At least one scholar has quite sensibly concluded that a better approach to this type of standing issue under the APA is one that recognizes that generally "[c]ompetitive economic injury is a substantial interest, and if persons claiming economic injury will be affected by the proposed agency action, they are entitled to standing to participate in the agency decision process." The zone of interest aspect of standing has not only been used to restrict parties' access to the administrative process. It has also been used by the courts to restrict the power of agencies to seek judicial action.

300. Id.
302. 484 So. 2d 1292 (Fla. 1st Dist. Ct. App. 1986) reh'd denied.
304. The court noted that an agency may not restrict by rule the standing of a party "who otherwise ... was a substantially interested party for purposes of ... the hearing under section 120.57(1)." Florida Medical Center, 484 So. 2d at 1294. See also Psychiatric Institutes of America, Inc. v. Department of Health and Rehabilitative Serv., 491 So. 2d 1199, 1200-01 (Fla. 1st Dist. Ct. App. 1986). However, an agency "consistent with the regulatory statutory purpose" may by rule "define or identify those persons who" have automatic standing. In effect, the court rejected the policy of HBS which excluded from certificate of need proceedings parties whose standing was based upon only economic considerations. Florida Medical Center, 484 So. 2d at 1294. But see Community Psychiatric Centers, Inc. v. Department of Health and Rehabilitative Serv., 474 So. 2d 870 (Fla. 1st Dist. Ct. App. 1985).

305. The court interpreted North Ridge General Hospital as turning on the failure of the hospital to "demonstrate that it was an affected person under ... [the rules which defined] affected persons as health care facilities located in the health care service area in which service [was] proposed ... [and] provided services similar to the proposed services under review." Florida Medical Center, 484 So. 2d at 1294. The problem with this reading of North Ridge General Hospital was that the point was only mentioned in the opinion as dicta to reinforce the holding that economic interests were not protected by the statutory scheme. North Ridge General Hospital, 478 So. 2d at 1139.
306. Florida Medical Center, 484 So. 2d at 1294. See also Baptist Hosp., Inc. v. Department of Health and Rehabilitative Serv., 500 So. 2d 620, 625-26 (Fla. 1st Dist. Ct. App. 1987) reh'd denied; Morton F. Plant Hosp. Assoc. v. Florida, Department of Health and Rehabilitative Serv., 491 So. 2d 586, 588 (Fla. 1st Dist. Ct. App. 1986) ("A primary goal of the ... certificate of need process is to contain the cost of medical care.").
307. See Dore, supra note 7.
308. Id. at 1092.
309. See, e.g., State v. General Development Corp., 469 So. 2d 1381, 1382 (Fla. 1985) (Boyd, C.J., concurring). School Board of Pinellas County v. Noble is an example of the many cases where the court has found an agency had standing. The court held that a local school board, whose dismissal of a teacher was set aside by the state Board of Education through the exercise of its quasi-judicial power of administrative appellate review of the local school board's decision, was an adversely affected party who had standing to seek judicial review of the state Board of Education's decision. 372 So. 2d 1111, 1114 (Fla. 1979). The court viewed this decision as affirmed by the recent amendments to 120.68(1) which specifically provided that local school boards had standing as an adversely affected parties under 120.68(1). Compare Fla. Stat. § 120.68(1) (Supp. 1976) with Fla. Stat. § 120.68(1) (Supp. 1978) (currently codified at Fla. Stat. § 120.68(1) (1987)).
State Planning, the court opined that regional planning agencies had no role in the approval or disapproval of development projects with no regional impact. Because the development projects in this case did not have a regional impact, the regional planning authority had no statutory role in the decision process, and it was properly found by the Division of State Planning that the South Florida Regional Planning Authority lacked standing to intervene in the land use decision process.

The zone of interest test for standing also was used in National Abortion Counseling Service, Inc. v. Department of Health and Rehabilitative Services, to prevent HRS from obtaining an injunction to prohibit an adoption agency's operation. The court determined that HRS was requesting an injunction in an area where it had no regulatory authority. Without regulatory authority, HRS had no standing to seek the injunction.

One last point about standing: it has been argued that courts may have distorted the standing requirements of the APA by looking to federal court decisions for guidance on the nature of the interest needed in order to have standing. There is some indication that courts may be reconsidering the Florida standing doctrine which evolved from reliance on the federal precedent. The APA provides that "[a]ny person substantially affected by a rule may seek an administrative determination of the validity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Recently, the First District Court of Appeal offered an interesting interpretation of what the nature of the standing requirement is when a person challenged a rule in an administrative proceeding on the basis of this section of the APA. The court in Greyndolls Park Manor, Inc. v. Department of Health and Rehabilitative Services, interpreted this standing provision of the

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APA as requiring a party to show only that the agency would rely upon the rule challenged in resolving its dispute with the agency. It was not necessary to show that holding the rule invalid as an improper delegation would alter the ultimate decision of the agency. In other words, this provision of the APA waived the standing doctrine requirement of demonstrating the causation element of the injury in fact prong. This result is inconsistent with the analysis of the court in Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services, where a showing of injury in fact was required before this provision of the APA could be successfully used to challenge a rule. The decision in Greyndolls Park Manor may signal a less stringent application of the injury in fact requirement in this and other contexts. It may also signal the beginnings of a movement by the judiciary to rethink the current state of the standing doctrine in light of the recent thoughtful critique by Professor Dore.

Exhaustion of Administrative Remedies

Generally, a party is required to exhaust his administrative remedies prior to seeking judicial review in the district courts of appeal under section 120.68 or filing suit in the circuit courts.

for hearing).

312. 408 So. 2d 250 (Fla. 4th Dist. Ct. App. 1985).
313. Id. at 252-53.
314. Id. at 253.
315. But in Department of Business Regulation v. Culip, the court held that once the agency took final agency action, and if it had the power to set enforcement of its final decision in the courts, then it had standing to bring a declaratory judgment action as part of its enforcement efforts. 484 So. 2d 1378, 1379 (Fla. 2d Dist. Ct. App. 1986).
316. Dore, supra note 7.
318. 491 So. 2d 1157 (Fla. 1st Dist. Ct. App. 1986) (modified in part on motion for rehearing).
319. Id. at 1158-59.
320. Id. But see Inquierdo v. Volkswagen of Interamericana, 450 So. 2d 602, 603 (Fla. 1st Dist. Ct. App. 1984) (The court held the "appellant has no standing to challenge the constitutionality of . . . [the statute because] [the order contains no finding that claimant would be entitled to . . . benefits but for the provisions of [the statute]].
321. The court noted that while a party may have standing under this analysis to challenge the rule, the effort may be doomed to failure for reasons of mootness. Greyndolls Park Manor, 491 So. 2d at 1158-59. See also Montgomery v. Department of Health and Rehabilitative Serv., 468 So. 2d 1014 (Fla. 1st Dist. Ct. App. 1985).
323. Dore, supra note 7.
324. The discussion of exhaustion of administrative remedies focuses primarily on whether it is appropriate for a circuit court to exercise jurisdiction over a matter before the administrative process is completed. It does not, except for the brief discussion of Booker Creek Preservation, Inc. v. Department of Environmental Regulations, address the related problem of whether a district court of appeal has jurisdiction over a matter prior to completion of the administrative process. 369 So. 2d 655 (Fla. 2d Dist. Ct. App. 1979).
325. FLA. STAT. § 120.68 (1987).
State Planning," the court opined that regional planning agencies held no role in the approval or disapproval of development projects with a regional impact. Because the development projects in this case did not have a regional impact, the regional planning authority had no statutory role in the decision process, and it was properly found by the Division of State Planning that the South Florida Regional Planning Authority lacked standing to intervene in the land use decision process. The zone of interest test for standing also was used in National Adoption Counseling Service, Inc. v. Department of Health and Rehabilitative Services, to prevent HRS from obtaining an injunction to prohibit an adoption agency's operation. The court determined that HRS was requesting an injunction in an area where it had no regulatory authority. Without regulatory authority, HRS had no standing to seek the injunction.

One last point about standing: it has been argued that courts may have distorted the standing requirements of the APA by looking to federal court decisions for guidance on the nature of the interest needed in order to have standing. There is some indication that courts may be reconsidering the Florida standing doctrine which evolved from reliance on the federal precedent. The APA provides that "[a]ny person substantially affected by a rule may seek an administrative determination of the validity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." Recently, the First District Court of Appeal offered an interesting interpretation of what the nature of the standing requirement is when a person challenged a rule in an administrative proceeding on the basis of this section of the APA. The court in Grecynolds Park Manor, Inc. v. Department of Health and Rehabilitative Services, interpreted this standing provision of the APA as requiring a party to show only that the agency would rely upon the rule challenged in resolving his dispute with the agency. It was not necessary to show that holding the rule invalid as an improper delegation would alter the ultimate decision of the agency. In other words, this provision of the APA waived the standing doctrine requirement of demonstrating the causation element of the injury in fact prong. This result is inconsistent with the analysis of the court in Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services, where a showing of injury in fact was required before this provision of the APA could be successfully used to challenge a rule. The decision in Grecynolds Park Manor may signal a less stringent application of the injury in fact requirement in this and other contexts. It may also signal the beginnings of a movement by the judiciary to rethink the current state of the standing doctrine in light of the recent thoughtful critique by Professor Doré.

Exhaustion of Administrative Remedies

Generally, a party is required to exhaust his administrative remedies prior to seeking judicial review in the district courts of appeal under section 120.68 or filing suit in the circuit courts. Although

311. Id. at 449. See also South Florida Regional Planning Council v. Land and Water Adjudicatory Comm’n, 372 So. 2d 159, 165 (Fla. 3d Dist. Ct. App. 1979).
312. 480 So. 2d 250 (Fla. 4th Dist. Ct. App. 1985).
313. Id. at 252-53.
314. Id. at 253. But in Department of Business Regulation v. Curly, the court held that once the agency took final agency action, and if it had the power to set enforcement of its final decision in the courts, then it had standing to bring a declaratory judgment action as part of its enforcement efforts. 484 So. 2d 1378, 1379 (Fla. 2d Dist. Ct. App. 1986).
315. Doré, supra note 7.
316. Fla. STAT. § 120.56(1) (1987).
courts often treat the doctrine of exhaustion of administrative remedies as a jurisdictional requirement, it is clear that absent an express command from the legislature making it so, a rare circumstance; it is not. The judicial command to exhaust administrative remedies before seeking judicial review is founded on prudential considerations primarily designed to assure: (1) that courts do not stray from their limited role of judicial review in the administrative process; (2) that agencies have an opportunity to perform the duties delegated to them by the legislature; and (3) that agencies have the initial opportunity to correct any errors that occurred during the administrative process. While these prudential considerations support the general rule that a party is required to exhaust administrative remedies, they also leave

damus. The APA recognizes that in appropriate circumstances the circuit court may exercise jurisdiction in such actions. Fla. Stat. § 120.71 (1987) (declaratory judgment jurisdiction preserved). See Adams Packing Ass'n v. Department of Circuits, 352 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977); Department of Health and Rehabilitative Serv. v. circuit courts may exercise jurisdiction, it is clear that the preferred method of judicial intervention or review is through the judicial review process in the appropriate district court of appeal established by the APA. See, e.g., School Bd. of Leon County v. Mitchell, 346 So. 2d 562 (Fla. 1st Dist. Ct. App. 1977).

"We find that the appellants have failed to exhaust their administrative remedies; before this court does not have subject matter jurisdiction." Orange County v. Game and Fresh Water Fish Comm'n, 397 So. 2d 411, 413 (Fla. 5th DCA 1981). See, e.g., City of Gainesville v. Republic Investment Corp., 480 So. 2d 1344, 1347 (Fla. 1st Dist. Ct. App. 1986) (reh'g denied); Friends of the Everglades v. Department of Envi. Regulation, 387 So. 2d 511 (Fla. 1st Dist. Ct. App. 1980).

327. The question of whether or not jurisdiction over a controversy is in a court or in an administrative agency is one of policy not power or jurisdiction. As a matter of policy, a court should not exercise its jurisdiction if an adequate administrative remedy is available until that remedy has been exhausted. See, e.g., City of Miami v. Dep't of Housing, 409 So. 2d 379 (Fla. 1982) (remand to EPA); Ortega v. Miami-Dade County, 388 So. 2d 665 (Fla. 1980) (remand to EPA).

328. See, e.g., Key Haven, 427 So. 2d at 157; Cooney v. Florida Parole and Probation Comm'n, 388 So. 2d 1341 (Fla. 1st Dist. Ct. App. 1980). See, e.g., City of West Palm Beach, 490 So. 2d 115 (Fla. 1986) (noting in the context of reviewing a zoning decision); Key Haven, 247 So. 2d at 157.

330. See, e.g., Key Haven, 427 So. 2d at 157; Pesticide Control Comm'n v. Ace Pest Control, Inc., 214 So. 2d 892 (Fla. 1st Dist. Ct. App. 1968). See, e.g., Brooks v. School Bd. of Brevard County, 382 So. 2d 422 (Fla. 5th Dist. Ct. App. 1980); City of Melbourne v. Cotron, 372 So. 2d 944, 945 (Fla. 4th Dist.

1988) the judiciary with the discretion to create exceptions from the requirement where equity or other considerations demanded it. There is, however, a general judicial hostility to finding that the facts in a case support an exception to the exhaustion doctrine. In Department of Health and Rehabilitative Services v. Lewis, the court held that exhaustion of administrative remedies was required prior to seeking judicial review of the agency's failure to follow its own rules in determining eligibility for benefits under the Aid to Families with Dependent Children program. Prior to exhausting administrative remedies, it was inappropriate to file an action for a declaratory judgment in circuit court. The court appropriately recognized that in most cases an agency should have the first opportunity to correct any errors in the administration of its program. Further, the court noted that judicial review of agency decisions under the APA generally was vested in the District Courts of Appeal and not the circuit courts. To permit excep-

334. 367 So. 2d 1042 (Fla. 4th Dist. Ct. App. 1979) reh'g denied.

335. It was probably inappropriate - even if administrative remedies were exhausted - because judicial review power is assigned to the district courts of appeal and not the circuit courts. Fla. Stat. § 120.68 (1987).

336. Lewis, 367 So. 2d at 1045.
courts often treat the doctrine of exhaustion of administrative remedies as a jurisdictional requirement, it is clear that an express command from the legislature making it so, a rare circumstance. It is not. The judicial command to exhaust administrative remedies before seeking judicial review is founded on prudential considerations primarily designed to assure: (1) that courts do not stray from their limited role of judicial review in the administrative process; (2) that agencies have an opportunity to perform the duties delegated to them by the legislature; and (3) that agencies have the initial opportunity to correct any errors that occurred during the administrative process. While these prudential considerations support the general rule that a party is required to exhaust administrative remedies, they also leave

The APA recognizes that in appropriate circumstances the circuit court may exercise jurisdiction in such actions. Fla. Stat. § 120.70 (1987) (declaratory judgment jurisdiction preserved). See Adams Packing Ass’n v. Department of Citrus, 352 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977); Department of Health and Rehabilitative Servs. v. Lewis, 367 So. 2d 1042 (Fla. 1st Dist. Ct. App. 1979). Although in some cases the circuit courts may exercise jurisdiction, it is clear that the preferred method of judicial intervention or review is through the administrative review process in the appropriate district courts of appeal established by the APA. See, e.g., School Bd. of Leon County v. Mitchell, 346 So. 2d 562 (Fla. 1st Dist. Ct. App. 1977).

326. “[W]e find the agency the appelleants have failed to exhaust their administrative remedies; therefore this court does not have subject matter jurisdiction.” Orange County v. Game and Fresh Water Fish Comm’n, 397 So. 2d 411, 413 (Fla. 5th Dist. Ct. App. 1981). See, e.g., City of Gainesville v. Republic Investment Corp., 480 So. 2d 1344, 1347 (Fla. 1st Dist. Ct. App. 1986) reh’g denied; Friends of the Everglades v. Department of Envtl. Regulation, 387 So. 2d 511 (Fla. 1st Dist. Ct. App. 1980).

327. “The question of whether or not jurisdiction over a controversy is in a court or in an administrative agency is one of policy not power or jurisdiction. As a matter of policy, a court should not exercise its jurisdiction unless that remedy has been exhausted.” Department of General Serv. v. Bilmore Constr. Co., 413 So. 2d 803, 804 (Fla. 1st Dist. Ct. App. 1982) reh’g denied (emphasis added). See also Key Haven Associated Enter. v. Board of Trustees of the Internal Improvement Fund, 427 So. 2d 153, 157 (Fla. 1983) reh’g denied; Jones v. Bon, 379 So. 2d 115, 117 (Fla. Dist. Ct. App. 1979).

328. See Key Haven, 427 So. 2d at 157; Comer v. Florida Parole and Probation Comm’n, 388 So. 2d 1341 (Fla. 1st Dist. Ct. App. 1980).

329. See, e.g., De Carlo v. West Miami, 49 So. 2d 596 (Fla. 1950) (noted in the context of reviewing a zoning decision); Key Haven, 427 So. 2d at 157.

330. See, e.g., Key Haven, 427 So. 2d at 158; Pest Control Comm’n v. Ace Pest Control, Inc., 214 So. 2d 892 (Fla. 1st Dist. Ct. App. 1968).

331. See, e.g., Brooks v. School Bd. of Brevard County, 382 So. 2d 422 (Fla. 5th Dist. Ct. App. 1980); City of Melbourne v. Cotron, 372 So. 2d 944, 945 (Fla. 4th Dist.

the judiciary with the discretion to create exceptions from the requirement where equity or other considerations demanded it. There is, however, a general judicial hostility to finding that the facts in a case support an exception to the exhaustion doctrine. In Department of Health and Rehabilitative Services v. Lewis, the court held that exhaustion of administrative remedies was required prior to seeking judicial review of the agency’s failure to follow its own rules in determining eligibility for benefits under the Aid to Families with Dependent Children program. Prior to exhausting administrative remedies, it was inappropriate to file an action for a declaratory judgment in circuit court. The court appropriately recognized that in most cases an agency should have the first opportunity to correct any errors in the administration of its program. Further, the court noted that judicial review of agency decisions under the APA generally was vested in the District Courts of Appeal and not the circuit courts. To permit excep-


332. For example, because the exhaustion doctrine is not jurisdictional, it can be waived if a party fails to raise the exhaustion issue in a timely fashion and cannot be used to bar the court from reaching the merits of the case. E.g., Grigg v. Wainwright, 473 So. 2d 49, 50 n.1 (Fla. 1st Dist. Ct. App. 1985) (dicta); Jones v. Braxton, 379 So. 2d 115, 117 (Fla. Dist. Ct. App. 1979).

333. “[T]he circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass the usual administrative channels can demonstrate that no adequate remedy remains available under the APA.” Key Haven, 427 So. 2d at 157 (emphasis added) (quoting Gulf Pines Memorial Park, Inc. v. Oakland Park, Inc., 361 So. 2d 695, 699 (Fla. 1978)). “[A]s a general rule, it is improper to seek judicial relief before an available, adequate administrative remedy has been exhausted.” Eastern Air Lines, Inc. v. Hillsborough County Aviation Authority, 454 So. 2d 1076, 1078-79 (Fla. 2d Dist. Ct. App. 1984).

334. 367 So. 2d 1042 (Fla. 4th Dist. Ct. App. 1979) reh’g denied.

335. It was probably inappropriate - even if administrative remedies were exhausted - because judicial review power is assigned to the district courts of appeal and not the circuit courts. Fla. Stat. § 120.68 (1987).

336. Lewis, 367 So. 2d at 1045.
tions to the exhaustion of administrative remedies, in any other that the rarest of circumstances, would destroy this statutorily created system of judicial review. In *Booker Creek Preservation, Inc. v. Department of Environmental Regulation,* the court found recourse to the courts premature when the Environmental Regulation Commission had statutory jurisdiction to hear an appeal from the department's declaratory statement. The statute granted the Commission authority to "review final actions taken by the department" and thus created broad authority to review the department's actions including declaratory statements. The exhaustion doctrine dictated that judicial review of the Department's decision occur only after the administrative appeal process was completed. One of the primary reasons for requiring exhaustion of administrative remedies is that some agencies, such as local zoning boards, have specialized knowledge which aids them in resolving issues and provides a forum for correcting any inequities or mistakes made. The judiciary should not intervene until such an agency has reached a final determination and these advantages have had an opportunity to operate.

One well established exception to the exhaustion rule is "where the agency actions are so egregious or devastating that the promised administrative remedies are too little or too late." Judicial hostility to waiving the exhaustion requirement can be seen in cases where the courts considered this potentially open-ended exception. The courts rarely found the record adequate to justify its use. *Cherry v. Bronson* is such a rare case. In *Cherry,* the court held that the exhaustion of administrative remedies doctrine applied only when the administrative remedies were "available and adequate." Where the allegation in the complaint was that the procedure to be used was unfair and not impartial, then "[i]t would be an exercise in futility to require participation in [such] an administrative hearing." In such a case, the courts should exercise jurisdiction to resolve the issues raised in the complaint and should not impose the exhaustion doctrine as a barrier to access to the courts.

Courts have fashioned another exception to the exhaustion requirement where a party has made a constitutional attack on the facial validity of a statute which proved incapable of resolution in the administrative proceedings. If exhaustion of administrative remedies were required, resolution would have to wait until after the administrative proceeding was completed and the normal process of judicial review could be invoked. In such a case, a party may, without exhausting administrative remedies, invoke the jurisdiction of a circuit court in an attempt to resolve the constitutional issue. The courts have limited the scope of this exception by requiring that no factual determinations, within the agency's jurisdiction to make, must be necessary for judicial resolution of the constitutional challenge. The courts have refused to

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337. Id.
338. 369 So. 2d 655 (Fla. 2d Dist. Ct. App. 1979).
342. Id. at 1348-49. See also *Eastern Air Lines,* 454 So. 2d at 1079 (The court noted the lack of need for expertise to deal with the question as a factor in determining whether a court should require exhaustion of administrative remedies.
344. *Id. But see Eastern Air Lines,* 454 So. 2d at 1079.
345. 384 So. 169 (Fla. 5th Dist. Ct. App. 1980).
346. Id. at 170.
tions to the exhaustion of administrative remedies, in any other than the rarest of circumstances, would destroy this statutorily created system of judicial review. In Booker Creek Preservation, Inc. v. Department of Environmental Regulation, the court found that the courts were premature when the Environmental Regulation Commission had statutory jurisdiction to hear an appeal from the department's declaratory statement. The statute granted the Commission authority to "review final actions taken by the department" and thus created broad authority to review the department's actions including declaratory statements. The exhaustion doctrine dictated that judicial review of the Department's decision occurred only after the administrative appeal process was completed. One of the primary reasons for requiring exhaustion of administrative remedies is that some agencies, such as local zoning boards, have specialized knowledge which aids them in resolving issues and provides a forum for correcting any inequities or mistakes made. The judiciary should not intervene until such an agency has reached a final determination and these advantages have had an opportunity to operate.

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337. Id. See also Lewis Oil Co. v. Alachua County, 496 So. 2d 184, 188-89 (Fla. 1st Dist. Ct. App. 1986). Judicial review through a declaratory judgment action may be invoked where it was alleged the agency improperly denied a party a hearing under the APA. Freeman v. School Bd. of Broward County, 382 So. 2d 140 (Fla. 4th Dist. Ct. App. 1980).

340. Key Haven, 427 So. 2d at 157 (The court noted the lack of need for expertise to deal with the question as a factor in determining whether a court should require exhaustion of administrative remedies.).


346. Key Haven, 427 So. 2d at 157 (The court noted that a party may choose to proceed with the administrative process in which case the district court of appeal would resolve the issue of facial constitutionality of the statute.). See also Long v. Department of Admin., 428 So. 2d 688, 692-93 (Fla. 1st Dist. Ct. App. 1983) reh'g denied; Dyco Corp. v. Pollock, 510 So. 2d 2d (Fla. 4th Dist. Ct. App. 1987).

348. City of Gainesville v. Republic Investment Corporation, 480 So. 2d 1344.

349. City of Gainesville v. Republic Investment Corporation, 480 So. 2d 1344.


351. Department of Transp. v. Hendry Corp., 500 So. 2d 218, 222 (Fla. 1st Dist. Ct. App. 1987) reh'g denied; Glendale Federal Savings and Loan Assoc. v. Department of Ins., 485 So. 2d 1321 (Fla. 1st Dist. Ct. App. 1986). Cf. Occidental Chemical Agriculture Products, 501 So. 2d at 678-79 (The court rejected the attempt to use a pending jurisdiction analogy to permit a circuit court to decide issues, specifically within an agency's jurisdiction to resolve, as part of the suit over the facial constitutional

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expand this exception to include facial attacks on the constitutional validity of an agency rule, reasoning that with a rule, unlike a statute, "an adequate remedy remains available in the administrative process." The agency may correct any constitutional error in the rule through the administrative process. If the agency fails to do so, then the district court of appeal is the appropriate forum to conduct judicial review of the agency decision. Similarly, the courts have refused to authorize an exception to the exhaustion requirement where "an agency has applied a facially constitutional statute or rule in such a way that the aggrieved party's constitutional rights ... were violated." However, the court in Key Haven recognized an exception to the exhaustion doctrine for taking claims.

[W]here the agency is implementing a statute which, by its terms, properly allows a total taking of private property, direct review in the district court [of appeal] of the agency action may be eliminated and proceedings properly commenced in circuit court, if the aggrieved party is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings.

The court permitted such an action because it was "not a veiled attempt to collaterally attack the propriety of agency action."

Another exception to the exhaustion doctrine has only recently emerged. A few recent opinions have allowed an exception where a party has challenged the agency's jurisdiction. In order to guard against abuse of this exception, courts generally required that the pleadings in such cases persuasively establish that the jurisdictional challenge was legitimate, and not merely a subterfuge to avoid application of the exhaustion doctrine. These cases are an extension of Key Haven in that they place jurisdictional issues in the factual constitutional

validity of a rule.

352. Key Haven, 427 So. 2d 157-58.
353. Id. at 158.
354. Id.
355. Id. at 159.
356. Id.
357. E.g., Department of Environmental Regulations v. Falls Chase Special Taxing Dist., 424 So. 2d 787 (Fla. 1st Dist. Ct. App. 1983).

primary jurisdiction

The doctrine of primary jurisdiction dictates that when the judiciary and an agency have concurrent jurisdiction over a subject matter, the court should defer to the agency. "[T]he judiciary, although possessing subject matter jurisdiction to pass upon the asserted claim, stays its hand and defers to the administrative agency in order to maintain uniformity at that level or to bring specialized expertise to bear upon the disputed issues." This doctrine, like the exhaustion doctrine, is a judicially created rule designed to reinforce the roles in the administrative process assigned by the legislature respectively to the courts and agencies. It establishes a strong policy based preference that an agency, not the courts, should decide matters initially. The courts should await an agency's determination and review it under the procedures provided for in the APA. In discussing primary jurisdiction issues the courts did not always label their discussion as one directly concerning primary jurisdiction principles. An example of a primary jurisdiction case not so labeled is the court's discussion in Richter v. Florida Power Corporation. In Richter, the issue was whether the circuit courts or the Public Service Commission had jurisdiction over a

359. See supra text accompanying notes 349-56.

It should be noted that there is an agency parallel to the primary jurisdiction doctrine founded on a principle of comity. When a case is properly pending in a circuit court, a party cannot compel the agency through a declaratory statement petition to answer an interpretative question central to that litigation. Couch v. Department of Health and Rehabilitative Serv., 377 So. 2d 32 (Fla. 1st Dist. Ct. App. 1979) (per curiam) reh'g denied.

362. FLA. STAT. § 120.68 (1987). Another benefit of the primary jurisdiction doctrine is that it maintains the legislatively assigned role of the district courts of appeal as the principal forum for judicial review of agency action. Of course, if the subject matter is not within the scope of an agency's authority to resolve, then the circuit court cannot use the primary jurisdiction doctrine to avoid the case. Florida Water & Utilities, Inc. v. Cutler Ridge Association, 376 So. 2d 273, 274 (Fla. 3d Dist. Ct. App. 1979) reh'g denied, Hill Top Developers, 478 So. 2d at 372-74 (Oct., dissenting).
363. 366 So. 2d 798 (Fla. 2d Dist. Ct. App. 1979) (as amended).
expand this exception to include facial attacks on the constitutional validity of an agency rule, reasoning that with a rule, unlike a statute, "an adequate remedy remains available in the administrative process."

The agency may correct any constitutional error in the rule through the administrative process. If the agency fails to do so, then the district court of appeal is the appropriate forum to conduct judicial review of the agency decision. Similarly, the courts have refused to authorize an exception to the exhaustion requirement where "an agency has applied a facially constitutional statute or rule in such a way that the aggrieved party’s constitutional rights . . . were violated." However, the court in Key Haven recognized an exception to the exhaustion doctrine for taking claims.

[W]here the agency is implementing a statute which, by its terms, properly allows a total taking of private property, direct review in the district court [of appeal] of the agency action may be eliminated and proceedings properly commenced in circuit court, if the aggrieved party is willing to accept all actions by the executive branch as correct both as to the constitutionality of the statute implemented and as to the propriety of the agency proceedings.

The court permitted such an action because it was "not a veiled attempt to collaterally attack the propriety of agency action." Another exception to the exhaustion doctrine has only recently emerged. A few recent opinions have allowed an exception where a party has challenged the agency’s jurisdiction. In order to guard against abuse of this exception, courts generally required that the pleadings in such cases persuasively establish that the jurisdictional challenge was legitimate, and not merely a substitute for avoiding application of the exhaustion doctrine. These cases are an extension of Key Haven in that they place jurisdictional issues in the facial constitutional validity of a rule.

352. Key Haven, 427 So. 2d 157-58.
353. Id. at 158.
354. Id.
355. Id. at 159.
356. Id.
357. E.g., Department of Environmental Regulations v. Falls Chase Special Taxing Dist., 424 So. 2d 787 (Fla. 1st Dist. Ct. App. 1983).
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363. 366 So. 2d 798 (Fla. 2d Dist. Ct. App. 1979) (as amended).
claim by consumers that they had been illegally overcharged for electricity and were entitled to a refund. The consumers brought an action in circuit court, but the court dismissed it, because the Public Service Commission had exclusive authority to determine the reasonableness of the rates charged for electricity. The court affirmed the circuit court’s dismissal of the complaint. It held that the Public Service Commission had jurisdiction to determine the validity of rates charged by electrical utilities, and thus, was the appropriate forum for resolution of this dispute. Critical to the court’s decision was its view of the Commission’s jurisdiction. The court noted in dicta that the rate making power of the Public Service Commission was not restricted to altering rates to be charged prospectively. The Public Service Commission may “alter previously rate orders under extraordinary circumstances.” The facts alleged in the circuit court complaint were insufficient, if proven, to constitute extraordinary circumstances justifying a rate adjustment by the Commission.

Similarly, in Roberts v. Ayers, the court held that an administrative proceeding of the Florida Real Estate Commission would be preempted by a declaratory judgment action in the circuit court under section 475.25(1)(c) of the Florida Statutes only if the action was filed in a timely fashion. The court found that a gap of over two years between the transaction and the filing of the declaratory judgment action was not timely under the statute.

373. Roberts, 380 So. 2d at 1059.
374. Florida courts, at least in the administrative context, do not effectively distinguish between res judicata and collateral estoppel. But see infra note 375. They are not alone in this failure as many courts find that the precise line between the two doctrines is not always clear. "A survey of relevant informed opinion reveals little agreement as to how the doctrines should be defined, how they differ from each other, or how the two may be reliably differentiated in any but the most commonplace situations." Clark-Cowlitz Joint Operating Agency v. FERC, 773 F.2d 366, 373 (D.C. Cir. 1985). See also Restatement (Second) of Judgments §§ 27-29, 83 (1982) (reporter's notes). Burns, supra note 9, at 1013-15. Nor is it necessarily important. Regardless of the location of the precise dividing line between these doctrines, they serve the mutual purposes of "reliev[ing] parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980).
375. Some courts have recognized as distinct from res judicata the principle of collateral estoppel as a bar to subsequent agency actions. E.g., Department of Health and Rehabilitative Serv. v. Vernon, 379 So. 2d 683, 684-85 (Fla. 2d Dist. Ct. App. 1980) (where the standard for proving misconduct was substantially lower for the second agency, it was not bound by the prior agency's decision on the issue under the principles of collateral estoppel); Friends of the Everglades, Inc. v. Zoning Board, Monroe County, 478 So. 2d 1126 (Fla. 1st Dist. Ct. App. 1985) rev'd and dis. Welty v. Florida Game & Fresh Water Fish Commission, 501 So. 2d 671 (Fla. 1st Dist. Ct. App. 1987) rev'd and dis. Hello and
376. E.g. Maret v. Hardy, 450 So. 2d 1207, 1210 (Fla. 4th Dist. Ct. App. 1984) rev'd and dis. ("should be applied in zoning cases with great caution"); Marion County School Board v. Clark, 378 So. 2d 831, 835-37 (Fla. 1st Dist. Ct. App. 1979) rev'd and dis.; Special Disability Trust Fund v. University of Miami, 379 So. 2d 1323, 1324-25 (Fla. 1st Dist. Ct. App. 1980). Of course, courts have never been terribly embued about its application in the judicial context either. As Judge Clark noted in Riordan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945).
claim by consumers that they had been illegally overcharged for electricity and were entitled to a refund. The consumers brought an action in circuit court, but the court dismissed it, because the Public Service Commission had exclusive authority to determine the reasonableness of the rates charged for electricity. The court affirmed the circuit court’s dismissal of the complaint. It held that the Public Service Commission had jurisdiction to determine the validity of rates charged by electrical utilities, and thus, was the appropriate forum for resolution of this dispute. Critical to the court’s decision was its view of the Commission’s jurisdiction. The court noted in dicta that the rate making power of the Public Service Commission was not restricted to altering rates to be charged prospectively. The Public Service Commission may alter previously final rate orders under extraordinary circumstances. The facts alleged in the circuit court complaint were sufficient, if proven, to constitute extraordinary circumstances justifying a rate adjustment by the Commission.

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364. The consumers alleged in their class action lawsuit that Florida Power Corporation charged a fuel adjustment charge in excess of that permitted under the rules of the Public Service Commission. Id. at 799 n.2. See also Florida Power Corp. v. Zenith Indus. Co., 377 So. 2d 203 (Fla. 2d Dist. Ct. App. 1979) reh’g denied.

365. Id. at 799. See also Florida Power Corp. v. Hawkins, 367 So. 2d 1011, 1013-14 (Fla. 1979) (The Court noted that due process was a limitation on the power of the Commission to subsequently alter its rate orders.)

366. Id. at 798. See also Florida Power Corp. v. Ayers, supra note 9, at 1013-15. Nor is it necessarily important. Regardless of the location of the precise dividing line between these doctrines, they serve the mutual purposes of "rele[ving] parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980).

367. Some courts have recognized as distinct from res judicata the principle of collateral estoppel as a bar to subsequent agency actions. E.g., Department of Health and Rehabilitative Serv. v. Vernon, 379 So. 2d 683, 684-85 (Fla. 2d Dist. Ct. App. 1980) (where the standard for proving misconduct was substantially lower for the second agency, it was not bound by the prior agency’s decision on the issue under the principles of collateral estoppel); Friends of the Everglades, Inc. v. Zoning Board, Monroe County, 478 So. 2d 1126 (Fla. 1st Dist. Ct. App. 1985) reh’g denied; Walley v. Florida Game & Fresh Water Fish Commission, 501 So. 2d 671 (Fla. 1st Dist. Ct. App. 1987) reh’g denied.

368. E.g., Marelly v. Hardy, 450 So. 2d 1207, 1210 (Fla. 4th Dist. Ct. App. 1984) reh’g denied ("should be applied in zoning cases with great caution"); Marion County School Board v. Clark, 378 So. 2d 831, 835-37 (Fla. 1st Dist. Ct. App. 1979) reh’g denied; Special Disability Trust Fund v. University of Miami, 379 So. 2d 1323, 1324-25 (Fla. 1st Dist. Ct. App. 1980). Of course, courts have never been terribly enthused about its application in the judicial context either. As Judge Clark noted "[t]he defense of res judicata is universally respected, but actually not very well liked." Riodan v. Ferguson, 147 F.2d 983, 988 (2d Cir. 1945).
trict courts of appeal under the APA. 377

In order for res judicata to act as a bar to subsequent relitigation, there must be a valid final agency or court order in a prior proceeding and identity in "(1) . . . the thing sued for; (2) . . . the cause of action; (3) . . . the persons and parties of the action; and (4) . . . the quality in the person for or against whom the claim is made." 378 If the requirements of res judicata are satisfied, then neither agencies nor courts may subsequently relitigate issues already resolved by a court or another agency. 380

Obviously, res judicata doctrine cannot bind a subsequent agency or court, if the requirements for application of the doctrine were not satisfied. The courts generally have rigorously applied the requirements to avoid application of the doctrine. 381 Even where the courts have found res judicata should apply, they have minimized its effects. For example, in City of Bartow v. Public Employees Relations Commission, 382 the court held that the Public Employees Relations Commission properly declined to give res judicata effect to the decision of the Bartow Civil Service Board, because the Board's decision was on a different substantive issue. The board had decided whether the employee was insubordinate, not whether the city was engaged in an unfair labor practice, the issue before the commission. At most, the Commission was barred from relitigating the insubordination issue, but this did not deprive it of the power to resolve the unfair labor practice claim. 383

The courts have also fashioned an equity based exception to res judicata when there has been a substantial change in the law or facts. 384 In Guinn v. Board of County Commissioners, 385 the court held that substantial changes in the zoning plan prevented the application of res judicata principles to bar a subsequent proposal for a special exception for a softball field. The fact such a request was denied earlier did not bar the second request, because the changes in the plans made it a substantially different request. 386

The courts have struggled with the problem of whether res judicata principles apply to an agency decision in which a party has failed to timely pursue the administrative review process and instead has attacked the validity of the agency decision by suing for declaratory relief in circuit court. 387 In Mellon v. Cannon, 388 the court held that the decision of the Department of Highway Safety was final, and that the failure to pursue the remedy provided by statute for reviewing the decision precluded a circuit court from subsequently exercising jurisdiction in a mandamus action to do so. 389 In Coulter v. Davis, 390 the court held that when such a lawsuit attacked the constitutional validity of the

380. See Florida Ethics Comm'n v. Plante, 369 So. 2d 332, 336 (Fla. 1979) (dicta); South Florida Regional Planning Council v. Florida Land and Water Adjudicatory Comm'n, 372 So. 2d 159, 166-67 (Fla. 3d Dist. Ct. App. 1979). But see Florida Ethics Comm'n v. Plante, 369 So. 2d 332, 340 (Fla. 1979) (Adkins, J., dissenting). Such an approach did not always govern whether an agency's decision was final. See Marion County School Bd. v. Clark, 378 So. 2d 831, 834 (Fla. 1st Dist. Ct. App. 1979) rehg denied.
381. E.g., Friends of the Everglades, 478 So. 2d 1126, 1127 (Fla. 1st Dist. Ct. App. 1985) rehg denied. (The court noted that there was "insufficient identity of the cause of action for application of the strict res judicata doctrine."). But see White v. Bd. of Dade County, 466 So. 2d 1141 (Fla. 3d Dist. Ct. App. 1985) rehg denied.
382. 382 So. 2d 311 (Fla. 2d Dist. Ct. App. 1980).

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strict courts of appeal under the APA. In order for res judicata to act as a bar to subsequent relitigation, there must be a valid final agency or court order in a prior proceeding and identity in "(1) ... the thing sued for; (2) ... the cause of action; (3) ... [the] persons and parties of the action; and (4) ... the quality in the person for or against whom the claim is made." If the requirements of res judicata are satisfied, then neither agencies nor another court may subsequently relitigate issues already resolved by a court or another agency.

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The courts have also fashioned an equity based exception to res judicata when there has been a substantial change in the law or facts. In Gunn v. Board of County Commissioners, the court held that substantial changes in the zoning plan prevented the application of res judicata principles to bar a subsequent proposal for a special exception for a softball field. The fact that such a request was denied earlier did not bar the second request, because the changes in the plans made it a substantially different request.

The courts have struggled with the problem of whether res judicata principles apply to an agency decision in which a party has failed to timely pursue the administrative review process and instead has attacked the validity of the agency decision by suing for declaratory relief in circuit court. In Mellon v. Cannon, the court held that the decision of the Department of Highway Safety was final, and that the failure to pursue the remedy provided by statute for reviewing the decision precluded a circuit court from subsequently exercising jurisdiction in a mandamus action to do so. In Coulter v. Davin, the court held that when such a lawsuit attacked the constitutional validity of the

377. FLA. STAT. § 120.68 (1987).
iment of Revenue, 510 So. 2d 936, 943 (Fla. 1st Dist. Ct. App. 1987) (noting lack of jurisdiction even if the decision was not challenged on that point deprives an agency's decision of res judicata effect in subsequent proceedings).
381. (E.g., Friends of the Everglades, 478 So. 2d 1126, 1127 (Fla. 1st Dist. Ct. App. 1985) (re'g denied. (The court noted that there was "insufficient identity of the cause of action for application of the strict res judicata doctrine.") But see White v. School Bd. of Dade County, 466 So. 2d 1141 (Fla. 3d Dist. Ct. App. 1985) (re'g denied).
382. 382 So. 2d 311 (Fla. 2d Dist. Ct. App. 1980).
agency decision, res judicata prohibited the circuit court from considering this aspect of the complaint, because such claims were implicitly or explicitly resolved by the prior agency proceeding. 398

When administrative action in a proceeding has become final as to a party, whether or not review by a district court of appeal is sought, that party is foreclosed from asserting in circuit court that the agency action is unconstitutional (or improper for any other reason). This is for the simple reason that the constitutionality of the action is an issue which could have been asserted by the party on direct review by the district court of appeal pursuant to Section 120.68. That would be the case whether the particular agency action took the form of a rule, a regulation, an order, or any other form. 399

A distinction has been made between cases involving an attack on the constitutionality of a statute and those involving a constitutional attack on an agency's decision. When the agency and the district court of appeal cannot resolve the issue of statutory constitutionality through the process provided under the APA, 400 then the circuit court may exercise jurisdiction. In such cases, there is no adequate forum for the litigation of the constitutional issue and it cannot be assumed these issues can be implicitly or explicitly resolved by the regular administrative decision processes. In such cases, it is inappropriate to apply res judicata principles to preclude the subsequent lawsuit to resolve the constitutional issue. 401

The general rule is that representations by state officers or employ-

398. Coulter, 373 So. 2d at 426-27. See also Fraternal Order of Police Miami Lodge 20 v. City of Miami, 364 So. 2d 726, 727 (Fla. 3d Dist. Ct. App. 1980).

399. Id. at 427.

400. Telling the difference between these two types of claims is not always an easy task as the court noted in Florida Cannors Ass'n v. Department of Citrus, 371 So. 2d 503 (Fla. 2d Dist. Ct. App. 1979); Cutler, 373 So. 2d at 428-29.

401. Coulter, 373 So. 2d at 427-28; Mellon, 482 So. 2d at 607 (Cowart, J., dissenting). Cf. Escambia County Sheriff's Dep't v. Florida Police Benevolent Ass'n, 376 So. 2d 435 (Fla. 1st Dist. Ct. App. 1979) (the court held constitutional arguments were not waived by the failure to raise the issue in the proceeding before the agency, because the agency lacked authority to rule on the issue.).


398. Hobbs, 368 So. 2d at 369; Project Home, 373 So. 2d at 712. See also Realty Management Corp. v. Kemp, 381 So. 2d 1114, 1116-17 (Fla. 1st Dist. Ct. App. 1980).

399. "[A] general rule, equitable estoppel will be applied against the State only in rare instances and in exceptional circumstances." Long v. Department of Administration, 428 So. 2d 688, 691 (Fla. 1st Dist. Ct. App. 1983)rehg denied. See, e.g., Micret, Inc. v. Public Serv. Comm'n, 483 So. 2d 415, 419 (Fla. 1986) (rejected estoppel claim based upon position established by the PSC in federal court); Bill Salter Outdoor Advertising, Inc. v. Department of Transp., 492 So. 2d 408 (Fla. 1st Dist. Ct. App. 1986)rehg denied; City of Miami v. Fraternal Order of Police, 378 So. 2d 20,
agency decision, res judicata prohibited the circuit court from considering this aspect of the complaint, because such claims were implicitly or explicitly resolved by the prior agency proceeding.\[88\]

[W]hen administrative action in a proceeding has become final as to a party, whether or not review by a district court of appeal is sought, that party is foreclosed from asserting in circuit court that the agency action is unconstitutional (or improper for any other reason). This is for the simple reason that the constitutionality of the action is an issue which could have been asserted by the party on direct review by the district court of appeal pursuant to Section 120.68. That would be the case whether the particular agency action took the form of a rule, a regulation, an order, or any other form.\[89\]

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Estoppel

The general rule is that representations by state officers or employ-


393. Id. at 427.

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395. Coulter, 373 So. 2d at 427-28; Melion, 482 So. 2d at 607 (Cowart, J., dissenting). Cf. Eucambo County Sheriff’s Dept v. Florida Police Benevolent Assoc., 376 So. 2d 435 (Fla. 1st Dist. Ct. App. 1980) (The court held constitutional arguments were not waived by the failure to raise the issue in the proceeding before the agency, because the agency lacked authority to rule on the issue).

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ees do not result in the state being estopped from enforcing the law.\[88\]

Three elements must be satisfied before courts will consider the state estopped:

The[se] elements of equitable estoppel [as applied to the government] are:

1. . . good faith reliance on
2. (2) some act or omission of the government [which the government later repudiated] and
3. (3) a substantial change in position or the incurring of excessive obligations and expenses so that it would be highly inequitable and unjust to destroy the right acquired.\[89\]

A prima facie claim of estoppel exists only when the state has encouraged a party to rely upon representations of its officers or employees as to the law’s application to a party’s circumstances and that the party has detrimentally relied in good faith upon these representations.\[88\] It is a rare case in which an appellate court finds these elements have been satisfied.\[89\] Even when all the elements were satisfied,


398. Hobbs, 368 So. 2d at 369; Project Home, 373 So. 2d at 712. See also Realy Management Corp v. Kemp, 381 So. 2d 1114, 1116-17 (Fla. 1st Dist. Ct. App. 1980).

399. “[A] general rule, equitable estoppel will be applied against the State only in rare instances and in exceptional circumstances.” Long v. Department of Administration, 428 So. 2d 688, 693 (Fla. 1st Dist. Ct. App. 1983) reh’g denied. See, e.g., Microtel, Inc. v. Public Serv. Comm’n, 483 So. 2d 415, 419 (Fla. 1986) (rejected estoppel claim based upon position established by the PSC in federal court); Bill Saltier Outdoor Advertising, Inc. v. Department of Transp., 492 So. 2d 408 (Fla. 1st Dist. Ct. App. 1986) reh’g denied; City of Miami v. Fraternal Order of Police, 378 So. 2d 20.
the courts rejected application of estoppel principles in circumstances where the law clearly prohibited as against public policy the government Employee's decision.\textsuperscript{496} Given the number of cases in which estoppel argument has been raised on appeal, it would appear to be a favorite argument of the bar. The bench, however, is much less enamored with it and an estoppel argument generally offers little chance of

24-25 (Fla. 3d Dist. Ct. App. 1980) reh'g denied; Corona Properties of Fla., Inc. v. Monroe County, 485 So. 2d 1314, 1317-18 (Fla. 3d Dist. Ct. App. 1986) reh'g denied; Dodge County v. United Resources, Inc., 374 So. 2d 1046, 1051 (Fla. 3d Dist. Ct. App. 1979) reh'g denied; Department of Envtl. Regulation v. Oyster Bay Estates, Inc., 34 sources v. Railway Marketing Corp., 485 So. 2d 840, 842-43 (Fla. 5th Dist. Ct. App. 1986) reh'g denied; Health Care Retirement Corp. v. Department of Health and Rehabilitative Servs., 463 So. 2d 1175, 1177-78 (Fla. 1st Dist. Ct. App. 1985) reh'g denied; Holladay v. City of Coral Gables, 382 So. 2d 92, 96-97 (Fla. 3d Dist. Ct. App. 1980) 2d 735, 737-38 (Fla. 1st Dist. Ct. App. 1986) reh'g denied; Machules v. Dep't of Adm. Mangement, 381 So. 2d at 1116-17 (taxing power); St. Joseph Land and Development Co. v. Florida Bd. of Trustees of the Internal Improvement Trust Fund, 365 So. 2d 1084, 1089-90 (Fla. 3d Dist. Ct. App. 1979) reh'g denied. (Equitable estoppel principles are applicable to the actions of state agencies. However, in this case the estoppel claim was founded solely on the quantity of land received in a [government] conveyance to them. There must be a showing of substantial detrimental reliance by the private party on the government's position.); T.I. Management, Inc. v. Department of Transp., 497 So. 2d 685, 687 (Fla. 1st Dist. Ct. App. 1986) reh'g denied. But see Chipley Mortgage Co. v. Department of Transp., 498 So. 2d 1357, 1359 (Fla. 1st Dist. Ct. App. 1986) Killman Properties, Inc. v. City of Tallahassee, 336 So. 2d 172 (Fla. 1st Dist. Ct. App. 1979) reh'g denied (The court held estoppel principles prevented the city from discontinuing electric street light service.); Kuge v. Department of Administration, 449 So. 2d 389, 391 (Fla. 3d Dist. Ct. App. 1984); Ready Creek Improvement Dist., 483 So. 2d at 647-48; Walker v. Department of Transportation, 366 So. 2d 96 (Fla. 1st Dist. Ct. App. 1979) reh'g denied (radical change of agency position not carried into effect through the rule making process.);

400. Sale v. Department of Administration, 432 So. 2d 1736 (Fla. 3d Dist. Ct. App. 1983); Swoob v. Florida Construction Indus. Licensing Bd., 363 So. 2d 1009 (Fla. 1st Dist. Ct. App. 1980); (Estoppel and waiver principles cannot bar the court from considering whether an agency had jurisdiction to issue an order.) Administrative agencies are granted only the jurisdiction and powers conferred by the legislature and not authority over the subject matter jurisdiction of the court [or agency] to bear a matter.\textsuperscript{496} may be attacked at any time.); Pumphkin v. Lombard, 279 So. 2d 79, 82 (Fla. 3d Dist. Ct. App. 1973); Tri-State Systems, Inc. v. Department of Transp., 218 (Fla. 1st Dist. Ct. App. 1986) (dictum).
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erning Florida administrative law. What follows is a discussion of how the courts have interpreted various provisions of the APA.

What Is An Agency Under The APA?

The APA contains a very broad definition of agency. The courts have interpreted this definition consistent with the theory that the APA should apply to all agencies unless legislatively exempted. In Florida Governor's Council on Indian Affairs v. Tweeman, the court held that the term agency as used in the APA included "quasi-independent" public councils created by executive order or legislation and which had been funded by the state and which received benefits from being considered a part of the state government. In Commission on Ethics v. amended at Fla. Stat. § 120.52(5)(c), (5)(e) (1987); ch. 87-385 § 120.54(3)(b), 1987 Fla. Laws 2316, 2318-19 (codified as amended at Fla. Stat. § 120.54(3)(b) (1987)); ch. 87-385 § 120.54(3)(b), 1987 Fla. Laws 2316, 2319 (codified as amended at Fla. Stat. § 120.54(3)(b) (1987)); ch. 87-224 § 120.55(1)(a), 1987 Fla. Laws 1373, 1384 (codified as amended at Fla. Stat. § 120.55(1)(a) (1987)); ch. 87-322 § 120.55(4)(a)-(4) (1987); ch. 87-6 § 120.57(1)(b)(3), 1987 Fla. Laws 9, 66 (codified as amended at Fla. Stat. § 120.57(1)(b)(3) (1987))

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Saltonstall, the court held that the Ethics Commission was an agency as defined in the APA and that it was governed by APA procedures and that it promulgated rules to the contrary under the rule making authority delegated to it by the legislature. But the court resisted an overly expansive reading of the term agency in Convention Press, Inc. v. Gordon. In Convention Press, the court found the joint legislative management committee was a legislative body and specifically exempted from the APA. Thus, its proceedings were not governed by the APA's procedural processes. This was a sound result as the various provisions of the APA clearly designate the committee's purpose as legislative in nature. Similarly, courts have respected the legislative decision to exempt local agencies from the APA. For example, the court in Greene v. Carson, held that local civil service boards are not automatically agencies subject to the constraints of the APA. They are governed by the APA only "to the extent they are expressly made subject to the . . . [APA] by . . . law." In Booker Creek Preservation, Inc. v. Pinellas Planning Councd., the court used a functional approach focused on the jurisdiction of an agency in determining whether an agency created by the legislature was a county or municipal agency, exempt from the APA, or a state agency subject to the APA. The court held that "[b]ecause the [Pinellas] [Planning Ccouncil operate[d] entirely within Pinellas County and ha[d] no authority outside that county, it [wa]s not comparable in jurisdiction to a statewide agency or even a regional, interstate agency." The court noted that nothing in the legislative enactment of the council indicated that the legislature considered it anything other than a local agency created by special legislative act.

450 So. 2d 553 (Fla. 1st Dist. Ct. App. 1986).
451 Id. at 555.
452 Id. at 554-55. See also Airboat Assoc. of Fla. v. Florida Game and Fresh Water Fish Com'n, 498 So. 2d 629, 631-32 (Fla. 3d Dist. Ct. App. 1986).
453 370 So. 2d 963 (Fla. 1st Dist. Ct. App. 1979) (per curiam).
454 Id. at 963-94. See Fla. Stat. § 120.51(1) (1987).
455 Id. at 964.
456 Fla. Stat. §§ 120.54(3)(b)-(14), 120.545 (1987).
457 207 So. 2d 1007 (Fla. 1st Dist. Ct. App. 1967) rel d denied.
458 Id. at 1008-09.
Rules Versus Orders

The dichotomy between a rule and an order established by the APA is significant for two reasons.48 First, it establishes what procedures an agency must comply with under the APA in taking any action. Second, it shapes the nature of judicial review process of an agency decision. Unfortunately, the APA and the courts have not given much guidance in the distinction between the two concepts. The APA distinguishes between a rule and an order by noting that the former is a "statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of any agency,"49 while an order is anything which is not a rule.49

This division envisions that agencies will generally develop policy through the rule-making process.48 However, it is clear that not all policies must be established through that process. Agencies have considerable freedom in choosing to develop policy through the courts in the rule-making process or incrementally through the adjudicative process by a series of orders.48 Administrative agencies are not required to institute rule-making procedures each time a new policy is developed... although that form of proceeding is preferable where... industry-wide policy is being established."48 Even if policies are developed

48. See, e.g., City of Tallahassee v. Public Serv. Comm'n, 433 So.2d 1085, 1088 (Fla. 1983) (reversed); Ashmeier v. Department of Business Regulation, 393 So.2d 147 (Fla. 1980) (reversed); McDonald v. Department of Banking & Fin., 346 So.2d 569, 581 (Fla. 1977) (reversed).

49. See, e.g., City of Tallahassee v. Public Serv. Comm'n, 433 So.2d 1085, 1088 (Fla. 1983) (reversed); Ashmeier v. Department of Business Regulation, 393 So.2d 147 (Fla. 1980) (reversed); McDonald v. Department of Banking & Fin., 346 So.2d 569, 581 (Fla. 1977) (reversed).

50. See, e.g., City of Tallahassee, 433 So.2d at 1085; see also Department of Health and Rehabilitative Servs., 452 So.2d 976 (Fla. 1st Dist. Ct. App. 1984) (reversed); Department of Health and Rehabilitative Servs., 452 So.2d 976 (Fla. 1st Dist. Ct. App. 1984) (reversed); Department of Health and Rehabilitative Servs., 452 So.2d 976 (Fla. 1st Dist. Ct. App. 1984) (reversed).

"In a rule-making proceeding, there must be an adequate support for... the decision in the record of the proceeding" or the policies will be invalid.48 An agency is not required to interpret a statutory term through the rule-making process before that term can serve as a basis for administrative proceedings.48 But an agency is required to disclose... the rules and interpretations govern the processes. It may not create new rules, policies, or procedures which govern the outcome in a case that are secret or unknown to the nongovernment parties involved in the proceeding.48

The Rule-Making Process

It is constitutionally legitimate and functionally necessary for the legislature to delegate rule-making authority to agencies. By doing so, the legislature avoids being trapped into continual sessions in order to deal with the complexities of modern society. It is primarily through the rule-making process that agencies fill in the details necessary for effective functioning of modern government.48 Agency rules implementing a statute are presumed to be valid "absent a clear showing that the subject of the statutory enactments was outside the power of the legislature, or that the rules and regulations promulgated under the statute were arbitrary or unreasonable or not consistent with the mandate of the legislature."48 The courts use this deferential form of judicial review in determining whether a rule is substantively valid.48
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presumably subject to the APA, Id.; Fla. Stat. § 120.52(1)(c) (1987).


423. Fla. Stat. § 120.52(16) (1987) (This provision also exempts several types of decisions or action from the rule category).


425. Rule-making is the preferred method for developing policy “in order not to waste resources by repeatedly explicating and defending the policy in Section 1307 hearings.” Public Serv. Comm’n v. Indiantown Telephone Sys., Inc., 435 So. 2d 892, 895 (Fla. 1st Dist. Ct. App. 1983).

426. See, e.g., City of Tallahassee v. Public Serv. Comm’n, 433 So. 2d 505, 98 (Fla. 1983) (reh’g denied); Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177 (Fla. Dist. Ct. App. 1981); Indiantown Telephone, 435 So. 2d at 895-6; McDonald v. Department of Banking & Fin., 346 So. 2d 569 (Fla. 1st Dist. Ct. App. 1983).

427. Florida Cities Water Co. v. Public Serv. Comm’n, 384 So. 2d 1080 (Fla. 1980). See also City of Tallahassee, 433 So. 2d at 508. But see Anheuser-Busch, 393 So. 2d at 1281-83 (Boyd, J, concurring and dissenting); Balsam v. Department of Health and Rehabilitative Serv., 452 So. 2d 976 (Fla. 1st Dist. Ct. App. 1984); Pelaez v. Department of Health and Rehabilitative Serv., 452 So. 2d 1007 (Fla. 1st Dist. Ct. App. 1984).

In a non-rule proceeding, there must be an adequate support for... the decision in the record of the proceeding” or the policies will be invalid. An agency is not required to interpret a statutory term through the rule-making process before that term can serve as a basis for administrative proceedings. But an agency is required to disclose what rules and interpretations govern its processes. It may not create rules, policies, or procedures which govern the outcome in a case that are secret or unknown to the nongovernment parties involved in the proceeding.

The Rule-Making Process

It is constitutionally legitimate and functionally necessary for the legislature to delegate rule-making authority to agencies. By doing so, the legislature avoids being trapped into continual sessions in order to deal with the complexities of modern society. It is primarily through the rule-making process that avoids being trapped into continual sessions in order to deal with the complexities of modern society. It is primarily through the rule-making process that agencies have the ability to develop policy in the absence of the legislature, or that the rules and regulations promulgated under the statutes were arbitrary or unreasonable or not consistent with the mandate of the legislature. The courts use this deferential form of judicial review in determining whether a rule is substantively valid.

428. Florida Cities Water, 384 So. 2d at 1281; Indiantown Telephone, 435 So. 2d 895-6.


431. See, e.g., State v. Denmark, 366 So. 2d 469, 470 (Fla. 4th Dist. Ct. App. 1979) reh’g denied; see supra text accompanying notes 52-81.

432. State v. Denmark, 366 So. 2d 469, 471 (Fla. 4th Dist. Ct. App. 1979) reh’g denied. Properly promulgated rules are legal binding and their violation may result in an assessment of liability. See First Overseas Investment Corp. v. Corton, 491 So. 2d 201 (Fla. 4th Dist. Ct. App. 1986) reh’g denied (per se tort liability for failure to comply with IRS rules).

433. The standards of judicial review are discussed more fully in part III of this Article.
However, in order for a rule to be legally binding, it must also be adopted pursuant to the APA rule-making process. If an agency fails to comply with the procedural or substantive requirements of the APA rule-making process, then the rule so adopted is invalid. A violation of the provisions of the APA concerning the procedure for promulgating rules converts an otherwise valid exercise of delegated rule-making authority into an ultra vires and unlawful administrative decision. This can occur in a number of ways. In McCarty v. Department of Insurance and Treasurer, the court held that the Fire Marshall could not implement policy through a letter rather than the rule-making procedures of the APA. The court recognized that in the case of "incipient agency policy," the agency was not required to use the APA rule-making procedures until the agency wanted the rules to have general legal effect. In this case the incipient policy exception did not apply, as the Fire Marshall intended for the policy stated in the letter to have general effect.

But other cases demonstrate, the harmless error doctrine may in some circumstances save from invalidity rules promulgated by a procedurally defective means. For example, in School Board of Broward

434. Unless of course the legislature exempted the agency from this process. Even then the ultimate policy adopted was considered a rule. See, e.g., State Bd of Educ v. Brady, 368 So. 2d 661 (Fla. 1st Dist. Ct. App. 1979).


436. Department of Health and Rehabilitative Services v. Florida Project Direc tors Assoc., 368 So. 2d 954, 955 (Fla. 1st Dist. Ct. App. 1979) (The court held that the Departmental Forms Index published in the Florida Administrative Code could not be promulgated as official rules until the notice provisions of the APA were complied with. It was not sufficient for the published notice to merely state these forms were incorporated by reference. The rule making notice must state the title of each form with sufficient clarity so that its content and purpose are revealed and that specific forms may be ordered for examination during the rule making process.)


438. 479 So. 2d 135 (Fla. 2d Dist. Ct. App. 1985) rem'g denied.

439. Id. at 136.

440. Id. at 137.

441. Id.

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County v. Greamish, the court noted that the failure to prepare the required economic impact statement was not always fatal to the validity of an agency rule. The court held that when this failure could be characterized as harmless error the rule was valid despite the procedural error. In Polk v. School Board of Polk County, the court interpreted section 120.68(8) as providing a statutory authorization for holding procedural errors which did not "[f]render [the] [agency's] ruling unfair or incorrect" to be harmless errors. In light of this APA provision, the court held that failure to prepare an economic impact statement as required was harmless error. The court believed it was too late to reconsider the decision in light of any information such a statement would provide, and the decision process of the school board was sound even without the economic impact statement.

The APA also provides for the promulgation of emergency rules. The courts have generally demanded strict compliance with the procedures for promulgation of emergency rules and engaged in an independent assessment of the substantive basis for such rules. In Times Publishing Company v. Department of Corrections, the court rejected the harmless error approach and required an agency to strictly comply with the requirements for the promulgation of an emergency rule: that it "publish 'in writing at the time of, or prior to, its action specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances.'" The department of corre-
However, in order for a rule to be legally binding, it must also be adopted pursuant to the APA rule-making process. If an agency fails to comply with the procedural or substantive requirements of the APA rule-making process, then the rule so adopted is invalid. A violation of the provisions of the APA concerning the procedure for promulgating rules converts an otherwise valid exercise of delegated rule-making authority into an ultra vires and unlawful administrative decision.

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But other cases demonstrate, the harmless error doctrine may in some circumstances save from invalidity rules promulgated by a procedurally defective means. For example, in School Board of Broward County v. Grumish, the court noted that the failure to prepare the required economic impact statement was not always fatal to the validity of an agency rule. The court held that when this failure could be characterized as harmless error the rule was valid despite the procedural error. In Polk v. School Board of Polk County, the court interpreted section 120.68(8) as providing a statutory authorization for holding procedural errors which did not "[render] the [agency] ruling unfair or incorrect" to be harmless errors. In light of this APA provision, the court held that failure to prepare an economic impact statement as required was harmless error. The court believed it was too late to reconsider the decision in light of any information such a statement would provide, and the decision process of the school board was sound even without the economic impact statement.

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434. Unless of course the legislature exempted the agency from this process. Even then the ultimate policy adopted was considered a rule. See, e.g., State Bd of Educ. v. Brady, 368 So. 2d 661 (Fla. 1st Dist. Ct. App. 1979).
436. Department of Health and Rehabilitative Services v. Florida Project Directors Ass'n, 368 So. 2d 954, 955 (Fla. 1st Dist. Ct. App. 1979) (The court held that the Departmental Forms Index published in the Florida Administrative Code could not be promulgated as official rules until the notice provisions of the APA were complied with. It was not sufficient for the published notice to merely state these forms were incorporated by reference. The rule making notice must state the title of each form with sufficient clarity so that its content and purpose are revealed and that specific forms may be ordered for examination during the rule making process.).
437. See, e.g., Department of Corrections v. Piccirillo, 474 So. 2d 1199 (Fla. 1st Dist. Ct. App. 1985), Department of Health and Rehabilitative Serv. v. Delray Hospital Corporation, 373 So. 2d 75 (Fla. 1st Dist. Ct. App. 1979); Gulfstream Park Racing Ass'n v. Division of Pari-Mutuel Wagering, 407 So. 2d 263 (Fla. 1st Dist. Ct. App. 1981); Cj North Miami Beach Medical Center, Inc. v. City of Fort Lauderdale, 374 So. 2d 1106 (Fla. 4th Dist. Ct. App. 1979) (failure to give adequate notice of proposed zoning code amendment).
438. 479 So. 2d 135 (Fla. 2d Dist. Ct. App. 1985) re'hg denied.
439. Id. at 136.
440. Id. at 137.
441. Id.
receptions failed to comply with this requirement and the court held that the emergency rule it had adopted was invalid.\textsuperscript{668}

What Counts As Evidence In An Administrative Proceeding\textsuperscript{669}

Compared to the rules of evidence which govern traditional court proceedings, the APA's rules for the admission of evidence are very liberal.\textsuperscript{666} Section 120.58 provides that in both a rule-making and adjudication context only evidence which is "[i]relavent, immaterial, or unduly repetitious shall be excluded, but all other evidence relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible." \textsuperscript{667}

Hearsay

Although the APA permits the admission of such evidence primarily for "the purpose of supplementing or explaining other evidence,"\textsuperscript{668} it also provides that hearsay evidence may constitute competent substantial evidence if "it would be admissible over objection in civil actions."\textsuperscript{669} In Florida Department of Law Enforcement v. Dukes,\textsuperscript{670} the court correctly held that hearsay statements which might be excluded in a court proceeding were admissible under section 120.58(3)(a). The failure to qualify the statement for admissibility in court did not entitle

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the hearing officer to exclude them.\textsuperscript{671} Similarly, in Kaiko v. Department of Legal Affairs,\textsuperscript{672} the court held that the hearing examiner erred in not admitting evidence solely because it was hearsay.\textsuperscript{673} And in E. Blanche, Inc. v. Unemployment Appeals Commission,\textsuperscript{674} the court correctly held that hearsay evidence "cannot alone support" a finding that an employee was discharged for misconduct related to his employment,\textsuperscript{675} as the hearsay evidence relied upon would not have been admissible in a civil action as required by the APA.\textsuperscript{676} Unfortunately, the holding does not reflect this reasoning. Rather, the court granted its holding on the claim that no matter what sort of case is involved, hearsay evidence alone is insufficient to constitute competent substantial evidence.\textsuperscript{677} In doing so it clearly erred.

In Tallahassee Housing Authority v. Unemployment Appeals Commission,\textsuperscript{678} the court dealt with an interesting hearsay issue concerning the admission of a summary of business records in an administrative hearing. The court held that the admission was governed by section 90.956, of the Evidence Code and not section 120.58(1)(a) of the APA\textsuperscript{679} and that because the summary did not comply with the requirements of section 90.956 there was insufficient evidence to support the agency's decision. While this result was correct, the reasoning supporting the conclusion was lacking and the manner in which the claim was stated was misleading. The court erred in stating that section 120.58(1)(a) was "not applicable under the circumstances of this case."\textsuperscript{680} By its very terms, this section governs the admissibility of evidence in all administrative hearings. The court did not point out and section 120.58(1)(a) does not provide an exception for its application to unemployment compensation claims. Absent an express exception, section 120.58(1)(a) governs the admissibility of such evidence.

\textsuperscript{668} Id. at 648. Of course it may effect whether the statements can constitute competent substantial evidence.

\textsuperscript{669} 373 So. 2d 101 (Fla. 3d Dist. Ct. App. 1979).

\textsuperscript{670} Id. at 44.

\textsuperscript{671} 373 So. 2d 101 (Fla. 1st Dist. Ct. App. 1979).

\textsuperscript{672} Id. See also MacPherson v. School Bd. of Monroe County, 505 So. 2d 682, 684 (Fla. 4th Dist. Ct. App. 1987).

\textsuperscript{673} Fla. Stat. \$ 120.58(1)(a) (1987).

\textsuperscript{674} Anderson-Busch, 373 So. 2d at 101. See Harris v. Game and Fresh Water Fish Comm'n, 495 So. 2d 806, 808-9 (Fla. 1st Dist. Ct. App. 1986).

\textsuperscript{675} 483 So. 2d 413 (Fla. 1986) req'd denied.

\textsuperscript{676} Id. at 413.

\textsuperscript{677} Id.
rejections failed to comply with this requirement and the court held that the emergency rule it had adopted was invalid.688

What Counts As Evidence In An Administrative Proceeding?

Compared to the rules of evidence which govern traditional court proceedings, the APA’s rules for the admission of evidence are very liberal.689 Section 120.58 provides that in both a rule-making and adjudication context only evidence which is "[i]rrelevant, immaterial, or unduly repetitious shall be excluded, but all other evidence relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible."690

Hearsay

Although the APA permits the admission of such evidence primarily for "the purpose of supplementing or explaining other evidence,"691 it also provides that hearsay evidence may constitute competent substantial evidence if "it would be admissible over objection in civil actions."692 In Florida Department of Law Enforcement v. Duker,693 the court correctly held that hearsay statements which might be excluded in a court proceeding were admissible under section 120.58(1)(a). The failure to qualify the statement for admissibility in court did not entitle


453. In dicta, the court confronted the issue of what constituted a sufficient statement of "specific facts and reasons for finding an immediate danger to the police, health, safety, or welfare" to justify an agency promulgating a rule under the emergency rule making procedures of 120.54(9). The court indicated that affidavits from an agency director or other person responsible for the subject matter area of the rule outlining the nature of the problem and the need for an immediate solution were sufficient. Times Publishing Co., 375 So. 2d at 306. See also Times Publishing Co. v. Department of Corrections, 375 So. 2d 107 (Fla. 1st Dist. Ct. App. 1979) (The court declared invalid an expanded version of the emergency rule after it was reenacted, because it prohibited media access to prisoners who were not subject to the threat of imminent execution. The court found there was no evidence of an immediate threat to public safety in such cases).


458. 484 So. 2d 645 (Fla. 4th Dist. Ct. App. 1986).

the hearing officer to exclude them.694 Similarly, in Kasha v. Department of Legal Affairs,695 the court held that the hearing examiner erred in not admitting evidence solely because it was hearsay.696 And in Anheuser-Busch, Inc. v. Unemployment Appeals Commission,697 the court correctly held that hearsay evidence "cannot alone support" a finding that an employee was discharged for misconduct related to his employment,698 as the hearsay evidence relied upon would not have been admissible in a civil action as required by the APA.699 Unfortunately, the holding does not reflect this reasoning. Rather, the court grounded its holding on the claim that no matter what sort of case is involved, hearsay evidence alone is insufficient to constitute competent substantial evidence.700 In doing so it clearly erred.

In Tallahassee Housing Authority v. Unemployment Appeals Commission,701 the court dealt with an interesting hearsay issue concerning the admission of a summary of business records in an administrative hearing. The court held that the admission was governed by section 90.956, of the Evidence Code and not section 120.58(1)(a) of the APA.702 and that because the summary did not comply with the requirements of section 90.956 there was insufficient evidence to support the agency's decision. While this result was correct, the reasoning supporting the conclusion was lacking and the manner in which the conclusion was stated was misleading. The court erred in stating that section 120.58(1)(a) was "not applicable under the circumstances of this case,"703 By its very terms, this section governs the admissibility of evidence in all administrative hearings. The court did not point out and section 120.58(1)(a) does not provide an exception for its application to unemployment compensation claims. Absent an express exception, section 120.58(1)(a) governed the admissibility of such evidence. The

459. Id. at 648. Of course it may affect whether the statements can constitute competent substantial evidence.

460. 375 So. 2d 43 (Fla. 3d Dist. Ct. App. 1979).

461. Id. at 44.


463. Id. See also MacPherson v. School Bd. of Monroe County, 505 So. 2d 682, 689 (Fla. 3d Dist. Ct. App. 1987).


466. 484 So. 2d 413 (Fla. 1986) rev’d gr’d denied.

467. Id. at 415.

468. Id.

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summary was admissible under section 120.58(1)(a) because it was a record which a reasonably prudent person would rely upon in the conduct of his affairs. Clearly, the court was wrong in holding it could not be admitted. But the court correctly concluded that the summary could not by itself constitute competent substantial evidence unless it was admitted in conformance with the rules of evidence governing civil proceedings in court. Here, the summary was not admitted pursuant to 90.956, thus under section 120.58(1)(a) it could only be used to supplement or explain other evidence in the record. Because it was not admitted in a manner which made it admissible in a civil court proceeding, it could not constitute competent substantial evidence under the APA.466 In this case, the summary was the only evidence supporting the Commission’s finding of misconduct justifying denial of unemployment benefits.467 Thus, the court correctly concluded that the failure to admit the evidence pursuant to section 90.956 was fatal to the adequacy of the factual record, but erred in holding that section 120.58(1)(a) was not applicable.468

Under section 120.61, an agency may take official notice of evidence not in the record.469 When all parties to the proceeding have an opportunity “to examine and contest the material”470 noticed, it may constitute competent substantial evidence. However, where this opportunity was not provided such evidence cannot constitute competent substantial evidence.471

Adjudicatory Procedures and Structure

There are two types of adjudicatory processes under the APA, formal and informal. An informal hearing suffices unless a formal hearing is required by statute or the facts justify invoking the formal hearing process. The latter occurs when a party is able to show that its “substantial interest . . . are determined by an agency”472 and that there is “a disputed issue of material fact.”473 If a party makes a timely showing that these two conditions are satisfied, then he is entitled to a formal hearing process under section 120.57(1).474 In Tuckman v. Florida State University,475 the court held that the allegation by a former dean that the university was restricting him from removing him from his deanship only for good cause shown created a material issue of fact which entitled him to a formal hearing under section 120.57(1). The university erred in holding the informal process under section 120.57(2) was all that was required in the circumstances.476 The APA’s informal procedures are sufficient to protect parties’ interests only where there is “no disputed issue of material fact.”477 Similarly, in Miller v. Department of Business Regulation,478 the court noted that the right to a formal hearing was contingent upon demonstrating a material issue of fact existed. Where there was no evidence of a disputed material fact, then the agency could properly rely upon the informal hearing process in resolving the matter.479

Courts have held that the harmless error doctrine may be used to avoid overturning an order which does not strictly comply with the APA’s requirements if the hearing process was fundamentally fair in spite of these flaws.480 A general concern for fairness led the courts to

467. Tallahassee Housing Authority, 483 So. 2d at 414.
468. Cf. Department of General Serv. v. English, 509 So. 2d 1198, 1200 (Fla. 1st Dist. Ct. App. 1987) (business record exception to hearsay rule provided for in section 90.803(6) may convert hearsay evidence into competent substantial evidence).
472. Id. at 135. The court assumed being terminated from the deanship position was a decision by an agency which affected the substantial interests of the now former dean.
474. 479 So. 2d 319 (Fla. 3d Dist. Ct. App. 1985) (per curiam).
475. See H.B.A. Corp. v. Department of Health and Rehabilitative Serv., 482 So. 2d 401, 486-69 (Fla. 1st Dist. Ct. App. 1986) reh’g denied (The misinterpretation of the IRS rule’s impact on admissibility of evidence in subsequent formal hearing under 120.57 was harmless error.). Health Quest Realty XII v. Department of Health
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470. Tallahassee Housing Authority, 483 So. 2d at 414.
471. Cf. Department of General Serv. v. English, 509 So. 2d 1198, 1200 (Fla. 1st Dist. Ct. App. 1987) (business record exception to hearsay rule provided for in section 90.03(6) may convert hearsay evidence into competent substantial evidence).
476. Id.
478. 499 So. 2d 133 (Fla. 1st Dist. Ct. App. 1986) reh'd denied.
479. Id. at 135. The court assumed being terminated from the deanship position was a decision by an agency which affected the substantial interests of the now former dean.
481. 479 So. 2d 319 (Fla. 3d Dist. Ct. App. 1985) (per curiam).
482. Miller, 479 So. 2d at 319-20. See also Lee County Electric Cooperative v. Martin, 501 So. 2d 585 (Fla. 1987).
483. See H.B.A. Corp. v. Department of Health and Rehabilitative Serv., 482 So. 2d 461, 468-69 (Fla. 1st Dist. Ct. App. 1986) reh'd denied (The misinterpretation of the BRS' rules' impact on admissibility of evidence in subsequent formal hearing under 120.57 was harmless error.). Health Quest Realty XII v. Department of Health
rigorously enforce the procedural requirements of the APA in an adjudication context. The court was particularly concerned that all parties receive adequate notice, an opportunity for a meaningful hearing, and a decision on the record by an impartial decision maker; under the APA, this would be a hearing officer.

To insure adequate notice was received in a license revocation case, the court required compliance with the statutory procedures regarding filing of a complaint, including the requirements of pre-filing notification and the right to respond. In *Holmberg v. Department of Natural Resources,* the court noted that a party was not bound by an agency determination that affected his interest if no notice was given to the party by the agency that "his interests were at stake . . . and that he could seek . . . a hearing" under the APA to protect those interests from adverse agency action. Adequate notice also required that the person be meaningfully informed of the basis or the reasons for the agency action.

The order of the Education Practices and Rehabilitative Serv., 477 So. 2d 576 (Fla. 1st Dist. Ct. App. 1985) *reh'gd denied* ("consideration of . . . post-hearing event . . . was harmless" even though the event was not in the record); *McNeil v. Barcelone Associates, v. Daniel,* 485 So. 2d 629, 629 (Fla. 2d Dist. Ct. App. 1986) *reh'gd denied.*


But the courts were reluctant to go beyond the requirements of the APA in attempting to insure a fair hearing. See *Harris v. Department of Corrections,* 486 So. 2d 27 (Fla. 1st Dist. Ct. App. 1986) (State not required to furnish indigent parties to an administrative proceeding a free transcript of the proceeding so they could invoke the judicial review provisions of section 120.68). See also *Kelly v. Department of Health and Rehabilitative Servs.,* 502 So. 2d 42 (Fla. 1st Dist. Ct. App. 1987) *reh'gd denied* (certification of the issue to the Supreme Court);

*Thompson v. Department of Professional Regulation,* 488 So. 2d 103 (Fla. 1st Dist. Ct. App. 1986) *reh'gd denied* (state has no obligation to provide counsel).


486. 503 So. 2d 944 (Fla. 1st Dist. Ct. App. 1987).

487. Id. at 947. The court also noted that in such a case the right to a hearing could not be barred by failure to timely file a request for one, as the party never had received proper notice. Id. *Cf. Nest v. Department of Professional Regulation,* 490 So. 2d 987 (Fla. 1st Dist. Ct. App. 1986) *reh'gd denied* (Once an agency agreed to stipulated facts it was error for the agency without notice to abandon that stipulation).


489. *Williams v. Burlington,* 498 So. 2d 468 (Fla. 3d Dist. Ct. App. 1986) *reh'gd denied* (license cannot be revoked on grounds not charged in the complaint, even if proven at the hearing).


493. *Synove,* 490 So. 2d at 1324. See also *City of St. Cloud v. Department of Environmental Regulation,* 490 So. 2d 1316, 1318 (Fla. 5th Dist. Ct. App. 1986); *Spohn v. Department of Professional Regulation,* 499 So. 2d 19 (Fla. 1st Dist. Ct. App. 1986). But in *Fields v. Burlington,* the court held a party cannot complain of lack of notice in a license suspension case where the party refused to accept the certified letter which was explicitly provided for by statute as a valid method of providing notice.
rigorously enforce the procedural requirements of the APA in an adjudication context. The court was particularly concerned that all parties receive adequate notice, an opportunity for a meaningful hearing, and a decision on the record by an impartial decision maker; under the APA, this would be a hearing officer.

To insulate adequate notice was received in a license revocation case, the court required compliance with the statutory procedures regarding filing of a complaint, including the requirements of pre-filing notification and the right to respond. In Holmberg v. Department of Natural Resources, the court noted that a party was not bound by an agency determination that affected his interest if no notice was given to the party by the agency that "his interests were at stake . . . and that he could seek . . . a hearing" under the APA to protect those interests from adverse agency action. Adequate notice also required that the person be meaningfully informed of the basis or the reasons for the agency action.

The order of the Education Practice and Rehabilitative Serv., 477 So. 2d 576 (Fla. 1st Dist. Ct. App. 1985) was reversed because the consideration of the post-hearing event was harmless even though the event was not in the record. McNeil Barcelone Assoc. v. Daniel, 485 So. 2d 628, 629 (Fla. 2d Dist. Ct. App. 1986) was reversed because of notice.

In Chestnut v. School Bd. of Hillsborough County, 378 So. 2d 1237, 128 (Fla. 2d Dist. Ct. App. 1979), see also Prime Orlando Properties, Inc. v. Department of Business Regulation, 502 So. 2d 456, 459 (Fla. 1st Dist. Ct. App. 1987) reversed on appeal (complied with notice requirements in land sales practices law). But the facts were different because the requirements of the APA in attempting to issue a hearing. See Harris v. Department of Corrections, 486 So. 2d 27 (Fla. 1st Dist. Ct. App. 1986) (State not required to furnish indigent parties with an administrative proceeding a free transcript of the proceeding so they could invoke the judicial review provisions of section 120.68); Kelly v. Department of Health and Rehabilitative Serv., 502 So. 2d 42 (Fla. 1st Dist. Ct. App. 1987) (certification of the issue to the Supreme Court). Thompson v. Department of Professional Regulation, 488 So. 2d 203 (Fla. 1st Dist. Ct. App. 1986) reversed (state has no obligation to provide counsel).


487. Id. at 947. The court also noted that in such a case the right to a hearing could not be barred by failure to timely file a request for one, as the party in this case had received proper notice. Id. Cf. Nest v. Department of Professional Regulation, 490 So. 2d 987 (Fla. 1st Dist. Ct. App. 1986) reversed (once an agency agreed to stipulate facts it was error for the agency without notice to abandon that stipulation).

player from a prior evidentiary hearing that the claimant had not attended. This deprived the claimant of his statutory right to an opportunity to respond to the evidence presented by his former employer. In *Nest v. Department of Professional Regulation,* the court noted that it was "irreversible error for an agency to supplement the record through post-hearing testimony." Such supplementation of the record deprived the party of the right to respond to the new evidence.

Only in a few cases have courts discussed the nature of the right to an impartial decision maker. In *Chestnut v. School Board of Hillsborough County,* the court held that the right to an impartial decision maker was denied when a hearing for reinstatement of an employee was conducted by administrative employees of a school board. In *McIntyre v. Tucker,* the court held that it was impermissible for the school board attorney to act both as "advisor or to the Board in its capacity as hearing officer" and as prosecutor in the proceeding. "In practice, impartiality and zealous representation are inherently incompatible in the same person at the same time."

**License Suspension By Emergency Order**

Strict compliance with the APA substantive and procedural requirements is required for emergency orders. License suspension cases frequently involve such orders. In *Anderson v. Department of Health and Rehabilitative Services,* the court reviewed an HRS emergency order which suspended a child care facility's license due to allegations that an employee of the facility, in the past, had been involved in child abuse. The court held that in order for an agency to successfully invoke the power to summarily suspend a license under the procedures established by section 120.60(8), the agency must strictly comply with the procedures provided for in 120.54(9). It is unclear from the opinion whether the court viewed this as a violation of due process, the APA or both. 482 So. 2d 987 (Fla. 1st Dist. Ct. App. 1986) rem'g denied.

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500. 490 So. 2d 1012, 1013 (Fla. 1st Dist. Ct. App. 1986).
501. 1031.
502. 1031.
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ployer from a prior evidentiary hearing that the claimant had not attended. This deprived the claimant of his statutory right to an opportunity to respond to the evidence presented by his former employer. In Nest v. Department of Professional Regulation,88 the court noted that it was "reversible error for an agency to supplement the record through post-hearing testimony."89 Such supplementation of the record deprived the party of the right to respond to the new evidence.

Only in a few cases have courts discussed the nature of the right to an impartial decision maker. In Chestnut v. School Board of Hillsborough County,90 the court held that the right to an impartial decision maker was denied when a hearing for reinstatement of an employee was conducted by administrative employees of a school board. In McIntyre v. Tucker,91 the court held that it was impermissible for the school board attorney to act both as "advisor[to] the Board in its capacity as hearing officer" and as prosecutor in the proceeding.92 "In practice, impartiality and zealous representation are inherently incompatible in the same person at the same time."93

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Strict compliance with the APA substantive and procedural requirements is required for emergency orders. License suspension cases frequently involve such orders. In Anderson v. Department of Health and Rehabilitative Services,94 the court reviewed an HRS emergency order which suspended a child care facility's license due to allegations that an employee of the facility, in the past, had been involved in child abuse. The court held that in order for an agency to successfully invoke the power to summarily suspend a license under the procedures established by section 120.60(8),95 the agency must strictly comply with

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495. Id. at 342.
496. 490 So. 2d 987 (Fla. 1st Dist. Ct. App. 1986) reh'g denied.
497. Id. at 989. See also Friends of Children v. Department of Health and Rehabilitative Serv., 504 So. 2d 1345, 1348 (Fla. 1st Dist. Ct. App. 1987).
499. Id. at 1238.
500. 490 So. 2d 1012, 1013 (Fla. 1st Dist. Ct. App. 1986).
501. Id. at 1013.
502. Id. It is unclear from the opinion whether the court viewed this as a violation of due process, the APA or both.
503. 482 So. 2d 491 (Fla. 1st Dist. Ct. App. 1986).
504. Fla. Stat. § 120.60(8) (1987). This statutory provision incorporated by ref. 

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that section's requirements.96 Although a number of statutes governing the qualifications of child care providers granted HRS substantial regulatory authority in the area,97 the agency's emergency suspension order in this case was flawed in two ways. First, the order failed to facially identify the specific incident of child abuse relied on or the particular . . . [person] involved.98 The court concluded that this aspect of the order violated the requirement of 120.54(9)(a)3,99 that the "specific facts and reasons for finding an immediate danger to public health, safety or welfare" be stated. Second, the court found that "the circumstances recited in the order . . . [did not justify] the immediate closing of . . . [the] facility instead of some lesser and fairer alternative."100 Thus, the order also violated the requirement of 120.54(9)(a)2101 that "[t]he agency take only that action necessary to protect the public interest."102 In this case a less onerous and fairer alternative was available. HRS could have adequately protected the public interest by ordering the person believed to be in violation of the day care provider standards to remain away from the day care facility pending resolution of the issue in an HRS hearing.103 In Ibarraide v. Department of Professional Regulation,104 the court noted that in a license revocation or suspension proceeding, the agency's emergency order is automatically stayed upon the filing of a petition for judicial review.105 The automatic stay will not apply when

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88. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
89. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
90. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
91. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
92. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
93. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
94. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
95. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
96. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
97. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
98. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
100. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
102. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
103. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
104. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2
105. Nova Law Review, Vol. 12, Iss. 2 [1988], Art. 2

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the agency petitions the court and carries the burden of proving that the agency's mandate "would constitute a probable danger to the health, safety, or welfare of the state."818 The court noted that the agency need not wait until the court has entered its order staying the mandate of the agency to file such a petition. This may be done contemporaneously with, or soon after, filing of the petition for judicial review. The agency need not await the entry of the court's stay order.819

Final Agency Action

Generally, final agency action is required before judicial review is available. In Friends of the Everglades, Inc. v. Zoning Board, Moore County,820 the court noted that an order by a hearing officer dismissing a petition because the claim was moot was not a final agency action under the APA. The hearing officer did not have the final authority on this point. The decision to dismiss because of mootness was not final until the agency in reviewing the hearing officer's order entered a final order to that effect.821 The filing of a request for modification of a final order of the Florida Industrial Relations Commission on which the time for appeal has expired did not convert the final agency order into a non-final order. The request for modification must be granted before the final order is converted into a non-final order. Until the modification request is granted, the courts are required to enforce the current final order.822

A formal order or ruling is not always required in order to satisfy this requirement. In Krestview Nursing Home v. Department of Health and Rehabilitative Services,823 the court noted that informal communication by letters and other methods which did not constitute a final agency order under the APA may in some circumstances be considered final agency action under the APA for purposes of seeking judicial re-

516. FLA. STAT. § 120.68(3) (1987). See also Old Timers Restaurant and Lounge, Inc. v. Department of Business Regulation, 483 So. 2d 463, 464-65 (Fla. 1st Dist. Ct. App. 1986) (agency failed to make a sufficient showing on this point).
517. Intraaldehyde, 482 So. 2d at 376.
518. 478 So. 2d 1126 (Fla. 1st Dist. Ct. App. 1985) reh'd denied.
519. Id. at 1127.
521. 381 So. 2d 240 (Fla. 1st Dist. Ct. App. 1980).
the agency petitions the court and carries the burden of proving that staying the agency’s mandate "would constitute a probable danger to the health, safety, or welfare of the state."™ The court noted that the agency need not wait until the court has entered its order staying the mandate of the agency to file such a petition. This may be done contemporaneously with, or soon after, filing of the petition for judicial review. The agency need not await the entry of the court’s stay order.™

Final Agency Action

Generally, final agency action is required before judicial review is available. In Friends of the Everglades, Inc. v. Zoning Board, Monroe County,™ the court noted that an order by a hearing officer dismissing a petition because the claim was moot was not a final agency action under the APA. The hearing officer did not have the final authority in this point. The decision to dismiss because of mootness was not final until the agency in reviewing the hearing officer’s order entered a final order to that effect.™ The filing of a request for modification of a final order of the Florida Industrial Relations Commission on which the time for appeal has expired did not convert the final agency order into a non-final order.™

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518. 478 So. 2d 1126 (Fla. 1st Dist. Ct. App. 1985) reh’g denied.
519. Id. at 1127.
521. 381 So. 2d 240 (Fla. 1st Dist. Ct. App. 1980).
523. 481 So. 2d 948, 949 (Fla. 1st Dist. Ct. App. 1986).
524. 481 So. 2d 948, 949 (Fla. 1st Dist. Ct. App. 1986).
525. Id. at 950. Judge Smith, in his concurring opinion, pointed out that this ray substantially expand the scope of agency action subject to formal hearing and intervention by third parties. He saw this as significant because it would convert preliminary communication between an agency and others into agency action. The danger is the hearing process was that it would short-circuit the agency decision process. It would require a formal hearing before the agency had made an initial decision. He "would hold preliminary type determinations cannot be reviewed as agency action triggering the right to a formal . . . hearing, unless the right to a hearing [in this context] is supported by the statutory framework guiding the particular agency action in question, or governing the rights of the party requesting the hearing." Id. at 951 (Smith, J., dissenting) (footnote deleted).
526. "A preliminary, procedural, or intermediate agency action or ruling, including an order of a hearing officer, is immediately reviewable if review of the final agency decision would not provide an adequate remedy." FLA. STAT. § 120.68(1) (1987).
sufficient to satisfy this requirement even though it may go uncorrected until the court reviewed the agency's final decision. Judge Zehmer correctly noted, in his concurring opinion in Charter Medical-Jacksonville, the tension between guarding against the waste of judicial, agency and litigants' resources through a piecemeal appeal process, and the waste of these same resources in association with an agency process which reaches a final decision but which must be reversed upon judicial review because of some fundamental error committed very early in the agency proceedings which went uncorrected. In Department of Law Enforcement v. Dukes, the court held that where an agency was: (1) precluded from appealing the final decision of a hearing officer on an evidentiary matter; and (2) could not in its review of the case "reemd the case to the hearing officer ... directing ... [that] the evidence" be admitted; and (3) could not in its review of the hearing officer's decision find there was competent substantial evidence to support its position before the hearing officer without the evidence the hearing officer excluded, it had "no adequate remunent on review of the final agency action" and may properly appeal the evidentiary decision of the hearing officer prior to final agency action in the case. Attorney Fees and Court Costs

The APA provides that a court exercising its judicial review function "may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion." What constitutes a gross abuse of discretion is a factual issue. While courts have been reluctant to conclude an agency engaged in such conduct, they have done so in a few cases. In University Community Hospital v. Department of Health and Rehabilitative Services, the court pointed out that the statute established two standards. The "gross abuse of discretion" standard is used to determine when agencies should be sanctioned by the imposition of attorney's fees and costs, while the "frivolous, meritless or abuse of appellate process" standard is used to determine when other parties should be so sanctioned. In Baxter v. Florida Career Service Commission, the court reaffirmed that an agency's flagrant violation of the APA's provisions justified the awarding of attorney's fees and costs. However, in Clay Oil Corporation v. Unemployment Appeals Commission, the court held that agency conduct characterized as merely "ill advised... did not... constitute that gross abuse of discretion which would warrant an award of attorney's fees." Of course requests for attorney's fees and costs must be made in a timely fashion or the right to them is lost. In Department of Health and Rehabilitative Services v. Barry, the court held that an administrative hearing was a tribunal under the Rules of Appellate Procedure and that costs may be assessed if requested by filing in the appropriate circuit court within thirty days of the mandate date of the District Court of Appeal opinion. The request in this case was denied, because it had been filed with the district court of appeal.
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The APA provides that a court exercising its judicial review function "may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meretricious, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion." What

528. *Charter Medical-Jacksonville*, 482 So. 2d at 438 (Zehner, J., concurring).
529. Id. Judge Zehner urged the agencies to adopt rules which better implemented the intervention right by giving clearer guidance to the hearing officer about when intervention was appropriate. Id.
530. 484 So. 2d 645 (Fla. 4th Dist. Ct. App. 1986).
531. Id. at 647. See also *Mediation of East Broward County, Inc. v. Department of Health and Rehabilitative Servs.*, 418 So. 2d 886, 887 (Fla. 1st Dist. Ct. App. 1986) (permitted appeal of hearing officer's discovery order because no adequate remedy at law).

constitutes a gross abuse of discretion is a factual issue. While courts have been reluctant to conclude an agency engaged in such conduct, they have done so in a few cases. In *University Community Hospital v. Department of Health and Rehabilitative Services*, the court pointed out that the statute established two standards. The "gross abuse of discretion" standard is used to determine when agencies should be sanctioned by the imposition of attorney's fees and costs, while the "frivolous, meretricious or abuse of appellate process" standard is used to determine when other parties should be so sanctioned. In *Baxter v. Florida Career Service Commission*, the court reaffirmed that an agency's flagrant violation of the APA's provisions justifying the awarding of attorney's fees and costs. However, in *Clay Oil Corporation v. Unemployment Appeals Commission*, the court held that agency conduct characterized as merely "ill-advised . . . [id] not . . . [constitute] that gross abuse of discretion which would warrant an award of attorney's fees." Of course requests for attorney's fees and costs must be made in a timely fashion or the right to them is lost. In *Department of Health and Rehabilitative Services v. Barr*, the court held that an administrative hearing was a tribunal under the Rules of Appellate Procedure and that costs may be assessed if requested by filing in the appropriate circuit court within thirty days of the mandate date of the District Court of Appeal opinion. The request in this case was denied, because it was not filed with the district court of appeal. In *Department of Health and Rehabilitative Services v. Brown*, the court held that an administrative hearing was a tribunal under the Rules of Appellate Procedure and that costs may be assessed if requested by filing in the appropriate circuit court within thirty days of the mandate date of the District Court of Appeal opinion. The request in this case was denied, because it was not filed with the district court of appeal.
ment of Commerce, the court held "the proper procedure for requesting appellate attorney's fees is to file a separate motion no later than the time for service of the reply brief." The court warned that in the future improperly filed requests would be denied.

Comparative Hearing

In Bio-Medical Application of Clearwater, Inc. v. Department of Health and Rehabilitative Services, the court confronted the interesting issue of what type of hearing is required under the APA if a decision for one party precludes the agency from granting the petitions of another party. The court concluded that the decision turned on whether the Ashbacher doctrine applied to such circumstances under the APA. The court held that fairness required the HRS to hold a comparative hearing when there was more than one applicant seeking approval to construct and operate the same type of health facility in the same region. It is debatable whether the Ashbacher doctrine supported this conclusion, as the United States Supreme Court's opinion is that case was based upon federal statutory requirements, not due pr

543. 379 So. 2d 1313 (Fla. 1st Dist. Ct. App. 1980) (per curiam).
544. Id.
545. Id. See also Special Disability Trust Fund v. Warnesh, 381 So. 2d 27 (Fla. 1st Dist. Ct. App. 1980) rev'd & remanded (The court held the failure to file an objection to an attorney's fee award in a procedurally correct manner may result in waiver of the objection.).
549. Bio-Medical, 370 So. 2d at 23-4. Without approval in the form of a certificate of need granted by the Department, the applicant was prohibited from opening the health care facility. Id. at 21.
550. See Health Quest Realty XII v. Department of Health and Rehabilitative Serv., 477 So. 2d 376, 378 (Fla. 1st Dist. Ct. App. 1985) rev'd & remanded (limited the right to a comparative hearing to when there was a showing of mutual exclusiveness); University Medical Center, Inc. v. Department of Health and Rehabilitative Serv., 407 So. 2d 712 (Fla. 1st Dist. Ct. App. 1982) (clarified on rehearing) (limited the right to a comparative hearing to when there was a showing of mutual exclusiveness).
551. The Supreme Court held that under the Federal Communications Act, which required the FCC to give all applicants a meaningful hearing, the FCC must hold comparative hearings when two applicants apply for a license if the granting of the license to one applicant precludes the other applicant from receiving a license. The Second Circuit Court of Appeals found the decision as one founded on conditional concerns over procedural due process. Bio-Medical, 370 So. 2d at 23. It was not the only court to have done so. Id. (cases cited therein). This was wrong as the decision was based upon the requirements of the federal statute, not constitutional due process concerns. See W. Fox, supra note 9 at 106.
552. Fla. Admin. Code Ann. r.15-5.10(8) (1977); Bio-Medical, 370 So. 2d at 22-3. As the court noted the advantage of a comparative hearing circumstance such as this was that it permitted the proper balance of three competing considerations in the decision process: (1) interest of applicants in fair consideration of its application; (2) interest of the agency in an "orderly . . . timely and efficient" decision making process; and (3) interest of the public in the best application being granted. Bio-Medical, 370 So. 2d at 24.
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543. 379 So. 2d 1313 (Fla. 1st Dist. Ct. App. 1980) (per curiam).
544. Id.
545. Id. See also Special Disability Trust Fund v. Wareham, 381 So. 2d 257 (Fla. 1st Dist. Ct. App. 1980) remanded.
549. Bio-Medical, 370 So. 2d at 23-24. Without approval in the form of a certificate of need granted by the Department, the applicant was prohibited from operating the health care facility. Id. at 21.
550. See Health Quest Reality, XII v. Department of Health and Rehabilitative Serv., 477 So. 2d 576, 578 (Fla. 1st Dist. Ct. App. 1985) remanded (limited the right to a comparative hearing to when there was a showing of mutual exclusiveness); University Medical Center, Inc. v. Department of Health and Rehabilitative Serv, 483 So. 2d 712 (Fla. 1st Dist. Ct. App. 1986) (clarified on rehearing) (limited the right to a comparative hearing to when there was a showing of mutual exclusiveness).
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552. Fla. Admin. Code Ann. r.10-5.10(8) (1977); Bio-Medical, 370 So. 2d at 21-22. As the court noted the advantage of a comparative hearing circumstances such as this was that it permitted the proper balance of three competing considerations in the decision process: (1) interest of applicants in fair consideration of its application; (2) interest of the agency in an "orderly . . . and efficient" decision making procedure; and (3) interest of the public in the best application being granted. Bio-Medical, 370 So. 2d at 24.
554. In re application for a license to operate a hospital in the city of Fort Myers, 375 So. 2d 707 (Fla. 1st Dist. Ct. App. 1980) remanded.
555. In re application for a license to operate a hospital in the city of Fort Myers, 375 So. 2d 707 (Fla. 1st Dist. Ct. App. 1980) remanded.
556. In re Hospital Application, 497 So. 2d 1167 (Fla. 1st Dist. Ct. App. 1987) reh’g denied; South Broward Hosp. Dist., 385 So. 2d 1095.
An Agency Must Follow Its Own Rules

One of the unarticulated premises of the APA is that agencies must comply with the substantive and procedural rules they have promulgated. Failure to do so constitutes reversible error. In Marriott Corporation v. Metropolitan Dade County, the court held that the county had established competitive bidding criteria for a contract and could not ignore its provisions in granting a contract. If the decision would be arbitrary or capricious. Nor can a party force an agency to consider evidence unrelated to the substantive rules it has previously adopted to govern resolution of a matter within its jurisdiction. Just as the agency may not change its rules in midcourse without formally doing so, neither can a party argue for a rule change during a hearing governed by the existing rules. In C.H. Barco Contracting Company v. Department of Transportation, the court clearly distinguished abandonment or modification of existing rules, which is clearly impermissible, from merely engaging in a permissible interpretation of an existing rule. The court held that the latter is permissible while the former is not. Here, the interpretation arguably varied from that of


554. 383 So. 2d 662 (Fla. 3d Dist. Ct. App. 1980) rev'd'; denial.

555. Id. at 665-67. The court rejected the plaintiff's argument that the resolution avoided the contract contrary to the terms of the competitive bidding ordinance generally adopted by ordinance as it applied to the contract awarded. The court correctly noted that if such an argument were accepted then it "would render [competitive bidding ordinances] or resolutions meaningless, ineffectual acts of government." Id. at 667. The court's holding must be accomplished by an act which clearly expresses the intent of the governing body to do so or by complying with the procedures established by such act. Neither had occurred in this case: Id.

556. Id. at 668.


559. 483 So. 2d 796 (Fla. 1st Dist. Ct. App. 1986).

560. Id. at 804. But see id. (Booth, C.J., dissenting) (Disagreed with the maj. It's characterization of this as mere interpretive alteration. He believed this was an)

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Administrative Law

Other Statutes

Sunshine Law

The Florida Sunshine Law provides that official action taken by state and local agencies must occur only at "public meetings open to the public at all times" unless the Florida Constitution provides otherwise. The purpose of the law was to ensure that the shaping of public policy occur in the public domain. The courts have interpreted the statute very broadly in order to fully achieve its purpose. In Kuszewski v. Reno, the court held that the advisory body created to make recommendations to a city manager as to who should be appointed the chief of police was subject to the provisions of the Sunshine Law and required to hold public meetings. In Blackford v. School Board of Orange County, the court carefully noted that not all meetings

(informational charge of policy disposed as interpretation.)

561. Id. at 708-99.


563. Id. at 1137.

564. Id.

565. Id. at 1138. See also Pond v. Department of Health and Rehabilitative Serv., 30 So. 2d 1330 (Fla. Dist. Ct. App. 1989).


567. Id. at 839. Woody v. Marston, 442 So. 2d 934, 938 (Fla. 1983); Blackford v. School Bd. of Orange County, 373 So. 2d 578, 580-81 (Fla. 5th Dist. Ct. App. 1979).

568. Wood, 442 So. 2d at 938.

569. Id. at 839.

570. Id. at 844 (Fla. 3d Dist. Ct. App. 1979).

571. Id. at 1251-52.

572. 373 So. 2d 578 (Fla. 5th Dist. Ct. App. 1979).
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557. Id. at 663-67. The court rejected the argument that the resolution authorizing the contract contrary to the terms of the competitive bidding ordinance effectively overruled that ordinance as it applied to the contract awarded. The court correctly noted that if such an argument were accepted then it would “render [competitive bidding ordinances or] resolutions meaningless, ineffective acts of government.” Id. at 667. The overruling must be accomplished by an act which clearly expresses the intent of the governing body to do so or by complying with the procedure established for such action. Neither had occurred in this case. Id.

558. Id. at 668.


561. 483 So. 2d 796 (Fla. 1st Dist. Ct. App. 1986).

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between staff and members of an agency were a “meeting” under the Sunshine law.** But the court held that the school board held a “meeting” under the Sunshine law by holding a series of six sessions where members of the school board met with staff in secret and subsequently adopted the policy discussed at those meetings.*** The court opined that to do otherwise would permit a circumvention of the statute through interaction with staff who became a conduit for reaching a consensus on policy prior to any public meeting.

In *Turner v. Watersmeet,** the court held that the Sunshine statute did not unconstitutionally invade the function of the executive branch when applied to the Parole and Probation Commission.**** The Parole and Probation Commission was a creature of the legislative branch and subject to the restrictions legislatively imposed on the exercise of its powers.***** It was clear that the legislature intended for the Sunshine statute to apply to the Parole and Probation Commission.******

**Public Records Act*******

The Public Records Act creates a presumption that “all state, county, and municipal records” are open for public inspection unless exempted under the act.******** An agency claiming exemption from the disclosure requirement established by the public records act bears the burden of proving that the exemption claimed was properly invoked.********

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574. Id. at 560.
575. Id. at 560-81.
577. Id. at 141-54. The court reaffirmed that the legislature was prohibited by separation of powers principles from enacting legislation affecting the inherently and exclusively executive function of clemency. Id. at 151.
578. Id. at 154.
579. Id. at 154-55. See id. at 157-59 (Booth, J., dissenting).
582. The motive for seeking disclosure is irrelevant in determining whether a record must be disclosed. News-Press Publishing Co. v. Gaudt, 388 So. 2d 276, 278 (Fla. 3d Dist. Ct. App. 1980) rej’g denied.
between staff and members of an agency were a “meeting” under the Sunshine law. But the court held that the school board had violated the Sunshine law by holding a series of six sessions where members of the school board met with staff in secret and subsequently adopted the policy discussed at those meetings. The court opined that to do otherwise would permit a circumvention of the statute through interaction with staff who became a conduit for reaching a consensus on policy prior to any public meeting.

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574. Id. at 580.
575. Id. at 580-81.
577. Id. at 151-54. The court reaffirmed that the legislature was prohibited by separation of powers principles from enacting legislation affecting the inherently and exclusively executive function of clemency. Id. at 151.
578. Id. at 154.
579. Id. at 154-55. But see id. at 157-59 (Booth, J., dissenting).
584. Id. at 117-19 (Fla. 1st Dist. Ct. App. 1985).

In Shriver v. Byron, Harless, Schaffer, Reital & Associates, Inc., the court defined a record under the public records law as “any material prepared in connection with an official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type.” See generally Turner, Florida’s Open Government Law: No Exceptions for Attorney-Client Communications, 13 Fla. St. L. Rev. 391 (1985).
the statutory exemption from disclosure of medical staff disciplinary matters "must necessarily recognize and protect the attorney-client privilege that may exist in regard to agency proceedings involving" such matters.884

In Department of Professional Regulation v. Spivey, the court held that exemption under the Public Records Act did not provide discovery of the public records through "discovery rules applicable to an administrative proceeding." The party requesting the records must demonstrate that they are relevant and material to the issues raised in the administrative proceeding and that they are privileged under the discovery rules. The court by implication held that not all the exemptions established by the Public Records Act were recognized under the discovery rules, just as not all the exemptions under the discovery rules were recognized under the Public Records Act.

The Public Records Act permits the destruction of public records held by an agency when the agency submits a schedule for destruction of records to the Division of Archives and it is approved by the Division as not containing records which warrant retention. In L.R. v. Department of State, the court held that an affected party was entitled to a hearing on whether the schedule for destruction of teacher records held by the school board was appropriate in light of the need to preserve such records.885

Judicial Review

Preservation of the Right to Review

The APA statutorily provides for a general right to judicial review, which is consistent with but also exceeds the constitutional requirement that judicial review of administrative decisions - especially those of a quasi-judicial nature - be available.886 The right to judicial review of an administrative decision is not absolute, and there are several ways in which a party may lose it.887 One of the most common reasons for loss of the right to judicial review is the failure to comply with procedures set forth in the APA, other relevant statutes, rules of court, or agency regulations regarding timeliness of the request for review.888 In Illus v. Lykes Packers, the court noted that the proper and timely filing of notice of appeal from an administrative order, as provided for by statute, was jurisdictional. Although the appellate rules provided that notice of appeal in such cases must be filed with both the appellate court and the administrative agency, the court concluded that only one of these filings was jurisdictional. The

60. See Fla. Stat. § 120.68 (1987) (statutorily established a general right to judicial review).
61. Department of Natural Resources v. District Court of Appeal, 355 So. 2d 727 (Fla. 1979); Brothers v. Department of Corrections, 474 So. 2d 1239 (Fla. 3d Dist. Ct. App. 1985); Rixes v. Department of Revenue, 496 So. 2d 360 (Fla. 2d Dist. Ct. App. 1987) (per curiam); Speed v. Department of Legal Affairs, 387 So. 2d 459, 460 (Fla. Dist. Ct. App. 1980) nol. g. den.; Taylor v. Department of Professional Regulation, 493 So. 2d 498 (Fla. 1st Dist. Ct. App. 1986); Turtle White Constructors, Inc. v. Department of General Services, 371 So. 2d 1096, 1097-98 (Fla. 1st Dist. Ct. App. 1979) (per curiam) nol. g. den. (Ervin, J., dissenting). C.F. Vicholas County v. Florida Public Employees Relations Comm'n, 379 So. 2d 985 (Fla. 2d Dist. Ct. App. 1980) nol. g. den. (The court held that the Commission failed to fulfill its statutory obligation by not complying with the ninety-day deadline established by statute for reviewing the validity of local ordinances concerning collective bargaining with local public employers. The decision of the Commission was reversed because it did not meet the deadline.) Vreck Corp. v. Department of Professional Regulation, 489 So. 2d 1230 (Fla. 3d Dist. Ct. App. 1986) nol. g. den.; Bowers v. Department of Environmental Regulation, 489 So. 2d 1229 (Fla. 3d Dist. Ct. App. 1986) nol. g. den.; New Washington Heights Community Dev. Council v. Department of Community Affairs, 315 So. 2d 328 (Fla. 3d Dist. Ct. App. 1979). 62. 354 So. 2d 1132 (Fla. 2d Dist. Ct. App. 1979) (denial of motion to dismiss appeal of administrative order).
63. Id. at 1132-33.
64. Fla. R. App. P. 9-110(b).
65. Rixes, 374 So. 2d at 1133. See Franchi v. Department of Commerce, 375 So. 2d 1256, 1260 (Fla. 4th Dist. Ct. App. 1979) (The court held that the timely filing of notice of appeal with the district court of appeal was sufficient to establish
the statutory exemption from disclosure of medical staff disciplinary matters "must necessarily recognize and protect the attorney-client privilege that may exist in regard to agency proceedings involving" such matters. In *Department of Professional Regulation v. Spiva*, the court held that exemption under the Public Records Act did not preclude discovery of the public records through "discovery rules applicable to an administrative proceeding." The party requesting the records must demonstrate that they "are relevant and material to the issues raised" in the administrative proceeding and that they are not privileged under the discovery rules. The court by implication held that not all the exemptions established by the Public Records Act were recognized under the discovery rules, just as not all the exemptions under the discovery rules were recognized under the Public Records Act.

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592. Id. at 206.
595. Spiva, 478 So. 2d at 383.
597. 488 So. 2d 122, 123 (Fla. 3d Dist. Ct. App. 1986).
598. Id. at 125.
599. See Fla. Const. art. I, §§ 9, 18 and 21, art. V, § 4(b)(1); Fla. Stat. § 120.68 (1987); Bath Club, Inc. v. Dade County, 394 So. 2d 110 (Fla. 1981); Dep't

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administrative decision is not absolute, and there are several ways in which a party may lose it. One of the most common reasons for loss of the right to judicial review is the failure to comply with procedures set forth in the APA, other relevant statutes, rules of court, or agency regulations regarding timeliness of the request for review. In *Rion v. Lykes Paco Power*, the court noted that the proper and timely filing of notice of appeal from an administrative order is provided for by statute, was a jurisdictional matter. Although the appellate rules provided that notice of appeal in such cases must be filed with both the appellate court and the administrative agency, the court concluded that only one of those filings was jurisdictional. The

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court found it impossible to determine which filing was intended to be jurisdictional, and concluded that the timely filing of either was sufficient to satisfy the jurisdictional requirement. Even if the review request is filed in a timely fashion, a party must also comply with other provisions regulating perfection of appeals, such as transmission of the administrative record. If a party fails to comply with these provisions, the right to judicial review is lost. Another common method by which a party loses part or total access to the judicial review process is by failing to raise an issue during the administrative proceeding. Generally, the courts will not review matters which were not first presented to an agency for resolution. Failure to present an issue to an agency for resolution results in such matters being waived.

Next for an Adequate Explanation by the Agency of Its Factual Findings

A fundamental premise of the entire judicial review process is that the agency has provided the court with a reasoned explanation of its application of the applicable legal principles, findings of fact, and decision which complies with the requirements of the APA. This result is mandated because the failure to provide an adequate explanation makes it impossible for the court to perform the judicial review function assigned to it by the legislature.

The court is in such cases not free to "undertake" its own evaluation of the evidence because that role was assigned to the agency, and not to the court.
court found it impossible to determine which filing was intended to be jurisdictional,\(^\text{669}\) and concluded that the timely filing of either was sufficient to satisfy the jurisdictional requirement.\(^\text{670}\) Even if the review request is filed in a timely fashion, a party must also comply with other provisions regulating perfection of appeals, such as transmission of the administrative record. If a party fails to comply with these provisions, the right to judicial review is lost.\(^\text{671}\) Another common method by which a party loses part or total access to the judicial review process is by failing to raise an issue during the administrative proceeding.\(^\text{672}\) Generally, the courts will not review matters which were not first presented to an agency for resolution.\(^\text{673}\) Failure to proceed jurisdictionally.

606. See Franchi v. Department of Commerce, 375 So. 2d 1154, 1155 (Fla. 4th Dist. Ct. App. 1979) (suggests the notice filed with the agency was jurisdictional).

607. Hines, 374 So. 2d at 1133. See also Agrico Chemical Co. v. Department of Envt'l Regulation, 380 So. 2d 503, 504 (Fla. 2d Dist. Ct. App. 1980) (the court held that the time requirement for the filing of a notice of cross-appeal was non-jurisdictional).


609. See Brady v. Stierheim, 377 So. 2d 1004 (Fla. 3d Dist. Ct. App. 1979); Florida Assn. of Nurse Anesthetists v. Department of Professional Regulation, 500 So. 2d 324, 327 (Fla. 1st Dist. Ct. App. 1986); Department of Corrections v. Bradley, 510 So. 2d 1122, 1124 (Fla. 1st Dist. Ct. App. 1987). But see Wilson v. Department of Administration, 472 So. 2d 525, 529 (Fla. 3d Dist. Ct. App. 1985) (held denial of the court read section 120.57(1)(b)(6) as placing the burden of preserving the record on the agency). The court noted that when the record was lost, destroyed, or not transmitted and there is no factual dispute, then the court would accept the factual findings in the agency order and the record was not necessary for the court to have jurisdiction.) Cf United Traders of Dade v. Save Brickell Ave., Inc., 378 So. 2d 296 (Fla. 3d Dist. Ct. App. 1979) (used the wrong procedure to invoke judicial review).

610. See Buns Unlimited v. Fla. v. Unemployment Appeals Comm., 508 So. 2d 786, 788 (Fla. 5th Dist. Ct. App. 1987); Palm City Chrysler-Plymouth, Inc. v. Department of Commerce, 382 So. 2d 39 (Fla. 2d Dist. Ct. App. 1979) (statement of objections was sufficient to require the agency to hold a hearing); Yachting Arcade, Inc. v. Riverview Condominium Assoc., 500 So. 2d 202 (Fla. 1st Dist. Ct. App. 1986) (refusing to instruct on the facts). See, e.g., Pensacola Transit, Inc. v. Douglas, 160 Fla. 192, 34 So. 2d 555 (Fla. 1948). But see Rice v. Department of Health and Rehabilitative Servs, 386 So. 2d 844, 848-51 (Fla. 1st Dist. Ct. App. 1980) (asserting that the district courts of appeal may resolve constitutional issues on appeal which were beyond the power of the agency to consider or resolve). See supra text accompanying notes 333-59 (exhaustion of administrative remedies not required).

611. See Sonny's Italian Restaurant and Pizzaria, Inc. v. Department of Business Regulation, 414 So. 2d 1156 (Fla. 1st Dist. Ct. App. 1982) (waived exceptions to remanded order by failing to timely present them to the agency).


613. See Fla. Stat. § 120.68 (1987); City of Orlando v. International Ass'n of Fire Fighters, Local 1365, 384 So. 2d 941, 946 (Fla. 5th Dist. Ct. App. 1980) ("incorporation by reference of portions of a hearing officer's report in a Commission order is sufficient explanation to satisfy the requirements of [the APA]"); Wong v. Career Sm. Coll's, 371 So. 2d 530, 531 (Fla. 1st Dist. Ct. App. 1979). See generally Burtis, supra note 9, at 1033-52.


615. Ex. mg, Veesey & Board of Public Instruction, 247 So. 2d 80 (Fla. 1971); Lakhter v. Florida Bd. of Medical Examiners, 492 So. 2d 481 (Fla. 4th Dist. Ct. App. 1986) (per curiam).


Need for An Adequate Explanation by the Agency of Its Factual Findings

A fundamental premise of the entire judicial review process is that the agency has provided the court with a reasoned explanation\(^\text{675}\) of its interpretation of the applicable legal principles, findings of facts, and the rational linkage between these factual and legal conclusions and its ultimate decision.\(^\text{676}\) When an agency has failed to provide an adequate explanation on any of these three matters, the agency has not complied with the APA's requirements and the decision must be reversed and remanded to the agency for a decision which complies with the requirements of the APA.\(^\text{677}\) This result is mandated because the failure to provide an adequate explanation makes it impossible for the court to perform the judicial review function assigned to it by the legislature.\(^\text{678}\) The court in such cases is not free to "undertake its own evaluation of the evidence" because that role was assigned to the agency, and not the court.\(^\text{679}\)
What constitutes an adequate explanation varies, but two guiding principles are clear. First, as noted by the court in *City of Barton v. Public Employees Relations Commission,* the agency, not the court, must initially "resolve conflicts in testimony." Second, in performing its fact-finding role, the agency is required to respond to any proposed findings of fact offered by a party. Failure to provide an adequate explanation of its factual findings is reversible error. In *Belcher Oil Company v. Department of Revenue,* the court noted that a court should not "speculate as to the factual basis for the positions of each party, the principles of law applied, and the results reached by the hearing officer in the resolution of the controversy." If these matters are not clear from the record, the court should remand to the agency for further proceedings to obtain an adequate explanation of the agency’s decision. This assures that the court will perform its appropriate review function and not make the initial judgments in the case.

Scope of Hearing Officer’s Authority

An issue related to the adequacy of an agency’s explanation of its decision is the interrelationship between the ultimate agency decision on factual and legal issues and those reached by the hearing officer. When the hearing officer and the agency disagree about the factual conclusions the record supports, a particularly difficult circumstance is presented to the reviewing court. The problem posed in such cases is that the court is directed by the APA to defer to both these inconsistent decisions when engaging in a judicial review.

In *Kolsay v. Division of General Regulation,* the court adopted a dichotomy suggested in *McDonald v. Department of Banking and Finance,* to resolve this difficult issue. First, if the factual finding concerns "weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight," then the court must give greater weight to hearing officer’s factual findings. Second, if the factual finding concerns matters which were "infused by policy considerations for which the agency is in special responsibility," then the court must give greater weight to the agency’s decision. In cases involving the first type of factual issue, an agency, just as a court, must leave the finding of facts of the hearing officer undisturbed, unless it can be demonstrated that the findings are not supported by competent substantial evidence. In cases involving the second type of factual issues, the agency, unlike the court, is generally free to substitute its judgment on these factual issues for that of the hearing officer. In *Kolsay,* the court held that the case involved a factual issue within the first category, and that the agency had engaged in impermissible substitution of factual judgment when it

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617. 382 So. 2d 311 (Fla. 2d Dist. Ct. App. 1980).
618. Id. at 313.
620. In the majority opinion in *Health Care Management, Inc.*, however, the court noted that the failure to do so may not be reversible error in all cases. When such failure impairs neither the fairness of the proceeding nor the correctness of the agency’s decision, it is harmless error not requiring reversal. 479 So. 2d at 194-95. See also Britt v. Department of Professional Regulation, 492 So. 2d 697, 699-700 (Fla. 1st Dist. Ct. App. 1986)reh’d den’
621. 382 So. 2d 793 (Fla. 1st Dist. Ct. App. 1980).
622. Id. at 796.
624. Id. at 795-96.
625. See infra text accompanying notes 648-64.
626. Of course an agency is not bound by a decision of a hearing officer which was beyond the scope of his authority regardless of the sufficiency of the evidence supporting the conclusions reached. Hendry County School Bd. v. Kajawski, 498 So. 2d 361 (Fla. 2d Dist. Ct. App. 1986).
What constitutes an adequate explanation varies, but two guiding principles are clear. First, as noted by the court in City of Barrow v. Public Employees Relations Commission, the agency, not the court, must initially "resolve conflicts in testimony." Second, in performing its fact finding role, the agency is required to respond to any proposed findings of fact offered by a party. Failure to provide an adequate explanation of its factual findings is reversible error. In Belcher Oil Company v. Department of Revenue, the court noted that a court should not "speculate as to the factual basis for the positions of each party, the principles of law applied, and the results reached by the hearing officer in the resolution of the controversy." If these matters are not clear from the record, the court should remand to the agency for further proceedings to obtain an adequate explanation of the agency's decision. This assures that the court will perform its appropriate review function and not make the initial judgments in the case.

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In Kolay v. Division of General Regulation, the court adopted a dichotomy suggested in McDonald v. Department of Banking and Finance to resolve this difficult issue. First, if the factual finding concerns "weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight," then the court must give greater weight to hearing officer's factual findings. Second, if the factual finding concerns matters which were "infused by policy considerations for which the agency has special responsibility," then the court must give greater weight to the agency's decision. In cases involving the first type of factual issues, an agency, just as a court, must leave the finding of facts of the hearing officer undisturbed, unless it can be demonstrated that the findings are not supported by competent substantial evidence. In cases involving the second type of factual issues, the agency, unlike the court, is generally free to substitute its judgment on these factual issues for that of the hearing officer. In Kolay, the court held that the case involved a factual issue within the first category, and that the agency had engaged in impermissible substitution of factual judgment when it
In cases involving factual issues of the first category, the courts have been unwilling to accept a formalistic approach to agency rejection of the factual findings of a hearing officer. The courts have rejected such a perspective of the judicial review process because it would not easily permit an agency to engage in substitution of judgment behind a mere ritualistic recital. In Borovina v. Florida Construction Industry Licensing Board, the court rejected an attempted use of a generalized claim by the board that there had been insufficient competent substantial evidence to support a hearing officer’s factual determinations. The court noted that under the APA, an agency may reject the factual findings of a hearing officer which appear in a recommended order if it “determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.” This statutory provision was designed to assure the agency due deference to the factual determinations of the hearing officer. The court held that an agency did not meet the APA requirements.
reweighed the evidence and disagreed with the hearing officer's credibility evaluations.\textsuperscript{60} The court noted that the agency's mere disagreement with the hearing officer about weight and credibility of oral evidence did not constitute a demonstration that the hearing officer's factual determinations were not supported by competent substantial evidence.\textsuperscript{61} In *Tampa Wholesale Liquors, Inc. v. Division of Alcoholic Beverages and Tobacco*,\textsuperscript{62} the court clarified the scope of this approach by noting that the court still must review "the entire record," including both the decisions of the hearing officer and the agency, in determining whether the ultimate decision of the agency is supported by competent substantial evidence.\textsuperscript{63} In *Citrus Central v. Davelir*,\textsuperscript{64} the court extended this approach to intra-agency administrative appellate review. The court held that an intra-agency appellate review panel's finding of facts contrary to those of the claims examiner and appeals referee were not entitled to any deference from the court. Just as the courts and agencies may not reevaluate the evidence and substitute their judgment for that of the initial fact finder, nor can they.\textsuperscript{65}

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\textsuperscript{60} *Kulay*, 374 So. 2d 1391 (Fla. Dist. App. 1980) (by implication).

\textsuperscript{61} *Kulay*, 374 So. 2d at 1391. See also *School Bd. of Pinellas County v. Nibo*, 364 So. 2d 205, 207 (Fla. 1st Dist. Ct. App. 1980); *Tampa Wholesale Liquors, Inc. v. Division of Alcoholic Beverages and Tobacco*, 376 So. 2d 1195 (Fla. 2d Dist. Ct. App. 1980) (by implication).

\textsuperscript{62} *Kulay*, 374 So. 2d at 1391. See also *School Bd. of Pinellas County v. Nibo*, 364 So. 2d 205, 207 (Fla. 1st Dist. Ct. App. 1980); *Tampa Wholesale Liquors, Inc. v. Division of Alcoholic Beverages and Tobacco*, 376 So. 2d 1195 (Fla. 2d Dist. Ct. App. 1980) (by implication). In another line of cases in which the courts reviewed certificates of need decisions by HHS, the courts indicated that where the hearing officer only enters a recommended order, the agency has substantially greater leeway in rejecting his factual findings. This has been accomplished by two methods. First, courts converted what were factual issues into consistent applications of ordinary methods of proof, into factual issues immune with policy formation. In such cases, the courts are required to defer to the agency's factual determinations - not those of the hearing officer. See, e.g., *Alto v. Department of Professional Regulations*, 423 So. 2d 626 (Fla. 5th Dist. Ct. App. 1982) (holding that courts converted what were factual issues into questions of law. The agency had ultimate interpretative authority on those questions, and not the hearing officer. See 42 U.S.C. Federal Management Property Corp. v. Department of Health and Rehabilitative Serv., 482 So. 2d 475 (Fla. 1st Dist. Ct. App. 1986); *Humana, Inc. v. Department of Health and Rehabilitative Serv.*, 490 So. 2d 338 (Fla. 4th Dist. Ct. App. 1986) reh'd denied).

\textsuperscript{63} 150 So. 2d 1105 (Fla. 2d Dist. Ct. App. 1967) reh'd denied.

\textsuperscript{64} 150 So. 2d at 1117.

\textsuperscript{65} 364 So. 2d 81 (Fla. 4th Dist. Ct. App. 1979).

ments by merely stating that it had reviewed the complete record and rejected the factual findings of the hearing officer. In *Ferri v. Austin*, the court noted that an "agency may not reject the hearing officer's [factual] findings unless there was no competent, substantial evidence from which the findings could reasonably be inferred." The court found there was sufficient competent substantial evidence to support the factual findings of the hearing officer and that the school board wrongfully substituted its judgment for his on these issues. In *Victor v. Silberman*, the court held that the Duke County Manager had the power to reject a hearing officer's recommendation that an employee be reinstated with back pay, but only if "the record will support such action." "[A]bsent such a showing in the record, the county manager lacks the discretion to change or modify the findings of the hearing examiner or to impose disciplinary sanctions against an employee." There was no evidence supporting the county manager's decision to disregard the decision of the hearing officer. In *H.B.A. Corporation v. Department of Health and Human Services*, the court distinguished between where the agency engaged in substitution of judgment by merely disagreeing with the factual findings of the hearing officer where the factual findings of the hearing officer under the substantial competent evidence standard if the panel demonstrated that his factual conclusions were clearly erroneous. Id. (quoting Venetian Shores Home and Property Owners v. Rushakowski, 336 So. 2d 1039, 1040 (Fla. 3d Dist. Ct. App. 1976)).

639. Id. at 1039-40. See also Martin v. Department of Professional Regulation, 483 So. 2d 39 (Fla. 3d Dist. Ct. App. 1986); Okaloosa-Walton Jr. College Bd. of Trustees v. Public Employees Relations Comm'n, 372 So. 2d 1378, 1385-88 (Fla. 1st Dist. Ct. App. 1979); Shaliski v. Department of Environmental Regulation, 170 So. 2d 50, 53-54 (Fla. 1st Dist. Ct. App. 1965) reh'g denied.

640. 487 So. 2d 1165 (Fla. 5th Dist. Ct. App. 1986).

641. Id. at 1167 (emphasis in original).

642. Id. See also Department of Highway Safety and Motor Vehicles v. Taylor, 488 So. 2d 126, 127 (Fla. 3d Dist. Ct. App. 1986).

643. 380 So. 2d 1319 (Fla. 3d Dist. Ct. App. 1980).

644. Id. at 1321. See also Hudson v. Casey, 484 So. 2d 1284, 1285-86 (Fla. 1st Dist. Ct. App. 1986) (Agency must give a reason to support its decision to enhance the penalty recommended by the hearing officer.).

645. Id.

646. Id. See also Van Ore v. Board of Medical Examiners, 489 So. 2d 883 (Fla. 5th Dist. Ct. App. 1986) (Sanction enhancement by the Board of Medical Examiners over that recommended by the hearing officer is permitted if justified by a statement explaining the reason for not adopting the hearing officer's recommendation.).

647. 482 So. 2d 461 (Fla. 1st Dist. Ct. App. 1986) reh'g denied.

Another example of when an agency has greater discretion to disagree with a hearing officer's conclusions is when the courts view the conclusion reached by a hearing officer as "a mixed question of law and fact." In such cases, an agency may disagree with the hearing officer based upon its expertise as applied to the facts found by the hearing officer were not supported by the facts of the record. In the latter case, the court held that a statement by the agency that such evidence was lacking in the record was sufficient explanation for rejection of the hearing officer's factual findings. This was sufficient, because there was no danger of substitution of judgment by the agency reweighing of the evidence as there was no evidence to reweigh.

Even when an agency rejected the findings of fact by a hearing officer in matters "infused by policy considerations for which the agency has special responsibility," it could not do so without offering a reasoned explanation. In *Doctor's Osteopathic Medical Center, Inc. v. Department of Health and Rehabilitative Services*, the court noted that "[e]ven when policy considerations are involved and the agency has displaced the hearing officer's recommended conclusions because of such considerations, it is the agency's duty to explain its policies and to address countervailing arguments developed in the record as well as those urged by the hearing officer's recommended order." When in this case the explanation was inadequate, the court must follow the findings and recommendation of the hearing officer which were supported by substantial competent evidence. Similarly, in *Nest v. Department of Professional Regulation*, the court held that the Board of Medical Examiners erred in substituting its judgment for that of the hearing examiner that Nest was able to "practice [medicine] with reasonable skill and safety." The court found there was no evidence to support the Board's contrary conclusion.

648. Id. at 465.

649. Kolby, 374 So. 2d at 1390 (quoting McDonald, 346 So. 2d at 579).

650. 498 So. 2d 478 (Fla. 1st Dist. Ct. App. 1986) reh'g denied.

651. Id. at 480.

652. Id. at 480-81. See also Purvis v. Department of Professional Regulation, 40 So. 3d 134 (Fla. 1st Dist. Ct. App. 1984).

653. 490 So. 2d 987 (Fla. 1st Dist. Ct. App. 1986) reh'g denied.

654. Id. at 989.

655. Id. at 990.

ments by merely stating that it had reviewed the complete record and rejected the factual findings of the hearing officer.\footnote{94} In Ferris v. Austin,\footnote{94} the court noted that an "agency may not reject the hearing officer's [factual] findings unless there were [wa]s no competent, substantial evidence from which the findings[s] could reasonably be inferred."\footnote{94} The court found there was sufficient competent substantial evidence to support the factual findings of the hearing officer and that the school board wrongfully substituted its judgment for his on these issues.\footnote{94} In Victor v. Sierheim,\footnote{94} the court held that the Duval County Manager had the power to reject a hearing officer's recommendation that an employee be reinstated with back pay, but only if "the record will support such action."\footnote{94} "[A]bsent such a showing in the record, the county manager lacks the discretion to change or modify the findings of the hearing examiner or to impose disciplinary sanctions against an employee."\footnote{94} There was no evidence supporting the county manager's decision to disregard the decision of the hearing officer.\footnote{94}

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\footnote{93} Id. at 1039-40. See also Martin v. Department of Professional Regulation, 485 So. 2d 39 (Fla. 2d Dist. Ct. App. 1986); Okaloosa-Walton Jr. College M. of Trustees v. Public Employees Relations Comm'n, 372 So. 2d 1378, 1386-88 (Fla. 1st Dist. Ct. App. 1979); Shabloski v. Department of Environmental Regulation, 370 So. 2d 50, 53-54 (Fla. 1st Dist. Ct. App. 1979) (reh'g denied).

\footnote{93} Id. at 1167 (emphasis in original).

\footnote{92} Id. See also Department of Highway Safety and Motor Vehicles v. Taylor, 488 So. 2d 126, 127 (Fla. 3d Dist. Ct. App. 1986).

\footnote{92} Id. at 1319 (Fla. 3d Dist. Ct. App. 1980).

\footnote{91} Id. at 1284, 1285-86 (Fla. 1st Dist. Ct. App. 1986) (Agency must give a reason to support its decision to enhance the penalty recommended by the hearing officer.).

\footnote{91} Id.

\footnote{90} Id. See also Van Ore v. Board of Medical Examiners, 489 So. 2d 883 (Fla. 5th Dist. Ct. App. 1986) (Sanction enhancement by the Board of Medical Examiners over that recommended by the hearing officer is permitted if justified by a statement explaining the reason for not adopting the hearing officer's recommendation.).

\footnote{90} 482 So. 2d 461 (Fla. 1st Dist. Ct. App. 1986) (reh'g denied).
officer.47 An agency need not give deference to a hearing officer's interpretation of a vague statute even where the interpretation was in part based upon factual considerations.48

In cases where the agency and hearing officer disagree on the resolution of questions of law, the courts again are faced with a demand for dual deference. However, in these cases the agency clearly wins out over the hearing officer. Agencies have substantially greater discretion to reject the hearing officer's decision in the area of questions of law. Given this greater degree of discretion, the courts, in almost all cases, defer to the agency's interpretation on questions of law rather than the hearing officer's. But the courts have carefully restricted the scope of agency discretion on questions of law to insure that it does not become a device for agencies to engage in an independent reassessment of the hearing officer's findings of fact. An agency's role, when the hearing officer failed to correctly interpret the law in reaching his decision, is to independently apply the correct legal principles to the facts found by the hearing officer.49

This danger is illustrated in Baptist Hospital, Inc. v. Department of Health and Rehabilitative Services.50 In Baptist Hospital the court held that it was harmless error for HRS "to fail to state its reasons for rejecting the hearing officer's" interpretation of an HRS rule, because HRS's interpretation was "within its discretionary authority to interpret its own rules and statutes."51 In part, this decision was based upon the HRS's view of the facts supporting the policy, as compared with that of the hearing officer.52 To the extent that the opinion supported the agency to reject - without explanation - the policy-based factual findings of the hearing officer, it was inconsistent with the decision in Doctor's Osteopathic Medical Center which required HRS to explain why it rejected the policy based factual findings of the hearing officer.53

Finally, it should be noted that in the context of imposition of sanctions, the courts have permitted the agency greater discretion in reviewing the hearing officer's conclusions. In Britt v. Department of Professional Regulation,54 the court held an agency may enhance the recommended penalty of the hearing officer where the "reasons for increasing the recommended penalty were expressly stated and it was indicated that this disposition was reached upon 'a complete review of the matter.'"55 The court implicitly recognized that the agency's discretion concerning the sanction to be imposed was substantially greater than concerning other factual issues determined by the hearing officer. The competent substantial evidence test did not apply to the review of a hearing officer's sanction determinations.

Law v. Fact Dichotomy

The Florida APA draws a distinction between the role assigned courts is conducting judicial review of agency decisions depending on whether the issue is one of law or fact.56 The APA directs the Florida courts to deal with questions of law and fact separately in their opinions.57 While this dichotomy is a traditional one, it is not always easily applied. The distinction between law and fact is sometimes not easy to discern. The two tend to become inextricably intertwined.58

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660. 590 So. 2d 620 (Fla. 1st Dist. Ct. App. 1987) reh'g denied.

661. Id. at 623. The court went on to note that in such a case the decision of HRS should be affirmed unless it was clearly erroneous. The court it not in this one. Id. at 624.

662. Id. at 623-24.


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662. Id. at 623-24.
Professor Jaffe has offered a useful distinction between these two concepts as ever has been made. "A finding of fact is the assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect." Questions of law involve the legal implications of facts, or the issue of what particular statutes or rules mean independent of any particular set of facts.

This dichotomy between law and fact is extraordinarily important as it shapes the scope of judicial review exercised by the judiciary. The APA defines the standard for review of factual issues as competent substantial evidence. The competent substantial evidence test is designed to insure that the courts do not substitute their judgment for that of an agency unless, based upon the evidence in the record, reasonable minds could not support the agency's factual findings. This standard ideally envisions courts engaging in a careful review of the record to ensure that the quantum of evidence necessary to support the agency's factual conclusions is present. Any opinion dealing with such a challenge to an agency's findings of facts should also set forth a reasoned explanation of why the court found there was sufficient evidence to support the agency's factual findings. The APA defines the standard of review on questions of law as a query about whether the agency "has erroneously interpreted a provision of law and... whether a correct interpretation compels a particular action." This standard is viewed by the courts as establishing a defential approach to agency interpretations of the law. But clearly, the courts treat this standard as granting them a substantially greater latitude to disregard an agency's views on the law, as compared to the degree of discretion granted to courts to disregard an agency's findings of factual issues. How these standards of judicial review are used by the courts will be discussed in the following sections.

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Abuse of the Law/Fact Dichotomy

Both agencies and courts have at various times attempted to mis

678. E.g., Environmental Defense Fund v. EPA, 864 F.2d 341 (D.C. Cir. 1988).
use the dichotomy between law and fact to shape the applicable standard of judicial review. Courts, however, have attempted to curb such abuse. In *Silver Sand Company v. Department of Revenue*, the court held that an agency cannot escape the rigors of the substantial and competent evidence standard by merely labeling the issue a question of law. The court will look past the formal label attached to different portions of the hearing officer or agency decision to determine the true nature of the matter being resolved and will then apply the appropriate standard of review. But the abuse of the distinction between law and fact remains a problem. In *Citrus Central v. Derwiler*, the court based its decision at least in part on a mis-characterization of a factual issue as a question of law.

**Judicial Review of Factual Issues**

As noted earlier, competent substantial evidence is the standard for judicial review of factual issues. The courts generally characterize competent substantial evidence as such evidence as will establish a substantive basis of fact from which the fact can be reasonably inferred. [S]uch relevant evidence as a reasonable mind would accept as adequate to support a conclusion. [T]he evidence relied upon to sustain the ultimate finding

681. 365 So. 2d 1090 (Fla. 1st Dist. Ct. App. 1979) rev'd & denied.
682. Id. at 1093. See also Golden Isles Convalescent Center, Inc. v. Department of Health and Rehabilitative Serv., 500 So. 2d 651, 654-55 (Fla. 1st Dist. Ct. App. 1987); Gruman v. Department of Revenue, 379 So. 2d 1313, 1315 (Fla. 2d Dist. Ct. App. 1980) (the hearing officer labeled a factual conclusion a legal conclusion. The court held that regardless of the label attached to the conclusion it was a finding of fact entitled to deference from the agency when it reviewed the hearing officer's decision); National Ins. Serv. v. Unemployment Appeals Comm'n, 495 So. 2d 244, 245-46 (Fla. 2d Dist. Ct. App. 1986). In *School Bd. of Palm Beach County v. Florida Public Employees Relations Comm'n*, the court noted agencies should also avoid converting questions of law into questions of fact. 374 So. 2d 527, 528-29 (Fla. 1st Dist. Ct. App. 1979).
684. 368 So. 2d 81 (Fla. 4th Dist. Ct. App. 1979).
685. Id. at 83. See also Kinney v. United States Sugar Corp., 490 So. 2d 478, 481 (Fla. 4th Dist. Ct. App. 1986); Siess v. Department of Health and Rehabilitative Serv., 468 So. 2d 478 (Fla. 2d Dist. Ct. App. 1985).
686. Supra text accompanying notes 671-77.

The scope of judicial review established by the competent substantial evidence standard for agency determinations of factual issues is both restrictive and deferential. In most cases, the courts have complied with the letter and spirit of this restrictive and deferential approach to agency factual determinations; however, in some cases the courts have improperly abandoned the scope of review assigned to them by the APA. The potential for misuse of the substantial competent evidence test occurs primarily in two categories of cases: (1) substitution of judgment and (2) unenlightening factual review.

**Deferential Factual Review**

The competent substantial evidence standard of judicial review for factual issues establishes a general presumption that the factual findings of an agency are correct. In the overwhelming majority of cases, the courts have deferred to agency decisions on factual issues within an agency's area of special expertise. When the legislature has delegated to the agency the responsibility of choosing among various scientific methodologies in implementing a statute, the court should defer to the agency's expertise in its exercise of this power unless the choice "is either arbitrary, capricious, an abuse of discretion, or not reasonably related to the statutory purpose." The party attacking an agency's
use the dichotomy between law and fact to shape the applicable standard of judicial review. Courts, however, have attempted to curb such abuse. In Silver Sand Company of Leesburg v. Department of Revenue, the court held that an agency cannot escape the rigor of the substantial and competent evidence standard by merely labeling the issue a question of law. The court will look past the formal labels attached to different portions of the hearing officer or agency decision to determine the true nature of the matter being resolved and will then apply the appropriate standard of review. But the abuse of the distinction between law and fact remains a problem. In Citrus Central v. Detwiller, the court based its decision at least in part on a mischaracterization of a factual issue as a question of law.

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methodology selection has the burden of "show[ing] by a preponderance of the evidence" that the agency's selection of methodology was invalid. This "standard of judicial review accords great deference to the policy-making discretion and expertise of the regulatory agency." The courts have also deferred to agency decisions which did not involve its expertise, and where the legislature had allocated the initial decision making authority to the agency. Where the agency is the initial fact finder in a situation where the outcome turns on the credibility of the witnesses, the court should also defer to the agency's judgment. When the agency is the trier of fact the court must give its factual conclusions "as much weight and respect as the verdict of a jury." Other courts have characterized the determination of whether competent substantial evidence exists as a process requiring it to view

from the essential requirements of law" even where there was substantial conflicting evidence on the factual issues. This is an extremely deferential standard of judicial review, but it did not stop the court from holding the evidentiary record insufficient to support its decision. Jacksonville Suburban Utilities Corp. v. Hawkins, 360 So. 2d 426 (Fla. 1980). See also Kimball v. Maas, 384 So. 2d 1250, 1252 (Fla. 1980) re reversed (apparently applying this approach); Manatee County v. Marks, 304 So. 2d 767, 769 (Fla. 1975). But In Duval Utility Co. v. Florida Public Service Commission, the court described the nature of competent substantial evidence as "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred [ ] such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." 380 So. 2d 1028, 1031 (Fla. 1980) (quoting Sol Gut v. Sheffield, 95 So. 2d 912 (Fla. 1957)). See also C.H. Barco Contracting Co. v. Department of Transportation, 483 So. 2d 796, 800 (Fla. 1st Dist. Ct. App. 1986) (The court adopted this standard in evaluating contracting decisions of agencies).

690. Id. at 218 (the court concluded the challenging of the methodology failed to satisfy this standard). Manatee County, 504 So. 2d at 765 ["[t]he burden [was] at the party seeking review ... to demonstrate that the commission's determination is unsupported by [independent] evidence "].

691. Id. at 218. In Florida Power Corporation v. Public Service Commission, the court found that this standard was not met when there was no evidence to support the Public Service Commission's factual conclusions. 487 So. 2d 106 (Fla. 1986). "This finding [by the Commission was] wholly unsupported by the record and is palpably contrary to the essential requirements of law." Id. at 1063. See also MC Telecommunications Corp. v. Florida Public Service Commission, 491 So. 2d 538 (Fla. 1985). But see Florida Power Corp., 478 So. 2d at 1064 (Barkett, J., dissenting).


694. Id.

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694. Id.

695. At least in the light most favorable to the prevailing party."669 The court should not overturn the decision of the agency "unless a review of the entire record reveals a total lack of substantial evidence to support it."669 "Where the evidence [was] conflicting, the courts should not interfere with an administrative decision."669 This does not mean that the agency's substantial evidence standard, the courts have granted agencies unbridled authority over the determination of factual issues.669 Rather it has made it much more likely that courts in the judicial review process would accept the agency's factual determinations.669 This deferential approach to factual issues was not meant to prevent the courts from finding that an agency had erred in its factual determinations. It merely established that the courts should not
reevaluate the record on factual matters absent a clear showing that the agency had erred in a fundamental sense in its factual determinations. Such reevaluation should be limited to focusing on the decision of the agency on the factual issues and not a totally independent analysis. 700

Hartenstein v. Department of Labor and Employment Security 701 is an example of the application of the competent substantial evidence test where the court overturned the agency’s factual determination. The result was correct, but the approach used was flawed, because the court independently examined the record without any reference to the findings of the appeals referee or Commission. The issue was whether there was competent substantial evidence that the employee was guilty of misconduct connected to his job which justified denying him unemployment benefits. The employer had granted the employee temporary permission to vary his working hours as long as the job got done. The employee was fired - when prior to returning to regular working hours - he informed the employer he needed a few days off. 702 The evidence of misconduct was a statement from the employer that the employee worked irregular hours, had worked less than forty hours one week, had taken off time and a combination of these factors. 703 The court noted that failure to comply with an employer’s requests did not convert the employee conduct in all cases into misconduct sufficient to justify denial of unemployment compensation benefits. 704 The misconduct must be “wanton, deliberate disregard of the employer’s standard of behavior, or intentional disregard of the employer’s interest.” 705 The court, without reference to the agency’s factual findings, noted the record in this case indicated that the employer had not disapproved of his irregular schedule. Absent such an expression of disapproval, especially after the employer had acquiesced in the practice, the evidence did not constitute misconduct. 706 The absence from a job due to a family emergency cannot be considered misconduct, unless the employee

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fails to give notice that he would be absent and fails to explain the nature of the emergency. 707 The employee in this case gave notice of his absence and later the same day notified the employer of the reason for his absence. 708 While it was admitted the employee did work one week less than forty hours, that alone or taken in conjunction with the other events was insufficient to prove misconduct under the statute. 709

My criticism of cases such as Hartenstein is not that the courts did not reach the correct result, or even that the courts engaged in improper substitution of its judgment for that of the agency. It is clear that cases such as Hartenstein involved circumstances of an appropriate nature for the courts to overturn agency factual conclusions and substitute their judgment for that of the agency. Rather it is that the courts in these cases used a methodology of review which improperly focuses exclusively on the record and what it proved, when the court should be focusing upon the decision of the agency and whether the record supports it. It may seem like a small difference in perspective but by improperly and independently evaluating the record to determine what conclusions it may support, the courts are opening the door to engaging in substitution of judgment in cases where it is inappropriate. By adhering to the appropriate point of inquiry - whether the record supports an agency’s factual findings - the court guards against assuming this inappropriate role in the judicial review process.

Substitution of Judgment on Factual Issues

As noted above, the general rule is that the courts should engage in a very deferential process of judicial review of agency factual determinations. However, there are some cases where it is clearly appropriate for the courts to abandon the deferential approach to factual issues. The courts have abandoned the deferential form of factual review in determining the validity of the claimed emergency which justified the proclamation of an emergency rule. This is justified because the process circumvents many of the procedural safeguards in the APA and may implicate due process consideration where it is applied to a party in an adjudicatory context.

In Times Publishing Company v. Department of Corrections


701. 383 So. 2d 759 (Fla. 2d Dist. Ct. App. 1980).

702. His father had died, but he did not tell his employer that at the time. He was fired. Id. at 760.

703. Id. at 761.

704. Id.

705. Id. at 762.

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Hartenstein v. Department of Labor and Employment Security\textsuperscript{790} is an example of the application of the competent substantial evidence test where the court overturned the agency's factual determination. The result was correct, but the approach used was flawed, because the court independently examined the record with virtually no reference to the findings of the appeals referee or Commission. The issue was whether there was competent substantial evidence that the employee was guilty of misconduct connected to his job which justified denying him employment benefits. The employer had granted the employee temporary permission to vary his working hours as long as the job got done. The employee was fired - when just prior to returning to regular working hours - he informed the employer he needed a few days off.\textsuperscript{790} The evidence of misconduct was a statement from the employer that the employee worked irregular hours, had worked less than forty hours one week, had taken time off and a combination of these factors.\textsuperscript{790} The court noted that failure to comply with an employer's requests did not convert the employee conduct in all cases into misconduct sufficient to justify denial of unemployment compensation benefits.\textsuperscript{790} The misconduct must be "wanton, deliberate disregard of the employer's standard of behavior, or intentional disregard of the employer's interest."\textsuperscript{790} The court, without reference to the agency's factual findings, noted that the record in this case indicated that the employer had not disapproved of his irregular schedule. Absent such an expression of disapproval, especially after the employer had acquiesced in the practice, the evidence did not constitute misconduct.\textsuperscript{790} The absence from a job due to a family emergency cannot be considered misconduct, unless the employee fails to give notice that he would be absent and fails to explain the nature of the emergency.\textsuperscript{790} The employee in this case gave notice of his absence and later the same day notified the employer of the reason for his absence.\textsuperscript{790} While it was admitted the employee did work one week less than forty hours, that alone or taken in conjunction with the other events was insufficient to prove misconduct under the statute.\textsuperscript{790}

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In Times Publishing Company v. Department of Corrections

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\bibitem{790} Id.
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\bibitem{790} Id. at 762.
\bibitem{790} Id.
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the court in *dicta* confronted the issue of what constituted a sufficient statement of "specific facts and reasons for finding an immediate danger to the public health, safety, or welfare" to justify an agency promulgating a rule under the emergency rule-making procedures of 120.54(9). The court set forth the standard of judicial review to be applied, the court merely indicated that affidavits from the agency director or other person responsible for the subject matter area of the rule outlining the nature of the problem and the need for an immediate solution were sufficient. In *Times Publishing Company v. Department of Corrections (II)*, the court clarified the standard of judicial review when it declared invalid an expanded version of the original emergency rule after it was repromulgated, because it prohibited media access to prisoners who were not subject to the threat of imminent execution. The court found there was no evidence of an immediate threat to public safety in such cases. In effect, the court adopted a very independent approach to determining the sufficiency of evidence supporting such claims. In *Krajenka v. Division of Workers' Compensation*, the court used this nondeferential approach to judicial review of the facts alleged to support the invocation of the emergency rule making process of 120.54(9) when it rejected the attempt by the agency to adopt emergency rules because the Workers' Compensation statute had not been substantially amended. The court held that the mere fact that new rules were in place at the time the statutory amendments became effective did not constitute an emergency.

It is also appropriate for a court to substitute its judgment on factual issues in resolving a constitutional issue or when the court confronts factual issues in the context of determining whether the agency had jurisdiction to act. In such circumstances, the reason for deference is diminished by the need for the courts to ensure agencies act consistent with the constitution and to ensure that agencies do not expand their jurisdiction beyond that delegated to them by the legislature.

What is troubling are the cases where there are no countervailing considerations to justify a nondeferential or substitution of judgment approach to an agency's determination of factual issues. *Silver Sand Company of Leesburg v. Department of Revenue* is typical of these cases. In *Silver Sand*, the court applied the competent substantial evidence standard of judicial review in a manner which indicated it was engaging in selective substitution of its judgment for that of the agency on factual issues. On one factual issue, the court deferred to the factual determinations made by the hearing officer and found there was sufficient evidence to support the hearing officer's conclusion that Handy Haul-It did not have authority to purchase diesel fuel for resale to other trucking companies. But on another factual issue the court substituted its judgment for that of the hearing officer. In the latter factual issue they found insufficient evidence in the record to support the finding that Handy Haul-It was authorized to purchase diesel fuel for Silver Sand from any supplier. The court determined the record only supported finding that Handy Haul-It had authority to purchase diesel fuel from Radiant Oil for Silver Sand. The portions of the administrative hearing record disclosed in the opinion and the discussion of it failed to reveal any reason that would lead one to conclude that there was insufficient evidence to support a reasonable person reaching the same conclusion as the hearing officer. The court's decision on this factual issue apparently was reached just because the court disagreed with the hearing officer's findings of facts. This is precisely the sort of mischief the competent substantial evidence standard of judicial review was designed to guard against.

Of course the mere existence of the standard does not mean it will be effective in practice. The opinion in *Silver Springs, Inc. v. Department of Commerce* is an example of failure of the limitations on the

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710. 373 So. 2d 304 (Fla. 2d Dist. Ct. App. 1979).
711. Fla. Stat. § 120.54 (9)(a)(3) (1977). The court declared the rule invalid because the department failed to comply with the procedures set forth in the APA concerning promulgation of emergency rules.
712. *Times Publishing Co.,* 373 So. 2d at 306. See also *Times Publishing Co. v. Department of Corrections (II)*, 373 So. 2d 307 (Fla. 1st Dist. Ct. App. 1979) (The court declared invalid an expanded version of the emergency rule after it was repromulgated, because it prohibited media access to prisoners who were not subject to the threat of imminent execution. The court found there was no evidence of an immediate threat to public safety in such cases.).
714. Id. at 310-11.
715. 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979).
716. Id. at 1202-03.
717. Id. at 1203.
718. 365 So. 2d 1090 (Fla. 1st Dist. Ct. App. 1979) rej'd denied.
719. The court initially determined that an agency cannot escape the rigors of the substantial and competent evidence standard by merely labeling a factual issue as a question of law. Id. at 1093.
720. Id. at 1095.
721. Id. at 1096.
114. the court in *dicta* confronted the issue of what constituted a sufficient statement of “specific facts and reasons for finding an immediate danger to the public health, safety, or welfare" to justify an agency promulgating a rule under the emergency rule-making procedures of 12 O.54(9). Without setting forth the standard of judicial review to be applied, the court merely indicated that affidavits from the agency director or other person responsible for the subject matter area of the rule outlining the nature of the problem and the need for an immediate solution were sufficient. In *Times Publishing Company v. Department of Corrections* (111), the court clarified the standard of judicial review when it declared invalid an expanded version of the original emergency rule after it was repromulgated, because it prohibited media access to prisoners who were not subject to the threat of imminent execution. The court found there was no evidence of an immediate threat to public safety in such cases. In effect, the court adopted a very independent approach to determining the sufficiency of evidence supporting such claims. In *Krafla v. Division of Workers’ Compensation* (112), the court used this nondeferential approach to judicial review of the facts alleged to support the invocation of the emergency rule making process of 12 O.54(9) when it rejected the attempt by the agency to adopt emergency rules because the Workers’ Compensation statute had been substantially amended. The court held that the mere fact that new rules were in place at the time the statutory amendments became effective did not constitute an emergency. It is also appropriate for a court to substitute its judgment on factual issues in resolving a constitutional issue or when the court confronts factual issues in the context of determining whether the agency had jurisdiction to act. In such circumstances, the reason for deference is diminished by the need for the courts to insure agencies act consistent with the constitution and to insure that agencies do not expand their jurisdiction beyond that delegated to them by the legislature.

What is troubling are the cases where there are no countervailing considerations to justify a nondeferential or substitution of judgment approach to an agency’s determination of factual issues. *Silver Sand Company of Leesburg v. Department of Revenue* (113) is typical of these cases. In *Silver Sand*, the court applied the competent substantial evidence standard of judicial review in a manner which indicated it was engaging in selective substitution of its judgment for that of the agency on factual issues. On one factual issue, the court deferred to the factual determinations made by the hearing officer and found there was sufficient evidence to support the hearing officer’s conclusion that Handy Haul-It did not have authority to purchase diesel fuel for resale to other trucking companies. But on another factual issue the court substituted its judgment for that of the hearing officer. In the latter factual issue they found insufficient evidence in the record to support the finding that Handy Haul-It was authorized to purchase diesel fuel for Silver Sand from any supplier. The court determined the record only supported finding that Handy Haul-It had authority to purchase diesel fuel from Radiant Oil for Silver Sand. The portions of the administrative record disclosed in the opinion and the discussion of it failed to reveal any reason that would lead one to conclude that there was insufficient evidence to support a reasonable person reaching the same conclusion as the hearing officer. The court’s decision on this factual issue apparently was reached just because the court disagreed with the hearing officer’s findings of facts. This is precisely the sort of mischief the competent substantial evidence standard of judicial review was designed to guard against.

Of course the mere existence of the standard does not mean it will be effective in practice. The opinion in *Silver Springs, Inc. v. Department of Commerce* (114) is an example of failure of the limitations on the
scope of the review process to function effectively. After indicating that it was aware of the limited scope of appellate review applicable in this case, the court went on to hold the department had incorrectly concluded that the discharged employee had not engaged in "misconduct connected with his work." The court based the decision solely on the belief that three instances of disruptive behavior at work were sufficient to conclude the employee from finding he had not engaged in misconduct. The court apparently gave no consideration to the Department's factual determinations and offered no explanation of why it found the record insufficient to support the department's factual findings in the case. In short, on the face of the opinion, the court engaged in substitution of judgment.

As was detailed above, one of the reasons for why courts appear to engage in improper substitution of judgment on factual issues is because they fail to focus on the decision of the agency and instead focus exclusively on the record. The temptation of courts to do so is even greater when the case involves a decision based upon conflicting testimony. An example of this is Wayfarer, Inc. v. Department of Transportation. In Wayfarer the court weighed the evidence in order to hold that the outdoor advertising signs had not been enlarged contrary to the department's findings. While the court recognized that the administrative hearing record contained some evidence supporting the Department of Transportation's determination that the signs were enlarged contrary to the statutory prohibition, it believed that the evidence presented sufficiently established that the enlargements were really part of the original signs. Here, the court substituted its judgment for that of the department by weighing the conflicting evidence.

723. Fla. Stat. § 443.06(4) (1977). If an employee was guilty of such misconduct then he was precluded from receiving unemployment compensation.
724. Id. at 876-77.
725. Cf. Central Ctr. v. Detweiler, 368 So. 2d 81 (Fla. 4th Dist. Ct. App. 1979) (The court agreed with the claims examiner and appeal referee that the misconduct was related to the termination decision, and rejected the Board of Review's decision in the contrary).
726. 370 So. 2d 858 (Fla. 1st Dist. Ct. 1979).
727. Id. at 859.
728. See also Okaloosa Guidance Clinic, Inc. v. Davis, 384 So. 2d 1336, 1337-38 (Fla. 1st Dist. Ct. App. 1980) (Shaw, J., dissenting) (noting that the court engaged in substitution of judgment on both the facts and legal principles applied merely because it disagreed with the factual and policy conclusions of the hearing officer and Commission).

Administrative Law

Unenlightening Fact Review

A second and more prevalent type of judicial review of factual issues which is inconsistent with the spirit, if not the letter, of the APA is the three types of unenlightening conclusory factual review decisions by the courts. First, there are a group of cases where the courts summarily affirm the agency's factual findings by quoting extensively from the agency decision. In City of Jacksonville v. Jacksonville Association of Fire Fighters, IAFF, Local No. 1834 the court in, summary fashion, held there was sufficient evidence in the record to support the decision of the Public Employees Relations Commission that captains and lieutenants in the fire department were not management employees, and that a self-determination election was needed to ascertain whether the captains and lieutenants desired a bargaining unit and, if so, whether the unit should be separate from the one for the privates in the fire department. This decision is typical of the group of unenlightening opinions where the courts merely conclude there is ample evidence to support the agency's decision and then quote at length - without any other comments - from the opinion of the agency. The shortcomings of such opinions is that the courts have not engaged in any articulation of the reasons why these records are sufficient.

Equally unenlightening, if not more so, is the second type of cases which summarily resolved claims that the agency's factual determinations did not comply with the competent substantial evidence standard. For example in Tarpon Springs General Hospital v. Office of Community Health Facilities, the court merely asserts in a conclusory fashion that the record provided adequate factual support under the

729. 365 So. 2d 1098 (Fla. 1st Dist. Ct. App. 1979).
730. Id. at 1099, 1101.
731. E.g., Artis v. Department of Health and Rehabilitative Serv., 381 So. 2d 1170 (Fla. 4th Dist. Ct. App. 1980); Clark v. Department of Professional Regulation, 403 So. 2d 328 (Fla. 5th Dist. Ct. App. 1983) reh'g denied; School Bd. of Orange County v. Pilowitz, 367 So. 2d 730, 731-32 (Fla. 4th Dist. Ct. App. 1979). Cf. Dreyer v. Florida Real Estate Comm'n, 370 So. 2d 95 (Fla. 4th Dist. Ct. App. 1979) (The court did discuss some of the reasons why the evidence in the record constituted competent substantial evidence.); Exxon Co., U.S.A. v. Alexis, 370 So. 2d 1128 (Fla. 1979) (Example of this type of review under the competent substantial evidence standard in a worker's compensation case. Such cases are not governed by the APA although the standards of judicial review are generally similar.)
732. Fortunately, there has recently been a marked decline in this type of opinion.
733. 366 So. 2d 185 (Fla. 1st Dist. Ct. App. 1979) (per curiam) reh'g denied.
scope of the review process to function effectively. After indicating that it was aware "of the limited scope of appellate review," applicable in this case, the court went on to hold the department had improperly concluded that the discharged employee had not engaged in "misconduct connected with his work." The court based the decision solely on the belief that three instances of disruptive behavior at work were sufficient to preclude the department from finding he had not engaged in misconduct. The court apparently gave no consideration to the Department's factual determinations and offered no explanation of why it found the record insufficient to support the department's factual findings in the case. In short, on the face of the opinion, the court engaged in a substitution of judgment. As was detailed above, one of the reasons for why courts appear to engage in improper substitution of judgment on factual issues is because they fail to focus on the decision of the agency and instead focus exclusively on the record. The temptation of courts to do so is ever greater where the case involves a decision based upon conflicting testimony. An example of this is Wayfarer, Inc. v. Department of Transportation. In Wayfarer the court reweighed the evidence in order to hold that the outdoor advertising signs had not been enlarged contrary to the department's findings. While the court recognized that the administrative hearing record contained some evidence supporting the Department of Transportation's determination that the signs were enlarged contrary to the statutory prohibition, it believed the evidence presented sufficiently established that the enlargements were really part of the original signs. Here, the court substituted its judgment for that of the department by reweighing the conflicting evidence.

723. Fla. Stat. § 443.06(1) (1977). If an employee was guilty of such misconduct then he was precluded from receiving unemployment compensation.
724. Id. at 876-77.
725. Cf. Central Citrus v. Detwiller, 368 So. 2d 81 (Fla. 4th Dist. Ct. App. 1979) (The court agreed with the claims examiner and appeal referee that the misconduct was related to the termination decision, and rejected the Board of Review's decision to the contrary).
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\textsuperscript{734} Id. at 186. See also Department of Environmental Regulation v. Gallego, 477 So. 2d 532, 534 (Fla. 1985) \textit{rehg} denied; Gulf Coast Motor Line, Inc. v. Hawkins, 376 So. 2d 391 (Fla. 1979); Gulf Power v. Florida Public Serv. Comm’n, 487 So. 2d 1036 (Fla. 1986) \textit{rehg} denied. Sharby v. Department of Transp., 477 So. 2d 24, 25 (Fla. 1985); A.G. Ennis Realty, Inc. v. Department of Professional Regulation, 475 So. 2d 1012 (Fla. 2d Dist. Ct. App. 1984) \textit{rehg} denied (per curiam); Andrus v. Department of Labor and Employment Sec., 379 So. 2d 468, 470 (Fla. 4th Dist. Ct. App. 1980); Anshuezer-Busch, Inc. v. Unemployment Appeals Comm’n, 373 So. 2d 403 (Fla. 1st Dist. Ct. App. 1979); Board of Regents v. Cofsey, 378 So. 2d 52, 52 (Fla. 1st Dist. Ct. App. 1979); City of Jacksonville v. Public Employees Relations Comm’n, 381 So. 2d 283 (Fla. 1st Dist. Ct. App. 1980) \textit{rehg} denied. City of Jacksonville v. Florida Public Employees Relations Comm’n, 371 So. 2d 1044, 1046 (Fla. 1st Dist. Ct. App. 1979) \textit{rehg} denied; City of St. Petersburg v. Hawkins, 366 So. 2d 429, 430 (Fla. 1978); Collins v. Department of Health and Rehabilitative Serv., 497 So. 2d 1239 (Fla. 4th Dist. Ct. App. 1986); Department of Corrections v. Helleon, 477 So. 2d 14 (Fla. 4th Dist. Ct. App. 1985) \textit{rehg} denied; Engle v. Department of Professional Regulation, 477 So. 2d 10, 11 (Fla. 3d Dist. Ct. App. 1985) \textit{rehg} denied; Florida Jr. College at Jacksonville v. Department of Labor and Employment Security, 374 So. 2d 624, 625 (Fla. 1st Dist. Ct. App. 1979) (on the independent contractor factual issue only); Florida State Univ. v. Moore, 492 So. 2d 702 (Fla. 1st Dist. Ct. App. 1986) \textit{rehg} denied; Gabriel Communications Corp. v. Department of Revenue, 370 So. 2d 866 (Fla. 5th Dist. Ct. App. 1979); Gershank v. Department of Professional Regulation, 458 So. 2d 302, 304 (Fla. 3d Dist. Ct. App. 1984) \textit{rehg} denied; Gibbs v. Department of Commerce, 368 651, 652 (Fla. 3d Dist. Ct. App. 1979) (The court discussed the matter adequately on all factual elements except the one critical to the appeal where the court summarily affirmed the conclusion of the Board); Horgan v. South Broward Hosp. Admin., 477 So. 2d 617 (Fla. 4th Dist. Ct. App. 1985) \textit{rehg} denied (en banc); Kojal v. Department of Health and Rehabilitative Serv., 460 So. 2d 985 (Fla. 5th Dist. Ct. App. 1984) (per curiam); Lundy’s Market, Inc. v. Department of Commerce, 373 So. 2d 433, 434 (Fla. 3d Dist. Ct. App. 1979); Marion County School Bd. v. Clark, 384 So. 2d 1307, 1309 (Fla. 5th Dist. Ct. App. 1980) \textit{rehg} denied; McCreary v. Department of Health and Rehabilitative Serv., 384 So. 2d 980 (Fla. 3d Dist. Ct. App. 1980); Perez Department of Labor and Employment Security, 377 So. 2d 806, 807 (Fla. 3d Dist. Ct. App. 1979); Sonny’s Italian Restaurant and Pizzeria, Inc. v. Department of Business Regulation, 414 So. 2d 1156, 1157 (Fla. 3d Dist. Ct. App. 1982); Southeast Volusia Hosp. v. Department of Insurance, 478 So. 2d 820, 822 (Fla. 1st Dist. Ct. App. 1985) \textit{rehg} denied (for discussion of reason why the record was adequate); University Med-

\textsuperscript{735} Id. at 519.

\textsuperscript{736} Id. at 682. See also Commercial Truck Bros. v. Mann, 379 So. 2d 956, 959 (Fla. 1980); Duvall Util. Co. v. Florida Public Serv. Comm’n, 380 So. 2d 1038, 1031 (Fla. 1980) (The court held here conclusory statements were insufficient.); H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913 (Fla. 1979); Jacksonville Suburban Util. Corp. v. Hawkins, 380 So. 2d 425, 426 (Fla. 1980).


\textsuperscript{738} E.g., Bigler v. Department of Banking & Fin., 368 So. 2d 449 (Fla. 1st Dist. Ct. App. 1979); Compass Lake Hills Dev. Corp. v. Department of Community Affairs, 379 So. 2d 376 (Fla. 1st Dist. Ct. App. 1980) \textit{rehg} denied. (The court may have used this approach because Compass withdrew its request for a hearing under the APA.\textsuperscript{739} G & B Jacksonville v. Department of Business Regulation, 371 So. 2d 138 (1st Dist. Ct. App. 1979) \textit{rehg} denied; Jarvisen v. Unemployment Appeals Comm’n, 490 So. 2d 1189 (Fla. 3d Dist. Ct. App. 1986); Walsh v. Department of Labor and Employment Security, 371 So. 2d 579, 580 (Fla. 1st Dist. Ct. App. 1979).

\textsuperscript{739} \textit{Id.} at 29.

\textsuperscript{740} Published by INFORMS, 1984.
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formance of \[\text{contract[s]}\] with governmental entities.\textsuperscript{748} The terms of the contracts with the governmental entities demonstrated that the asphalt was purchased directly from Nali, because Nali was not using the asphalt to fulfill its construction obligations to governmental entities. While the result seems correct, the failure to state clearly the standard of judicial review applied leaves one questioning the scope of the court’s role in reviewing this agency decision.

Judicial Review of Questions of Law

As was noted earlier, the courts also engage in deferential review of agency decisions on questions of law, but with a difference, in that the courts have greater discretion to engage in independent evaluation of the issue. The courts deferred to an agency’s interpretation of the law where the agency was given primary responsibility for implementing a statute granting the agency substantial discretion in the area.\textsuperscript{749} In such cases, the courts have accepted the agency’s interpretation as long as it is in the “range of discretion” granted the agency by the statute.\textsuperscript{750} The scope of such discretion is not clear, and has been char-

\textsuperscript{748} Id. at 29 (emphasis in original deleted). Under the statute and administrative regulation in most cases a sale of goods directly to a governmental entity is exempt. But the indirect sale of goods to a governmental entity by a contractor to perform a service which required the contractor to supply the goods necessary to complete its service contract was in most cases taxable. Fla. Stat. § 212.08 (6) (1975). Fl. Adm. Code r.12A-1.151 (1975).


\textsuperscript{750} Implicit in this approach to statutory interpretation is that the agency makes the initial interpretation. Roberts v. Ayers, 381 So. 2d 1057, 1060 (Fl. 1st Dist. Ct. App. 1980) reh’g denied (noted in denial of rehearing petition).

\textsuperscript{744} Aurora Group, Ltd. v. Department of Revenue, 487 So. 2d 1132 (Fla. 3d Dist. Ct. App. 1986) reh’g denied (by implication); Board of Regents v. Public Employers Relations Comm’n, 368 So. 2d 641, 643 (Fla. 1st Dist. Ct. App. 1979) reh’g denied; Federal Property Management Corp. v. Department of Health and Rehabilitative Serv., 483 So. 2d 475, 477 (Fla. 1st Dist. Ct. App. 1986); Silver Sand Co. of Leesburg, Inc. v. Department of Revenue, 365 So. 2d 1090, 1097-98 (Fla. 1st Dist. Ct. App. 1979) reh’g denied (Ervin, J., dissenting) (Judge Ervin found the application of de regulation from the wrong year was harmless error, because they were essentially identical under the Department of Revenue’s interpretation. “The Department’s interpretation of the regulation is within its range of discretion, and we are not allowed to substitute our interpretation under the circumstances.”); Tarver v. Department of Health and Rehabilitative Serv., 371 So. 2d 190, 193 (Fla. 4th Dist. Ct. App. 1979) (en banc); Andian Investment Co. v. Department of Revenue, 370 So. 2d 377 (Fla. 4th Dist. Ct. App. 1979) (by implication).

745. Freedman v. State Board of Accountancy, 370 So. 2d 1168, 1169 (Fla. 4th Dist. Ct. App. 1979). In Schoettle v. Department of Administration, the court indicated that deference to the agency’s interpretation should be abandoned in such cases because the court was in as good a position to make this judgment as the agency. 513 So. 2d 129, 1301 (Fla. 1st Dist. Ct. App. 1987) reh’g denied. But see Schoettle, 513 So. 2d at 1302-03 (Ervin, J., dissenting).

746. Department of Revenue v. Skop, 383 So. 2d 678, 679 (Fla. 5th Dist. Ct. App. 1980) reh’g denied. See also Department of Environmental Regulation v. Goldring, 477 So. 2d 532, 533-34 (Fla. 1985) reh’g denied; Reedy Creek Improvement Dist. v. Department of Env’t Reg’l, 485 So. 2d 642, 648 (Fla. 1st Dist. Ct. App. 1986); Shell Harbor Group, Inc. v. Department of Business Regulation, 485 So. 2d 114, 114 (Fla. 1st Dist. Ct. App. 1986). See also Associated Mortgage Investors v. Department of Business Regulation, 503 So. 2d 379, 380 (Fla. 1st Dist. Ct. App. 1987); Cardioll, Inc. v. Hill, 503 So. 2d 1340, 1342 (Fla. 1st Dist. Ct. App. 1987); Good Samaritan Hosp. v. Department of Health and Rehabilitative Serv., 485 So. 2d 871 (Fla. 4th Dist. Ct. App. 1986) reh’g denied (per curiam); Island Harbor Beach Club v. Department of Natural Resources, 493 So. 2d 209, 214 (Fla. 1st Dist. Ct. App. 1986); Menon v. Department of Professional Regulation, 504 So. 2d 1341 (Fla. 1st Dist. Ct. App. 1987) (example of when a court found an interpretation was clearly erroneous); Palm Beach County School Bd v. Unemployment Appeals Comm’n, 504 So. 2d 165 (Fla. 4th Dist. Ct. App. 1987) (example of when a court found an interpretation was clearly erroneous); School Bd. Pinellas County v. Department of Admin., 492 So. 2d 767, 768 (Fla. 1st Dist. Ct. App. 1986); School Bd. of Palm Beach County v. Florida Public Employee Relations Comm’n, 374 So. 2d 527, 530 (Fla. 1st Dist. Ct. App. 1979) reh’g denied (Smith, J., dissenting); Southeast Volusia Hosp. v. Department of Insuran, 478 So. 2d 820, 822 (Fla. 1st Dist. Ct. App. 1985) reh’g denied; Surf Attractions, Inc. v. Department of Business Regulation, 480 So. 2d 1354, 1359 (Fla. 1st Dist. Ct. App. 1985) reh’g denied (Ervin, J., dissenting); Woodley v. Department of Health and Rehabilitative Serv., 505 So. 2d 676, 678 (Fla. 1st Dist. Ct. App. 1987) (example of when a court found an interpretation was clearly erroneous).
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to the agency’s interpretation as long as “there are [no] compelling indications that such construction is wrong.” 747 “Agency determinations with regard to a statute’s interpretation will receive great deference in the absence of clear error or conflict with legislative intent.” 748 The interpretation “does not have to be the only one or the most desirable one, it is enough if it is permissible.” 749 In General Telephone Company of Florida v. Marks, 748 the court noted that the standard of judicial review for the exercise of rule-making authority by the Public Service Commission required the court to defer to the PSC’s interpretation of the statute contained in a rule as long as it “is reasonably related to the enabling legislation and is not arbitrary and capricious.” 749 The reason for this deferential approach was that when the legislature delegated “[s]ome discretion . . . to regulatory bodies to promulgate . . . detailed rules that expand upon and implement legislative directives” it intended the regulatory bodies to exercise this discretion, not the courts. 750 This approach to judicial review properly preserved the balance of responsibilities established by the legislature and safeguarded against an agency acting outside the scope of its delegated authority. 

Deference to an agency’s interpretation of the law has been granted even where its construction was inconsistent with the “literal interpretation of the statute,” as long as it was designed to avoid as “unreasonable or ridiculous” reading of the statute. 751 This deference to agency interpretation of the law clearly is not an open-ended invitation to agencies to rewrite statutes. 751 It has been restricted to circumstances where “[s]uch a departure from the letter of the statute [w]
to the agency's interpretation as long as "there are [no] compelling indications that such construction is wrong."445 "Agency determinations with regard to a statute's interpretation will receive great deference in the absence of clear error or conflict with legislative intent."446 The interpretation "does not have to be the only one or the most desirable one, it is enough if it is permissible."447 In General Telephone Company of Florida v. Marks,448 the court noted that the standard of judicial review for the exercise of rule-making authority by the Public Service Commission required the court to defer to the PSC's interpretation of the statute contained in a rule as long as it "is reasonably related to the enabling legislation and is not arbitrary and capricious."449 The reason for this deferential approach was that when the legislature delegated "[s]ome discretion . . . to regulatory bodies to promulgate . . . detailed rules that expand upon and implement legislative directives" it intended the regulatory bodies to exercise this discretion, not the courts.450 This approach to judicial review properly preserves the balance of responsibilities established by the legislature and safeguards against an agency acting outside the scope of its delegated authority.

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This also did not mean that the courts would not substitute their judgment on legal issues while adhering to these principles. They just, as Walker v. Department of Transportation456 illustrates. In Walker the court confronted the issue of whether the Department of Transportation could order removal of outdoor advertising signs when the sign owner failed to timely file for renewal of sign permits by payment of the annual fees.457 The Department of Transportation sent Walker notice that he had failed to renew the permits for his signs.458 Walker attempted to pay the delinquent fees, but the Department of Transportation refused to accept payment. He then requested an administrative hearing.459 At the administrative hearing the Department of Transportation maintained that Walker had no right to pay the fees in an untimely fashion, and that the only question to be resolved at the hearing was whether Walker had in fact paid his permit fees in a timely fashion. The Department of Transportation argued that no notice of its change of policy was required because its past practice of remitting late fees for payment and renewal was illegal under the statutory terms. The court disagreed with the Department of Transportation on all points. First, it was a long standing construction of the statute by the Department of Transportation that the statute permitted late pay-

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447. Id. at 1192. See also Little Mayon Island, Inc. v. Department of Environmental Regulation, 492 So. 2d 735, 737 (Fla. 1st Dist. Ct. App. 1987).
449. Id. at 1193 (Fla. 1st Dist. Ct. App. 1986).
450. 500 So. 2d 143 (Fla. 1986).
451. Id. at 145. The court concluded that the PSC had acted reasonably in the case in construing the scope of the statute through the rule-making process. Id. at 145-46.
452. Id. at 145.
453. Shell Harbor Group, 487 So. 2d at 1142.
ment of fees and renewals. Such long standing interpretations by the agency charged with administering a statutory system are very persuasive and receive great deference from the courts.768 The courts should intervene to overturn such interpretations only where there has been a clear abuse of discretion; nothing in this record indicated that the Department of Transportation had abused its discretion by interpreting the statute as allowing renewal of permits by late payment of fees.769 Second, the legislature rejected the rigid application of the renewal deadline recently adopted, and affirmed the correctness of the Department of Transportation's earlier policy of permitting such late payment of fees and renewal of permits by codifying it in the statute.770 In light of the traditional principle of interpretation and the legislature's recent action, the court held the practice adopted by the Department of Transportation of not permitting late fee payment and renewal of permits was inappropriate, and absent "an imminent threat to public safety, the Department must give notice and reasonable opportunity to renew signs permits on existing signs."771

Nondeferential Review of Questions of Law

The courts have developed a variety of tests reflecting the factors which they believe justify abandoning the deferential approach to agency interpretations of the law. In Weisbrod v. Florida Career Service Commission,772 the court held, in part, that it should not defer to an agency's interpretation of a statute or agency rule which potentially violated individual rights guaranteed under the state and federal constitu-

760. Id. at 99. Accord Outdoor Advertising Art, Inc. v. Department of Transportation, 366 So. 2d 114, 115 (Fla. 1st Dist. Ct. App. 1979) (per curiam) reh'g denied.
761. Judge Smith dissented from this aspect of the court's reasoning. He believed that the majority had gone too far in using this principle to effectively freeze in place what an agency had determined was its prior misinterpretation of the law. He correctly notes that such a decision robs an agency of the power to correct its errors. He joined the majority opinion in the result because the Department of Transportation had not complied with the Administrative Procedure Act in announcing its change of position to Walker. Id. at 101-02, 107-08, 113-14 (Smith, J., dissenting and concurring). He also noted his disapproval of the majority's approach to the latent constitutional issues in the case. Id. at 102-04.
762. Fla. Stat. § 479.07(3) (Supp. 1978). Judge Smith also disagreed with the weight the majority gave to the subsequent legislative action in this case. Walker, 366 So. 2d at 108-09 (Smith, J., dissenting).
763. Walker, 366 So. 2d at 100.
764. 375 So. 2d 1102 (Fla. 1st Dist. Ct. App. 1979) reh'g denied.
765. Id. at 1108. See also Department of Revenue v. Markham, 381 So. 2d 130, 130-11 (Fla. 1st Dist. Ct. App. 1980); Palm Harbor Special Fire Control Dist. v. Kelly, 300 So. 2d 1383, 1388-90 (Fla. 2d Dist. Ct. App. 1987); Rosenberg v. Department of Professional Regulation, 488 So. 2d 153, 154-55 (Fla. 3d Dist. Ct. App. 1986); School Bd. of Okaloosa County v. Okaloosa Education Assoc., 480 So. 2d 1366, 1368 (Fla. 1st Dist. Ct. App. 1986) reh'g denied; Surf Attractions, Inc. v. Department of Business Regulation, 480 So. 2d 1299, 1299 (Fla. 1st Dist. Ct. App. 1987) reh'g denied; Thomas City of Crest City, 503 So. 2d 1301 (Fla. 1st Dist. Ct. App. 1987) reh'g denied (inconsistent with other zoning cases infra).
768. 372 So. 2d 197 (Fla. 1st Dist. Ct. App. 1979).
769. Id. at 199. See Fla. Stat. § 443.06(1) (1977).
770. ABC Auto Parts, 372 So. 2d at 198.
771. Id. at 198-99.
ment of fees and renewals. Such long standing interpretations by the agency charged with administering a statutory system are very persuasive and receive great deference from the courts.764 The courts should intervene to overturn such interpretations only where there has been a clear abuse of discretion; nothing in this record indicated that the Department of Transportation had abused its discretion by interpreting the statute as allowing renewal of permits by late payment of fees.765 Second, the legislature rejected the rigid application of the renewal deadline recently adopted, and affirmed the correctness of the Department of Transportation’s earlier policy of permitting such late payment of fees and renewal of permits by codifying it in the statute.766 In light of the traditional principle of interpretation and the legislature’s recent action, the court held the practice adopted by the Department of Transportation was not permitted, the late payment and renewal of permits was inappropriate, and absent “an imminent threat to public safety, the Department must give notice and reasonable opportunity to renew sign permits on existing signs.”767

Nondeferential Review of Questions of Law

The courts have developed a variety of tests reflecting the factors which they believe justify abandoning the deferential approach to agency interpretations of the law. In Weisbrod v. Florida Career Service Commission,768 the court held, in part, that it should not defer to an agency’s interpretation of a statute or agency rule which potentially violated individual rights guaranteed under the state and federal constitu-

764. See Eliot v. Department of Revenue. 381 So. 2d 1068 (Fla. 1st Dist. Ct. App. 1980); Palm Harbor Special Fire Control Dist. v. Ehr, 503 So. 2d 1383, 1388-90 (Fla. 2d Dist. Ct. App. 1987); Rosenberg v. Department of Professional Regulation, 488 So. 2d 153, 154-55 (Fla. 3d Dist. Ct. App. 1986); School Bd. of Polk County v. Polk Education Assoc., 480 So. 2d 1360, 1363 (Fla. 1st Dist. Ct. App. 1985)reh’g denied; Surf Attractions, Inc. v. Department of Business Regulation, 480 So. 2d 1354, 1356 (Fla. 1st Dist. Ct. App. 1985)reh’g denied; Thomas v. City of Cresent City, 503 So. 2d 1299, 1301 (Fla. 1st Dist. Ct. App. 1987)reh’g denied (inconsistent with other zoning cases infra).

768. See also Department of Revenue v. Markham, 381 So. 2d 1068 (Fla. 1st Dist. Ct. App. 1980); Palm Harbor Special Fire Control Dist. v. Ehr, 503 So. 2d 1383, 1388-90 (Fla. 2d Dist. Ct. App. 1987); Rosenberg v. Department of Professional Regulation, 488 So. 2d 153, 154-55 (Fla. 3d Dist. Ct. App. 1986); School Bd. of Polk County v. Polk Education Assoc., 480 So. 2d 1360, 1363 (Fla. 1st Dist. Ct. App. 1985)reh’g denied; Surf Attractions, Inc. v. Department of Business Regulation, 480 So. 2d 1354, 1356 (Fla. 1st Dist. Ct. App. 1985)reh’g denied; Thomas v. City of Cresent City, 503 So. 2d 1299, 1301 (Fla. 1st Dist. Ct. App. 1987)reh’g denied (inconsistent with other zoning cases infra).

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court disagreed with this interpretation of the statute. It held that the
relevance of misconduct was not limited to where an employer dis-
charged an employee. Misconduct could be an important element in
determining whether the employee left without good cause. Although a
literal reading of the statutory language may support the position of
the department, the general purpose of the statute as reflected in the
definitions of misconduct was sufficient to convince the court that the
legislature never intended that misconduct be restricted to cases involv-
ing discharge of an employee by the employer.778

The Walker case demonstrated that where an agency abandon a
long established interpretation of a statute, the courts will not always
defy the new interpretation.779 In such cases, the court shall defer to
the agency’s new interpretation or policy only if it is accompanied by
an adequate explanation detailing the reasons for the change of
position.778

There are a variety of other circumstances which the courts found
justified a nondeferential approach to agencies interpretations of stat-
utes. Court also did not defer to an agency’s interpretation of statutes
where it involves harmonizing conflicting statutory provisions.776 This
was a role the courts believed was more appropriately performed by the
courts to insure that both statutes were implemented to the fullest ex-
tent possible. The task should not be entrusted to an agency with
a policy preference for one statute over another. The court did not
defy to an agency’s interpretation of the law where it involved an issue
of first impression resolved in the context of an administrative adjudi-
catory hearing.776 The courts did not defer in these cases because the
administrative adjudicatory process was not designed to necessarily
consider all of the competing arguments, the agency being a captive of
the particular dispute it was resolving. The court did not defer to an
agency’s interpretation where there was no apparent foundation for it in
a statute.776 The court did not defer to an agency’s interpretation of the
law if it was unreasonable.776 The court did not defer to the agency’s
interpretation where it involved a determination of whether the agency
had jurisdiction.776 These are examples of the need for independent judi-
cial interpretation to insure that agencies operate within their as-
signed scope of delegated duties.

Concluding Thoughts

Over the past eight years, the Florida courts have decided a wide
variety of cases dealing with a diverse host of issues in the administra-
tive law area. This survey has discussed many of these cases, but not all

776. See Balssam v. Department of Health and Rehabilitative Serv., 486 So. 2d
141, 146-49 (Fla. 1st Dist. Ct. App. 1986) (reh’g denied); Board v. Department
of Commerce, 359 So. 2d 382, 384-85 (Fla. 2d Dist. Ct. App. 1979); Comer v. Unem-
ployment Appeals Comm’n, 481 So. 2d 67 (Fla. 3d Dist. Ct. App. 1985); Department
of the Air Force v. Unemployment Appeals Comm’n, 486 So. 2d 632 (Fla. 1st Dist.

777. Balssam, 486 So. 2d at 655 (Booth, J., dissenting) (argued the court should have deferred
to the Commission’s interpretation).

778. City of Winter Park v. Florida Public Employees Relations Comm’n, 383
So. 2d 653 (Fla. 5th Dist. Ct. App. 1980) (reh’g denied); Davis Des Rocher Sand Corp.
v. Vohg Review Bd., 376 So. 2d 402 (Fla. 3d Dist. Ct. App. 1979) (wrongful denial
of a hunting request); Duchow v. Florida Elections Comm’n, 485 So. 2d 18 (Fla. 3d
Dist. Ct. App. 1986); Federal Property Management Corp. v. Department of Health
and Rehabilitative Serv., 482 So. 2d 475, 477-78 (Fla. 1st Dist. Ct. App. 1986); Flor-
da Legal Serv., Inc. v. Department of Labor and Employment Security, 381 So. 2d
130, 112 (Fla. 1st Dist. Ct. App. 1980) (per curiam); Johnson & Johnson, Inc. v.
Department of Transportation, 371 So. 2d 494 (Fla. 1st Dist. Ct. App. 1979) (reh’d);
Monsanto Co. v. Department of Labor and Employment Security, 371 So. 2d
36, 59 (Fla. 1st Dist. Ct. App. 1979) (Statute required a person be able to work in
order to receive unemployment benefits and the record disclosed the person was unable
to work).

779. Home Fuel Oil Co. v. Unemployment Appeals Comm’n, 494 So. 2d 268
(Fla. 3rd Dist. Ct. App. 1986); Medlin v. Florida Bd. of Architecture, 382 So. 2d
708, 710 (Fla. 1st Dist. Ct. App. 1980) (unreasonable because contrary to ordinarily
understood meaning).

780. See United Telephone Co. of Fla. v. Public Serv. Comm’n, 496 So. 2d
116 (Fla. 1980) (reh’g denied).
court disagreed with this interpretation of the statute. It held that the relevance of misconduct was not limited to where an employer discharged an employee. Misconduct could be an important element in determining whether the employee left without good cause. Although a literal reading of the statutory language may support the position of the department, the general purpose of the statute as reflected in the definitions of misconduct was sufficient to convince the court that the legislature never intended that misconduct be restricted to cases involving discharge of an employee by the employer.\(^{774}\)

The \textit{Walker} case demonstrated that where an agency abandons a long established interpretation of a statute, the courts will not always defer to the new interpretation.\(^{774}\) In such cases, the court shall defer to the agency's new interpretation or policy only if it is accompanied by an adequate explanation detailing the reasons for the change in position.\(^{774}\)

There are a variety of other circumstances which the courts found justified a nondeferential approach to agencies' interpretations of statutes. Court also did not defer to an agency's interpretation of its statute where it involves harmonizing conflicting statutory provisions.\(^{774}\) This was a role the courts believed was more appropriately performed by the courts to ensure that both statutes were implemented to the fullest extent possible. The task should not necessarily be entrusted to an agency with a policy preference for one statute over another. The court did not defer to an agency's interpretation of the law where it involved an issue of first impression resolved in the context of an administrative adjudication.

\textbf{Concluding Thoughts}

Over the past eight years, the Florida courts have decided a wide variety of cases dealing with a diverse host of issues in the administrative law area. This survey has discussed many of these cases, but not all.


\footnotesize{776. See United Telephone Co. of Fla. v. Public Serv. Comm'n, 496 So. 2d 116 (Fla. 1986) \textit{reh\'g denied}.}
of them. The goal was to present a critical discussion of the most important, as well as the most controversial, cases which the courts decided during this period. Two trends, one with positive and the other with disturbing ramifications, are worthy of particular note in conclusion.

One trend is the emergence during the 1980's of a new pragmatism in the application of the Cross Key delegation doctrine. Although it is unlikely that the Cross Key decision will be overruled, the Florida Supreme Court, as well as the district courts of appeal, have retreated from the formalistic approach used in the aftermath of the decision to hold several delegations of legislative authority unconstitutional. This is a positive trend because it preserves the degree of legislative flexibility necessary to ensure that administrative agencies remain viable and useful institutions in the shaping and implementation of public policy in the complex modern world.

The other trend, which is deeply disturbing, concerns the failure of the courts to properly apply the competent substantial evidence standard of judicial review. In too many cases, the flawed implementation of this judicial review standard has resulted in unenlightening or inappropriate judicial decision making. An unenlightening decision is an opinion which offers little or no explanation of why the court found the agency decision was or was not supported by competent substantial evidence. One of the primary functions of a judicial opinion is to provide a rational explanation for the decision of the court. This explanation assists the public, government officials, and members of the bar and the bench in understanding how similar cases or disputes should be resolved in the future. In cases where the courts reverse, and to a lesser extent when the courts affirm, an agency's factual determinations, the presence of a reasoned explanation also provides some assurance that the court has performed its review function in a manner consistent with the scope of judicial review assigned it by the legislature. Where an opinion lacks a rational explanation, it fails to perform these functions.

A flawed use of the competent substantial evidence standard of judicial review also occurs when the court fails to sufficiently focus on the question of whether the record adequately supports the agency's factual determinations. The courts have far too often chosen to frame the question as whether the court would have reached the same factual conclusions as the agency based upon the evidence in the record. This approach invites the court to substitute its judgment for that of the agency, something the legislature in most cases wanted to prohibit. Even if a reasoned explanation is offered, a seemingly de novo approach...
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