

Winter 1994

1994 APA Legislation: The History, the Reasons, the Results

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Recommended Citation

David Gluckman, *1994 APA Legislation: The History, the Reasons, the Results*, 22 Fla. St. U. L. Rev. 345 (1995).
<http://ir.law.fsu.edu/lr/vol22/iss2/6>

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1994 APA LEGISLATION: THE HISTORY, THE REASONS, THE RESULTS

DAVID GLUCKMAN*

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This Article is a personal attempt to describe the actions and non-actions of the Florida Legislature during the 1994 Regular Session in a context that might be helpful in predicting the future of the Administrative Procedure Act (APA).¹ It covers the recent history of the APA, my analysis of the reasons some tried to change it, the results of these attempts, and a few predictions for the future. Before proceeding further it is important to note two things. First, in a year where enormous efforts were made to amend the APA in the Legislature, nothing major happened. Second, in light of some of the changes proposed, this was a very significant nonoccurrence.

I. HISTORY

A. *The House of Representatives Select Committee on Agency Rules and Administrative Procedures*

In order to understand what happened in 1994, it is important to review the most recent legislative attempts at review of the APA. In late

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1. The Administrative Procedure Act is codified in chapter 120, *Florida Statutes*.

1992, the House Speaker established the House of Representatives Select Committee on Agency Rules and Administrative Procedures (House Select Committee), whose charge was to review and suggest legislation relating to agency rulemaking power and procedures.² During the 1993 session, it was clear that this committee had a strong negative bias against agency rulemaking and would work actively to do what certain members wanted to restrain those agencies which were "out of control."³

A number of hearings were held where "horror" stories concerning agency actions were related to the members and agencies were "requested" to defend themselves. The complaints usually centered on the fact that "agencies were clearly exceeding their legislative authority" in passing certain rules, denying certain permits, or requiring local governments to otherwise restrict land use decisions (particularly comprehensive plan density decisions). Occasionally, committee members were reminded by certain rogue lobbyists (including the author and a few brave or stupid agency attorneys) that the agencies were being required to implement very non-specific laws and many of the problems could be corrected if the Legislature would write laws more clearly and specifically.

The strong hints about the Legislature writing clearer and more specific laws were generally ignored and very little of substance was accomplished during the 1993 session. However, after the session, an advisory committee of interested persons with expertise in the APA was appointed to report back to the House Select Committee prior to the 1994 session. Many of the advisory committee members were also members of the Administrative Law Section of The Florida Bar.

The advisory committee was divided into three working groups that met once a month, or more, for most of the summer and fall of 1993. The subcommittees were very effective in airing a number of the problems that practitioners had with the APA, but produced little of substantive value of interest to the House Select Committee except for proposals for a simplified administrative hearing process under section 120.57, *Florida Statutes*. It was very interesting participating in the subcommittee work. Though I only attended the one I was assigned to, discussions with members of the other subcommittees indicated the general results were the same in all. The agreements at the end of each meeting seemed to shift from meeting to meeting, depending on who

2. Representative Joseph R. "Randy" Mackey, Democrat, Lake City, was appointed Chair.

3. The "negative" bias was a result of general frustration with government expressed in the many hostile questions from the panel to agency witnesses.

attended. The person with the most immediate problem seemed to dominate until he or she missed the next meeting. If that happened, the recommendations of the subcommittee might turn 180 degrees. At one meeting, a consensus seemed to have been reached on a problem and solution involving the Division of Administrative Hearings (DOAH), only to find a new pair of hearing officers show up the next month with a wholly different perception of both the problems and the solutions. Different attorneys working in different areas had very different ideas of what changes were needed. Some felt everything was working well, others felt that the whole APA needed to be overhauled. Needless to say, though the discussions were often interesting and lively, little of substance was accomplished. At the end of the process the committee staff produced some proposed legislation with varying levels of support from the advisory committee participants.⁴

B. The Senate Select Committee on Governmental Reform

In late 1993, the Senate President created the Senate Select Committee on Governmental Reform (Senate Select Committee), whose task was to review agency rulemaking and governmental accountability. Its chairman was Senator Charles Williams⁵ and its members consisted of most of the major committee chairs and minority (out of power) leadership.⁶

Often referred to by lobbyists in and out of government as the "Williams Agency Bashing Committee," a name most unpopular with Senator Williams, its major role seemed to be to take testimony about agency abuses of authority. Because of its membership of busy leaders and the fact that select committees in the Senate do not have the power to pass or kill legislation, the committee attendance was sometimes sparse or "roving." There was a strong sense that this committee was formed to correct a number of preconceived problems, many of which either did not exist or had little to do with the APA. The ultimate direction of the committee was to concentrate on the rule-making process, mirroring many of the House proposals that were made by individual House members, the Florida Chamber of Commerce, and the Joint Administrative Procedures Committee. Few of the proposals made by the advisory committee to the House Select Committee were considered.

4. The actual result included a number of alternatives with different degrees of merit.

5. Dem., Live Oak.

6. Technically there had been no minority party in the Senate. The Senate was split evenly between Democrats and Republicans, so the party in power alternated in 1993 and 1994. After the November 1994 election, there were 21 Republicans and 19 Democrats in the Senate.

II. THE 1994 SESSION

The 1994 session started with a flurry of activity.⁷ After three frantic weeks of hearings in the both chambers, committee activity slowed to a crawl. It became obvious to most observers that the Governor's Office was not about to accept much of the work product of either chamber without substantial modification. The Governor's Office negotiated with the Speaker's Office to come up with an acceptable compromise, which was incorporated as a substitute for House Bill 237 and passed from the House Select Committee at the end of the first month. During that time, the Senate Select Committee continued to review and refine its options, most of which were not acceptable to the Governor.⁸

With a few minor later modifications, House Bill 237 became the accepted package for the House and the Governor. It was universally

7. At least 24 bills were filed which would have affected the APA. Some of the more noteworthy legislation would have:

- established a new impact statement and specific requirements for rules effecting counties with populations under 50,000. Fla. HB 135 (1994); Fla. SB 17 (1994).
- established new "hoops" for agencies to jump through when adopting new rules. Many of the provisions were either unconstitutional or of questionable public policy. Fla. HB 237 (1994).
- made the authorization or writing of a rule later found to be an invalid exercise of legislative authority a second degree misdemeanor. Fla. HB 375 (1994).
- gave JAPC the right to suspend the operation of any rule. Fla. HB 569 (1994); Fla. SB 1250 (1994).
- prohibited agencies from obtaining attorney fees if they prevailed in a contested proceeding, while not altering the provision allowing attorney fees to affected parties prevailing against an agency. Fla. HB 577 (1994); Fla. SB 464 (1994).
- established expedited procedures for less complex hearings. Fla. HB 2429 (1994); Fla. HB 833 (1994).
- provided for a state constitutional amendment giving the Legislature the authority to repeal agency rules by resolution. Fla. HJR 1669 (1994).
- made hearing officers judges and transferred the Compensation Claims Office to the Division of Administrative Hearings. Fla. HB 1977 (1994).
- established new evidentiary standards in administrative hearings for specific offenses. Fla. HB 1981 (1994); Fla. SB 2564 (1994); This legislation became law. See ch. 94-161, § 1, 1994 Fla. Sess. Law Serv. 563, 564 (West) (to be codified at FLA. STAT. § 120.58(1)(a)).
- added new requirements on all Department of Environmental Protection rules that would make them harder to adopt and easier to challenge. Fla. HB 1127 (1994); Fla. SB 2086 (1994).

See also, *A Brief History of Selected APA Bills in the 1994 Session*, 22 FLA. ST. U. L. REV. 359 (1994).

8. The Governor's Office made it clear that they would not support any additional power in the Joint Administrative Procedures Committee to suspend agency rules or giving the Legislature that power. The Governor's Office also did not want rulemaking to become more expensive and citizen challenges to become less effective. The agencies' general counsels and DOAH expressed concerns with the way the expedited section 120.57 process was drafted, so this was also placed on the "no" list.

praised by all, mainly because it did little and harmed no one. The agencies' general counsels were not happy with it, but the Governor's Office felt it had to offer something and this was the best they could get. The bill passed the House in the last week of the Regular Session but was left pending in messages when the session ended. Senator Williams refused to accept the House compromise. During the extended session, the Senate struck the House compromise language in House Bill 237, placed the more extreme Senate language in it, and sent it back to the House. The House took up the bill, struck most of the Senate language, put its own back in and sent it back. The bill died in messages as the extended session ended.

III. ANALYSIS

There were a number of factors that led to the surge of interest in the APA these past two years as well as the lack of substantive change to the law. These can be divided into two major categories. The first is the reaction to growth management and environmental laws, and the second is the competition between those constituencies that sought to protect and those that sought to change the APA.

A. *Growth Management and Environmental Permitting*

My personal opinion is that the implementation of the Growth Management Act in the rural counties was the strongest single trigger of interest in the APA.⁹ This occurred because most of the rural counties (and some of the newly mixed urban/rural counties) adopted local comprehensive plans that were found by the state not to be in compliance with state law, automatically triggering a section 120.57 process. The counties were told that their plans were inconsistent with chapter 9J-5, *Florida Administrative Code*,¹⁰ an administrative rule,¹¹ and they could lose all their state revenue sharing money if they didn't come into compliance. Some of these counties (and most of their commissioners) had never heard of *administrative rules*, and they wanted to know how they could be forced to change the way the county did business by "non-elected pointy-headed bureaucrats" from Tallahassee. Their opinions were reinforced by the large landowners who were politically influential in the counties, and who decried the unfairness

9. See FLA. STAT. §§ 163.3161-.3243 (1993).

10. Chapter 9J-5, *Florida Administrative Code*, is a series of agency rules adopted by the Department of Community Affairs pursuant to rulemaking procedures required by section 120.54, *Florida Statutes*.

11. See FLA. STAT. § 120.54 (1993).

of a law which required state review when they wanted to build condos on their farmland.

Enter legislators from those areas who had little more knowledge of the rulemaking process or growth management, who knew they hadn't approved or any such *administrative rules*, and to whom it was obvious that the agencies were *exceeding their delegated legislative authority*. Of course, most of these legislators were either not in the Legislature at the time of the passage of growth management laws or forgot that chapter 9J-5, *Florida Administrative Code*, was one of those rules that received legislative review before it became effective.

In any event, these legislators soon learned that they had little chance of reversing or repealing the Growth Management Act, which had enormous public support. So they did the next best thing. They decided to attack the APA in a move that was described by one observer as "attacking Mexico in retaliation for the bombing of Pearl Harbor." It took little courage and less understanding against a mainly unprotected foe, the "non-elected pointy-headed bureaucrats" from Tallahassee.

In order to fully understand the picture, the reader must also consider a few additional matters. This was the last year that conservative North Florida legislators would control the top leadership in both houses for at least the next two years. It was just after Florida bottomed out of an economic slump, when attacks on the environment in the name of jobs usually occur and the specter of *private property rights* rises as a divine need of mankind requiring much more protection than that afforded by the U.S. and Florida Constitutions. It also followed a year when the Growth Management Act was substantially amended¹² without giving any appreciable relief to the rural interests who tried vigorously to weaken the act as it applied to them and lost badly.

The sponsorship of various legislation and amendments over the last two years that would weaken growth management and environment laws, establish new property rights¹³ for land developers and speculators, and make it more difficult or impossible for agencies to adopt rules, are all by the same few names. These same individuals were the most vocal advocates for change in the APA and critical of agency action. They also seemed to be the least knowledgeable about the APA and its role in governmental affairs.

12. Ch. 93-206, 1993 Fla. Laws 1887.

13. See Fla. HB 485 (1994) (sponsored by Representatives Burt Harris, Dem., Lake Placid, and Ken Pruitt, Repub., Port St. Lucie); Fla. SB 680 (1994) (sponsored by Senator William "Doc" Meyers, Repub., Stuart).

B. Constituencies

The APA constituencies also played a major role in the results of the 1994 session or lack thereof. It always amazes me how protective some Tallahassee lawyers are about the APA. I make a small amount of money doing rule challenges and permit interventions for environmental groups, and I sometimes forget how much money is made by others in this area. I'm also amazed by the personal non-monetary support for the idea of the APA that exists out there. There are lawyers who really love this act and don't want anyone to mess with it. There are also agency lawyers who feel they couldn't keep their agencies functioning without the APA, and a few who would like to grind it into the dirt so they could do whatever they wanted (probably the same ones who largely ignore the APA now). The legislative process is influenced by all of these points of view in one measure or another.

Probably the most interesting conflict of the session over the APA came as a result of two different perspectives of agency rulemaking held by the Florida Chamber of Commerce (Florida Chamber) and Associated Industries of Florida (Associated Industries), two major business lobbying organizations. The push to stop those "out of control agencies" came from the Florida Chamber through a committee it formed. The Florida Chamber was the main drafter of the most egregious changes giving the legislature more control over the agencies. On the other hand, Associated Industries had just gone through rulemaking on workers' compensation and realized that if the agencies had their hands tied like the Florida Chamber suggested, the workers' compensation rules would never have been adopted, and they would be back in an impossible legislative forum again. The dynamics of the process included the Florida Chamber making numerous public and private presentations supporting most of the proposed legislation and Associated Industries working actively (but quietly) in the background to kill it.

While the roles of the different constituencies varied as described above, there seemed to be little support for most of the legal changes sought by the legislators from any group other than the Florida Chamber. A few non-lawyers from various other groups would join in with general support for whatever the Florida Chamber wanted to do, but they rarely gave any technical suggestions for changes to the APA that made much sense. There were some very valid suggestions made by a few speakers with a real understanding of the APA, who did not have any vested interests in changes for a particular client. Other than cleaning up some technical points and pointing out truly disastrous directions, however, their input did not result in any memorable changes. I think that most of the experienced APA lawyers watching

from the audience were so appalled by how the proceedings were going that they simply sat back and waited for the whole process to produce little and die, while working quietly behind the scenes to see that it did. The pivotal role in the end was played by the Governor's Office. The Governor's General Counsel Office, working with its lobbyist, successfully convinced the House to take a more reasonable position and held firm against the Senate. Though some of the general counsels of the agencies with much of the in-the-trenches knowledge felt they were not consulted sufficiently during the negotiation process (and they weren't), their off-the-record contacts with legislators also helped with the final results.

IV. RESULTS

The results were obvious. Very little happened except an educational process that left many legislators perplexed and a number of others very happy to see it all go away. When the smoke lifted, it was clear that nobody in the Legislature (staff excepted) cared much about the APA except for Senator Curt Kiser,¹⁴ who has shepherded most of the significant changes over the last fifteen years. He's also one of the very few who actually understands most of the APA.

V. THE FUTURE

With the changes in House leadership, a settling of the growth management process and improvement in the economy, the wholesale attack on the APA will probably not continue next year at the same level of ferocity. However, there are many participants, including this author, who feel it is time to rewrite the APA in order to make it more readable, simpler and cheaper for participants.¹⁵ None of us pushed hard in 1994 to do that because of the unfriendly climate. Expect a move in that direction in the years to come, however, either with the appointment of a drafting commission or revival of some form of statutory revision council. Those of you who are thinking of changes in the APA ought to start your lists now, just in case an op-

14. *Repub.*, Dunedin, 1972-1994.

15. I have been outspoken at both the legislative and Florida Bar levels in stating that the APA suffers from the same problem that affects most laws that are part of a changing system. Each year amendments are added while none are removed for fear of unintended consequences on other parts of the APA. Thus, for 20 years the APA has gotten fatter and fatter and portions of it no longer make sense. The process has become so complex that it is now "lawyerized" in a manner never contemplated. The practice of administrative law has become so specialized that rather than serve as a simpler and less expensive alternative to circuit court, it has become more complex and expensive than ever envisioned.

portunity is presented. Regardless of what's necessary, you can expect the issue to reappear in the 1995 legislative session.

