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## *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.: Defining Agency Rulemaking Authority Under the 1996 Revisions to the Florida Administrative Procedure Act*

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# FLORIDA STATE UNIVERSITY LAW REVIEW



*ST. JOHNS RIVER WATER MANAGEMENT DISTRICT V.  
CONSOLIDATED-TOMOKA LAND CO.:*  
DEFINING AGENCY RULEMAKING AUTHORITY UNDER THE 1996  
REVISIONS OF THE FLORIDA ADMINISTRATIVE PROCEDURE ACT

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**ST. JOHNS RIVER WATER MANAGEMENT DISTRICT  
V. CONSOLIDATED-TOMOKA LAND CO.: DEFINING  
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ADMINISTRATIVE PROCEDURE ACT**

MARTHA C. MANN\*

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I. INTRODUCTION

In 1996 the passage of the much-anticipated amendments to Florida's Administrative Procedure Act (APA)<sup>1</sup> set the stage for a notable controversy surrounding the authority of state administrative agencies to promulgate rules. The amendments decidedly changed the prevailing standard for determining whether the Florida Legisla-

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1. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147 (current version at FLA. STAT. ch. 120 (1997 & Supp. 1998)).

ture had properly delegated authority to administrative agencies. The revised APA rejected the long-applied standard that an administrative rule would be deemed valid if it was "reasonably related to the purposes of the enabling legislation and [was] not arbitrary or capricious."<sup>2</sup> The revised statute required more in that "[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute."<sup>3</sup>

The meaning of the phrase "particular powers and duties," however, was unclear. Neither the statute nor the legislative history defined the specificity required in an agency's delegated powers and duties in order for the Legislature to validly grant rulemaking authority. The First District Court of Appeal recently addressed this issue in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*,<sup>4</sup> in which a group of corporate and private landowners in the Tomoka River and Spruce Creek area challenged the St. Johns River Water Management District's (District) authority to create several proposed rules.<sup>5</sup> According to the District, the proposed rules were intended to do the following: (1) add the Tomoka River and Spruce Creek Hydrological Basins as new geographic areas of special concern and impose more stringent permitting standards and criteria for systems in those areas; and (2) set water recharge standards and establish riparian habitat protection zones.<sup>6</sup> The landowners argued, and an administrative law judge (ALJ) agreed, that the District had exceeded its rulemaking authority in violation of sections 120.52(8) and 120.536(1), *Florida Statutes*,<sup>7</sup> when it proposed these rules.<sup>8</sup> The landowners submitted that these rules went beyond the "particular powers and duties" delegated by the Legislature to the District.<sup>9</sup> The First District Court of Appeal, however, reversed

2. See *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984) (applying the "reasonably related" test and citing FLA. STAT. § 350.172(2) (1981)).

3. See Act effective Oct. 1, 1996, ch. 96-159, § 3(8), 1996 Fla. Laws 147, 150 (current version at FLA. STAT. § 120.52(8) (Supp. 1998); *id.* § 9, 1996 Fla. Laws at 159 (current version at § FLA. STAT. § 120.536(1) (1997)). The new standard for agency rulemaking authority can first be found in the definition of "invalid exercise of delegated legislative authority" in section 120.52(8). The same language is repeated in section 120.536, which restates the new standard for rulemaking authority and also provides for a "look back" mechanism to address existing rules that may not adhere to the new standard.

4. 717 So. 2d 72 (Fla. 1st DCA 1998).

5. See *id.* at 76-77.

6. See *id.* at 75.

7. FLA. STAT. §§ 120.52(8), .536(1) (Supp. 1996).

8. See *Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist.*, DOAH Case No. 97-0870RP, at 59 (Final Order entered June 27, 1997) [hereinafter Final Order].

9. *Id.* at 43-44.

the decision of the ALJ, finding that the agency had acted within the authority delegated by the Legislature in proposing the rules at issue.<sup>10</sup> In the wake of the new restrictions imposed on administrative agencies by the revised APA, the ruling scored an important victory for both the agency and proponents of administrative discretion and expertise.

This Note will discuss the policy implications of the new rule-making standard and the impact of the *Consolidated-Tomoka* opinion on future rule promulgation and challenges. The new rulemaking standard has already significantly impacted the role of administrative agencies in the implementation of laws. First, as demonstrated in *Consolidated-Tomoka*, the text of the new standard, though obviously a restraint on existing rulemaking authority, was facially unclear.<sup>11</sup> The decision of the First District Court in *Consolidated-Tomoka* should assist agencies and those subject to agency rules in their future understanding of what "particular powers and duties" agencies must be granted in order to make rules. Second, the new rulemaking standard has rekindled criticism of the issuance of final orders by ALJs rather than by the agency.<sup>12</sup> Where a rule challenge alleges an invalid exercise of delegated authority, should reviewing courts defer to the ALJ's interpretation of the agency's "particular powers and duties," or to the agency's interpretation? In some situations, deferring to the ALJ's interpretation would directly conflict with the notion of administrative expertise in interpreting statutes. Third, the "look back" provision contained in section 120.536(2), *Florida Statutes*, requiring a review of all agency rules promulgated prior to the revisions,<sup>13</sup> potentially violates the separation of powers doctrine where the statute allows the Legislature to veto the executive branch through the elimination of undesirable rules.<sup>14</sup> Finally, despite the court's decision in *Consolidated-Tomoka*, the new rule-making standard may cause agencies to avoid rulemaking in favor of nonrule processes such as adjudication and policy statements.<sup>15</sup> This result is in extreme conflict with the express desire in Florida for presumptive rulemaking, if at all feasible and practicable.<sup>16</sup>

Part II of this Note will examine the history of rulemaking authority in Florida prior to the 1996 APA revisions, giving special

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10. See *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 81 (Fla. 1st DCA 1998).

11. See discussion *infra* Part V.B.; see also *Consolidated-Tomoka*, 717 So. 2d at 79 (stating that "the phrase 'particular powers and duties' in section 120.52(8) could have more than one meaning").

12. See discussion *infra* Part V.C.

13. See FLA. STAT. § 120.536(2) (Supp. 1998).

14. See discussion *infra* Part V.D.

15. See discussion *infra* Part V.E.

16. See FLA. STAT § 120.54(1) (Supp. 1998).

consideration to the strict separation of powers requirement in the Florida Constitution. Part III summarizes the standards of rule-making authority by reviewing key rule challenge cases prior to the 1996 revisions. The legislative history and political background of the APA revisions are summarized in Part IV. Part V then provides the background of the *Consolidated-Tomoka* case and discusses the court's interpretation of the new rulemaking standard. Part V describes potential repercussions of the new rulemaking standard not directly at issue in *Consolidated-Tomoka*. Finally, Part VI concludes by predicting how the court's ruling is likely to impact agencies, courts, and those who challenge agency rules.

## II. RULEMAKING AUTHORITY PRIOR TO THE 1996 REVISIONS

The principle that agencies may only act within the scope of their delegated authority is central to the study of administrative law.<sup>17</sup> Scholars have discussed and debated the rulemaking authority of agencies nearly as long as agencies have existed.<sup>18</sup> For a delegation of authority to an agency to be proper, the legislature must sufficiently guide the agency as to the purpose and intent of the laws to be implemented. The necessary degree of guidance can differ greatly *vis-à-vis* the federal and state governments. At the federal level, the United States Supreme Court has upheld congressional grants of broad and vaguely defined rulemaking power to the agencies.<sup>19</sup> However, in many of the individual states, including Florida, the non-delegation doctrine "retains a certain vitality."<sup>20</sup> Florida case law bears out this statement in word, if not by deed.<sup>21</sup>

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17. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("So long as Congress >shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928))).

18. See generally SOTIRIOS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* (1975); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Samuel W. Cooper, *Notes: Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361 (1994); Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); Thomas O. Sargentich, *The Delegation Debate and Competing Ideals of the Administrative Process*, 36 AM. U. L. REV. 419 (1987); J. Skelly Wright, *Review: Beyond Discretionary Justice*, 81 YALE L.J. 575 (1972).

19. See, e.g., *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863 (1984) (concluding that Congress intentionally left certain policy decisions to the administrator in the area of environmental emissions because the competing interests in Congress could not agree); see also *Yakus v. United States*, 321 U.S. 414, 420 (1944) (upholding a statute that empowered an administrator to promulgate war-time price control standards that would be "generally fair and equitable and . . . effectuate the [enumerated] purposes of this Act").

20. WALTER GELLHORN ET AL., *ADMINISTRATIVE LAW* 90 (8th ed. 1987); accord LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 76-77 (1965) (suggesting that state courts are especially likely to strike down delegations as improper in situations in-

A. *Florida's Strict Separation of Powers and the Issue of Nondelegation*

Florida's separation of powers doctrine is far more stringent than that of the federal government.<sup>22</sup> The United States Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."<sup>23</sup> The Florida Constitution more explicitly declares: "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 herein."<sup>24</sup> The Florida Constitution further states that the two houses of the Florida Legislature hold all lawmaking power.<sup>25</sup> While the Florida Constitution recognizes the presence of agencies, it does not grant any legislative or quasi-legislative authority to agencies.<sup>26</sup>

Even though agency rulemaking was not contemplated in the federal or state constitution, it has been allowed as a necessary delegation of legislative power.<sup>27</sup> The complexities of law and society make it impossible for legislatures to address and decide every issue pre-

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volving real property or the practice of a profession, as the uncertainty of standards "encourages undetectable discrimination or subjective notions of policy").

21. In reality, Florida courts generally uphold statutes that delegate authority to agencies as constitutional. See Johnny C. Burris, *Administrative Law: 1991 Survey of Florida Law*, 16 NOVA L. REV. 7, 11 (1991) (emphasizing that administrative agencies may not exercise any powers not expressly delegated to them).

22. See B.H. v. State, 645 So. 2d 987, 991-92 (Fla. 1994). The Florida Supreme Court has emphasized "that Florida has expressly and repeatedly rejected whatever federal doctrine can be said to exist regarding nondelegation." *Id.* at 992; accord *Brown v. Apalachee Reg'l Planning Council*, 560 So. 2d 782 (Fla. 1990); see also *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 820 (Fla. 1983).

23. U.S. CONST. art. I, § 1.

24. FLA. CONST. art. II, § 3.

25. See *id.* art. III, § 1.

26. See *id.* art. V, § 1 (stating that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices").

27. See JERRY L. MASHAW ET AL., *ADMINISTRATIVE LAW: THE AMERICAN PUBLIC SYSTEM* 56-57 (3d ed. 1992). Mashaw states:

The [Supreme] Court's reiteration of the nondelegation principle, coupled with its very sparing use to strike down legislation, illustrates a continuing judicial effort to harmonize the modern administrative state with traditional notions of representative government and the rule of law. It testifies also to a judicial sense . . . that legal techniques short of declaring statutes invalid are generally preferable means for accommodating the necessities of public policy with effective control of administrative discretion.

*Id.*; see also F. Scott Boyd, *Legislative Checks on Rulemaking Under Florida's New APA*, 24 FLA. ST. U. L. REV. 309, 313 (1997) (stating that despite the stringent limitation of lawmaking power contained in the Florida Constitution, "Florida courts have found the delegation of some lawmaking power to administrative agencies inevitable" (citing *Jones v. Kind*, 61 So. 2d 188, 190 (Fla. 1952))).

sented.<sup>28</sup> Administrative agencies, for all their drawbacks,<sup>29</sup> are able to address regulation with greater experience, expertise, and flexibility than legislatures.<sup>30</sup> This notion is illustrated at the federal level in the functions of the Environmental Protection Agency (EPA). The EPA is charged with developing and enforcing national standards for air quality, water quality, and hazardous waste treatment and disposal, among other responsibilities.<sup>31</sup> In defining, monitoring, and enforcing these environmental standards, the EPA performs functions that Congress lacks the time or expertise to carry out. In this context, efficient lawmaking requires allowing agencies to relieve Congress of the burden of filling in the details of stated policy. Though the idea of delegation of authority to agencies has been accepted at both the federal and state levels for decades, proper delegation places constraints on the agency in the form of legislative guidelines.

By declaring that agencies have no inherent rulemaking authority,<sup>32</sup> and that all rules must be "authorized by law and necessary to the proper implementation of a statute,"<sup>33</sup> Florida's APA explicitly recognizes the need for agency constraint. These legislative guidelines ensure that agencies are carrying out the intent and purpose of the statute to be implemented.

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28. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) ("[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."); see also *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1979) ("Flexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society . . ."); *State v. Atlantic Coast Line R.R.*, 56 Fla. 617, 656-658, 47 So. 969, 982-84 (1908) (upholding an agency regulation imposing penalties for common carriers in the field of intrastate transportation).

29. There are many criticisms of the administrative process. See, e.g., PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 84-89 (1981) (agencies are susceptible of "capture" by private interest groups); Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613, 1686-87 (1995) (agencies are scientifically incompetent); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (agencies can be inflexible in their rulemaking); 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 27 (1958) (agencies are allowed excessive discretionary power).

30. See CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 27-35 (1994); see also ARTHUR E. BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* 14-15 (1989); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1516-19 (1992).

31. See Reorganization Plan No. 3 of 1970, 84 Stat. 2086 (1970).

32. See FLA. STAT. § 120.54(1)(e) (Supp. 1998).

33. *Id.* § 120.54(1)(f).

### B. Rulemaking Guidelines

The Florida APA, adopted in 1974,<sup>34</sup> was mainly geared toward combating the problem of “phantom government”<sup>35</sup> in which government “operates by rules known only to a select few and which are inconsistently applied.”<sup>36</sup> Florida’s first APA concentrated on rulemaking processes that included public participation,<sup>37</sup> rule challenges,<sup>38</sup> and rule publication.<sup>39</sup> The Act contained very little guidance for agencies, hearing officers, or courts to determine whether a rule was a valid exercise of the legislative authority delegated to the agency by the Legislature.<sup>40</sup>

As evidenced by the case law, a number of standards have been applied over the years. The Florida Supreme Court has directed the Legislature to provide agencies with “an intelligible principle,”<sup>41</sup> “adequate standards” for ministerial agencies,<sup>42</sup> “objective guidelines and standards,”<sup>43</sup> “adequate guidelines,”<sup>44</sup> and “reasonably definite standards.”<sup>45</sup> Whatever the precise name for the standard, legislation should inform the agency of the “fundamental policy” necessary for

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34. See Administrative Procedure Act, ch. 74-310, 1974 Fla. Laws 952 (current version at FLA. STAT. ch. 120 (1997 & Supp. 1998)).

35. The term “phantom government” is said to have been coined by Sen. Dempsey J. Barron, Dem., Panama City, 1957-88. See Stephen T. Maher, *Getting Into the Act*, 22 FLA. ST. U. L. REV. 277, 280 n.8 (1994).

36. James P. Rhea & Patrick L. “Booter” Imhof, *An Overview of the 1996 Administrative Procedure Act*, 48 FLA. L. REV. 1, 5 (1996); see also GOVERNOR’S ADMIN. PROC. ACT REVISION COMM’N, FINAL REPORT 18 (Feb. 20, 1996) [hereinafter APA COMM’N REPORT].

37. See FLA. STAT. § 120.54(2) (Supp. 1974).

38. See *id.* §§ 120.54(3), .56.

39. See *id.* § 120.55.

40. See Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U. L. REV. 965, 1010-12 (1986) (“[I]n this initial version of the validity challenge provision, no grounds for challenging the validity of proposed rules were specified and no requirement that the petition must allege facts sufficient to show that the challenger ‘would be substantially affected’ by the proposed rule was imposed.”).

41. *Phillips Petroleum Co. v. Anderson*, 74 So. 2d 544, 547 (Fla. 1954) (holding that a zoning ordinance prohibiting construction and operations if injurious to other properties and objectionable to neighbors failed to establish an intelligible principle for the guidance of the Building Inspector and the Board of Adjustment in the performance of their duties).

42. *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273, 275 (Fla. 1962) (holding that a statute authorizing the Florida Railroad and Public Utilities Commission to grant licenses delegated an unlimited discretion to the Commission to determine the best way in which the public interest would be served).

43. *High Ridge Mgmt. Corp. v. State*, 354 So. 2d 377, 380 (Fla. 1977) (finding that sections of the Omnibus Nursing Home Reform Act was an unlawful delegation of authority because the Act lacked “objective guidelines and standards for enforcement”).

44. *Smith v. State*, 537 So. 2d 982, 986 (Fla. 1989) (stating that legislative delegation of authority to agencies to promulgate rules implementing legislative enactments are valid if accompanied by adequate guidelines).

45. *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994) (stating that the Legislature has exclusive power to decide reasonably definite standards used to implement policy).

rulemaking.<sup>46</sup> Equally important is the notion that courts must also be able to evaluate agency action in relation to the framework of articulated legislative policy:

In the final analysis it is the courts, upon a challenge to the exercise or nonexercise of administrative action, which must determine whether the administrative agency has performed consistently with the mandate of the legislature. When legislation is so lacking in guidelines that neither the agency nor the courts can determine whether the agency is carrying out the intent of the legislature in its conduct, then, in fact, the agency becomes the lawgiver rather than the administrator of the law.<sup>47</sup>

Following the stated policy of the Legislature, agencies are able to fill in the details of legislative intent. Courts may then evaluate the validity of agency rulemaking in relation to the policy contained in the statute.

The nature of lawmaking is not constant, however, and the very conditions that may require the use of agency expertise and flexibility may also make the drafting of detailed or specific legislation "impractical or undesirable."<sup>48</sup> While some statutes may be explicitly detailed by the Legislature, the subject matter of another area of legislation "may be such that only a general scheme or policy can with advantage be laid down by the Legislature, and the working out in detail of the policy indicated may be left to the discretion of administrative or executive officials."<sup>49</sup> In such cases, the Florida Supreme Court has opined that "greater discretion must be delegated."<sup>50</sup> With the necessary amount of specificity in the statute varying with the subject matter to be regulated, it is perhaps only natural that the distinction between filling in details and establishing public policy often becomes blurred.<sup>51</sup>

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46. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 920 (Fla. 1978). The Legislature must provide this guidance because "flexibility in administration of a legislative program is essentially different from reposing in an administrative body the power to establish fundamental policy." *Id.* at 924.

47. *Id.* at 918-19.

48. *Department of Citrus v. Griffin*, 239 So. 2d 577, 581 (Fla. 1970) (upholding provisions of the Orange Stabilization Act and a subsequent Department of Citrus marketing order alleged to be an invalid delegation of legislative authority).

49. *State v. Atlantic Coast Line R.R.*, 56 Fla. 617, 622, 47 So. 969, 971 (1908) (upholding the validity of a Railroad Commission rule alleged to be an invalid delegation of legislative authority); see also *Florida East Coast Indus. Inc. v. Department of Comm'y Aff.*, 677 So. 2d 357, 361 (Fla. 1st DCA 1996); *Florida League of Cities, Inc. v. Administration Comm'n*, 586 So. 2d 397, 411 (Fla. 1st DCA 1991).

50. *B.H.*, 645 So. 2d at 993 (citing *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 212 (Fla. 1968)).

51. See *Boyd*, *supra* note 27, at 314.

### III. THE STANDARD FOR RULE CHALLENGES PRIOR TO THE 1996 REVISIONS

Prior to the 1996 revisions of the APA, any substantially affected person could seek an administrative determination of the validity of a rule on the ground that the rule was an invalid delegation of legislative authority pursuant to section 120.56, *Florida Statutes*.<sup>52</sup> A presumption of validity attached to all proposed and existing rules,<sup>53</sup> and the burden was placed on the party challenging a rule to demonstrate, based on a preponderance of the evidence, that one or more of the following was true: (1) the agency failed to follow applicable rulemaking procedures;<sup>54</sup> (2) the agency exceeded its grant of rulemaking authority;<sup>55</sup> (3) the rule enlarged, modified, or contravened the specific provisions of the law implemented;<sup>56</sup> (4) the rule was vague, failed to establish adequate standards for agency decisions or vested unbridled discretion in the agency,<sup>57</sup> or (5) the rule was arbitrary or capricious.<sup>58</sup>

Pre-revision courts ruled that administrative agencies were vested with "wide discretion in the exercise of their lawful rulemaking authority," whether it be clearly conferred or fairly implied, provided that the authority was consistent with the general statutory duties of

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52. FLA. STAT. § 120.56 (1995).

53. See Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 FLA. ST. U. L. REV. 283, 302-03 (1997) (citing Department of Labor & Employ. Sec., Div. of Workers Comp. v. Bradley, 636 So. 2d 807 (Fla. 1st DCA 1994); State Dep't of Health & Rehab. Servs. v. Framat Realty, 407 So. 2d 238, 241 (Fla. 1st DCA 1981); Agrico Chem. Co. v. Department of Env'tl Reg., 365 So. 2d 759, 762 (Fla. 1st DCA 1978)).

54. Generally applicable rulemaking procedures were (and still are) contained in section 120.54, *Florida Statutes*, though certain statutes may create different or additional rulemaking procedures. See FLA. STAT. § 120.54 (Supp. 1998); Boyd, *supra* note 27, at 332 n.140.

55. See, e.g., Grove Isle, Ltd. v. Department of Env'tl. Reg., 454 So. 2d 571, 573 (Fla. 1st DCA 1984) (finding a Department of Environmental Regulation rule to be an invalid exercise of delegated authority because the rule exceeded the agency's delegated legislative authority by requiring applicants for a construction permit to demonstrate the "proposed activity or discharge is clearly in the public interest").

56. See, e.g., Department of Bus. Reg. v. Salvation Ltd., 452 So. 2d 65, 66 (Fla. 1st DCA 1984) (finding a Division of Alcoholic Beverages and Tobacco rule invalid because it added to specifically listed statutory criteria); Department of HRS v. McTigue, 387 So. 2d 454, 457 (Fla. 1st DCA 1980) (striking down a Department of HRS rule because the rule modified specifically stated criteria for licensure eligibility).

57. See, e.g., Florida East Coast Indus., Inc. v. Department of Comm'y Aff., 677 So. 2d 357, 362 (Fla. 1st DCA 1996) (finding that rules proposed by the Department were not vague or without adequate standards).

58. See Florida League of Cities, Inc. v. Department of Env'tl. Reg., 603 So. 2d 1363, 1367 (Fla. 1st DCA 1984) (noting that "section 120.52(8)(e) . . . relating to the term arbitrary or capricious, 'codifies the long established principle that administrative rules cannot be arbitrary or capricious, i.e., unsupported by logic, despotic or irrational'" (citing Fla. H.R. Comm. on Gov'tl. Ops., H.B. 710 & S.B. 608 (1987) Staff Analysis (Oct. 1, 1987))).

the agency.<sup>59</sup> As stated by the First District Court of Appeal, “the agency’s interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations.”<sup>60</sup> The Florida Supreme Court, recognizing that the grants of authority given to agencies are often quite general in nature, supplied the oft-quoted pre-1996 standard of review for agency rulemaking:

Where the empowering provision of a statute states simply that an agency may “make such rules and regulations as may be necessary to carry out the provisions of this Act,” the validity of the regulations promulgated thereunder will be sustained as long as they are *reasonably related* to the purposes of the enabling legislation, and are not arbitrary or capricious.<sup>61</sup>

Some courts described the burden on challenging parties as a heavy one.<sup>62</sup> The 1996 revisions moved toward the goal shared by many in the Legislature and the business community by creating a “more level playing field.”<sup>63</sup> As a result of the revisions, agencies were no longer able to rely upon the “reasonably related” test and would be pressed to show a stronger connection between rules and the statute implemented.

#### IV. THE FLORIDA APA RULEMAKING REVISIONS

Florida’s APA has been amended every year since it was enacted in 1974,<sup>64</sup> yet none of the previous changes were as dramatic as the 1996 revisions. The revisions were not easily achieved—years of debate and proposed bills preceded the enactment of the new APA.<sup>65</sup> Many of the previous proposals and recommendations are reflected throughout the new APA, which is structurally and substantively dif-

59. Department of Prof. Reg., Bd. of Med. Exam’rs v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984).

60. *Id.*

61. General Tel. Co. of Fla. v. Florida Pub. Serv. Comm’n, 446 So. 2d 1063, 1067 (Fla. 1984) (emphasis added) (citing Agrico Chem. Co. v. Department of Env’tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), and Florida Beverage Corp. v. Wynne, 306 So. 2d 200, 202 (Fla. 1st DCA 1975)).

62. See, e.g., Board of Optometry v. Florida Soc’y of Ophthalmology, 538 So. 2d 878, 884 (Fla. 1st DCA 1988) (providing the requirements necessary for challenging parties to meet the heavy burden of showing that the agency exceeded its authority and that the rule is not appropriate to the ends of the legislative act or the purpose of the enabling statute but are arbitrary and capricious).

63. See APA COMM’N REPORT, *supra* note 36, at 23 (recommending that proposed rules not be clothed in a presumption of validity and that attorneys’ fees should be awarded to successful challengers of rules).

64. See Donna E. Blanton & Robert M. Rhodes, *Florida’s Revised Administrative Procedure Act*, FLA. B.J., July/Aug. 1996, at 30, 30.

65. See Rhea & Imhof, *supra* note 36, at 2-23 (summarizing the legislative history of the 1996 APA); Lawrence E. Sellers, Jr., *The Third Time’s the Charm: Florida Finally Enacts Rulemaking Reform*, 48 FLA. L. REV. 93, 95-105 (1996) (same).

ferent from the earlier Act. The structural changes are intended to simplify the administrative process,<sup>66</sup> and the substantive changes and additions are intended to add flexibility<sup>67</sup> and improve agency accountability.<sup>68</sup>

A. *The Political Backdrop: Previous Attempts to Revise the APA*

The impetus for the recent rulemaking reform can be traced back at least as far as the formation of the Florida House of Representatives Select Committee on Agency Rules and Administrative Procedures in 1992.<sup>69</sup> The Committee was organized for the purposes of “investigating allegations of agency abuse of delegated authority and recommending any necessary modifications” to the APA.<sup>70</sup> In 1993 the Florida Senate Select Committee on Governmental Reform was created to improve “the effectiveness and efficiency of state government,” and to “ensure that all agency rules are based on statutory authority and that the rules do no more than the law requires.”<sup>71</sup> In 1994 both the Florida Senate and House of Representatives presented comprehensive proposals for APA revisions through Senate Bill 1440<sup>72</sup> and House Bill 237.<sup>73</sup> Though the two houses were ultimately unable to agree on the extent of reform, both houses repeatedly passed provisions that contained some version of the reforms proposed in House Bill 237.<sup>74</sup>

Similar legislation was filed during the 1995 legislative session. Among the proposed changes was a provision designed to “level the playing field” in rule challenges by removing the judicially-created presumption of validity attached to rules.<sup>75</sup> All proposed and existing rules were to be presumed invalid and the burden would be placed on the agency to prove that the rule or portion thereof was a valid exercise of delegated authority.<sup>76</sup> If the agency failed to meet its burden,

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66. See Deborah K. Kearney & Kent Wetherell, *The Practitioner's "Road Maps" to the Revised APA*, FLA. B.J., Mar. 1997, at 53, 53.

67. See Donna E. Blanton & Robert M. Rhodes, *Loosening the Chains that Bind: The New Waiver and Variance Provisions in Florida's Administrative Procedure Act*, 24 FLA. ST. U. L. REV. 353, 353 (1997).

68. See Blanton & Rhodes, *supra* note 64, at 33-34.

69. See Sally Bond Mann, *Legislative Reform of the Administrative Procedure Act: A Tale of Two Committees*, FLA. B.J., July/Aug. 1994, at 57, 57.

70. *Id.*

71. *Id.* (quoting Letter from Sen. Pat Thomas, Senate President, to Sen. Charles Williams, Chair (Sept. 14, 1993)).

72. See Fla. SB 1440 (1994).

73. See Fla. HB 237 (1994).

74. See Sellers, *supra* note 65, at 97 & n.29.

75. See Fla. CS for CS for SB 536, § 11, at 45 (1995); see also Sellers, *supra* note 65, at 99-100; APA COMM'N REPORT, *supra* note 36, at 23.

76. See Fla. CS for CS for SB 536, § 11, at 45 (1995).

the rule or objectionable portion would be declared invalid and a judgment for attorneys' fees would be entered against the agency.<sup>77</sup>

The 1995 legislation passed both houses of the Legislature, but was vetoed thereafter by Governor Lawton Chiles.<sup>78</sup> Although the Governor was an outspoken proponent of regulatory reform, he viewed the bill as too burdensome on agencies.<sup>79</sup> The deciding factor in the Governor's decision to veto, however, was that the bill did not repeal section 120.535, *Florida Statutes*, which required rulemaking where practicable and feasible.<sup>80</sup> Although both the Legislature and executive branch pursued revisions to Florida's APA, disagreements about the revisions ensued in 1994 and 1995.

### B. *The Recommendations of the Governor's Administrative Procedure Act Review Commission*

On the same day Governor Chiles vetoed the Second Committee Substitute for Senate Bill 536, he also issued an executive order reiterating his commitment to the reduction of rules, ordering administrative agencies to repeal obsolete rules, and at the same time establishing the Governor's Administrative Procedure Act Review Commission (Commission).<sup>81</sup> The fifteen-member Commission was comprised of members of the House of Representatives and Senate, attorneys practicing administrative law, the Governor's chief of staff, an ALJ, the president of the Florida Audubon Society, a representative of the business community, and the Director of the Center for Governmental Responsibility at the University of Florida.<sup>82</sup> The Governor directed the Commission to review the impact of the existing APA section 120.535, *Florida Statutes*,<sup>83</sup> and the viability of the Governor's efforts to reduce the number of administrative rules and restore "common sense"<sup>84</sup> to state governance.<sup>85</sup>

77. See *id.* at 46.

78. Second Committee Substitute for Senate Bill 536 was vetoed by Governor Chiles on July 12, 1995. See FLA. LEGIS., HISTORY OF LEGISLATION, 1995 REGULAR SESSION, HISTORY OF SENATE BILLS at 68; see also Craig Quintana, *Chiles Scuttles Regulatory-Reform Bill*, ORLANDO SENT., July 13, 1995, at C1.

79. See Rossi, *supra* note 53, at 277-78.

80. See FLA. STAT. § 120.535 (1995); Rossi, *supra* note 53, at 287; see also Sellers, *supra* note 65, at 100-01 (noting that the rationale for the Legislature's decision to retain section 120.535 was that the Legislature did not wish to return to the days of "phantom government").

81. See Fla. Exec. Order No. 95-256 (July 12, 1995). Governor Chiles ordered agencies to review all rules and immediately repeal all obsolete rules in a previous executive order as well. See Fla. Exec. Order No. 95-74 (Feb. 27, 1995).

82. See APA COMM'N REPORT, *supra* note 36 (listing the names and occupations of the commissioners).

83. See FLA. STAT. § 120.535 (1995).

84. Governor Chiles was especially interested in lessening the number of administrative rules. See Rossi, *supra* note 53, at 287-88 (describing the Governor's efforts to reduce regulation). Section 120.535 mandated that all agency policies of general applicability be

The Commission met over a six-month period in an attempt to resolve the sticking points that had held up previous legislative efforts.<sup>86</sup> The Commission's Final Report endorsed the "simplified APA" recommended by a committee of government and nongovernment attorneys formed by the Governor's office, and the addition of a waiver and variance provision.<sup>87</sup> With regard to rulemaking authority, the Commission reported: "The perception exists that state agencies sometimes adopt rules and policies that misinterpret legislative intent or go beyond specific statutory authorization. The response to such criticism often is that laws passed by legislators are so general that agencies have little choice but to develop their own implementation schemes."<sup>88</sup> To combat this problem, the Commission recommended that legislative staff analyses identify sections of proposed bills which would require agency implementation and "discuss whether the bill provides adequate and appropriate standards and guidelines to direct agency's implementation of the proposal".<sup>89</sup> The report also endorsed the inclusion of agency comments in staff analyses of bills.<sup>90</sup>

This recommendation was partially adopted in the revised APA. While there is no *requirement* that staff analyses include consideration of whether proposed legislation provides sufficiently clear rulemaking standards, the APA includes a statement of intent "to consider the impact of any agency rulemaking required by proposed legislation and to determine whether the proposed legislation provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposed legislation."<sup>91</sup> Though well-intentioned, this precatory language lacks the teeth of the requirement suggested by the Commission. Although some observers believe that agencies would benefit from legislative consideration of rulemaking at the bill analysis stage<sup>92</sup> and that agencies would be able to

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published as a rule. For the current version of this mandate, see FLA. STAT. § 120.54(1), (Supp. 1998). The Governor sent a copy of the book *The Death of Common Sense: How Law Is Suffocating America* by Philip K. Howard to every member of the Florida Legislature in February 1995. Governor Chiles advocated Howard's message by stating that "[t]he book identifies 'Public Enemy Number One' and that is the rules and regulations and the way we are presently applying them." Governor Lawton Chiles, State of the State Address, in FLA. H.R. JOUR. 23, 24 (Reg. Sess. Mar 7, 1995); see also Rhea & Imhof, *supra* note 36, at 8-11.

85. See Exec. Order No. 95-256 (July 12, 1995).

86. See APA COMM'N REPORT, *supra* note 36, at 1.

87. See *id.* at 6, 9-15.

88. *Id.* at 16.

89. See *id.* at 17.

90. See *id.*

91. Act effective Oct. 1, 1996, ch. 96-159, § 1, 1996 Fla. Laws 147, 149.

92. See Rhea & Imhof, *supra* note 36, at 34.

advise the Legislature on the clarity of the standards.<sup>93</sup> To date, the Legislature has not gone so far as to require this.

### C. *Passage of the New Rulemaking Standard*

As stated in the final staff analysis, the intent of the Legislature in adding the language of section 120.536 was to expand the definition of an "invalid exercise of delegated legislative authority as found in section 120.58(8), *Florida Statutes*."<sup>94</sup> The change would require agency rules to be based upon specific statutes rather than general rulemaking authority.<sup>95</sup> The staff analysis expressly states that the new standard would overrule the line of cases standing for the proposition that "rules and regulations would be upheld so long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious."<sup>96</sup>

After years of debate and stalled bills, the APA revisions passed without controversy in the spring of 1996.<sup>97</sup> The revisions incorporated many of the recommendations of the Governor's Review Commission and included many of the proposals included in the 1995 bill vetoed by Governor Chiles.<sup>98</sup> The inclusion of the new rulemaking standard contained in sections 120.52(8) and 120.536(1) did not cause much, if any, controversy within the Governor's APA Review Commission or the Legislature.<sup>99</sup> Though the legal community's reaction to the new standard was a bit delayed, several commentators noted the importance of the new language.<sup>100</sup> The *Consolidated-Tomoka* case involves some of the issues raised by commentators, while other potential problems have yet to be judicially reviewed.

93. *See id.*

94. Fla. H.R. Comm. on Govtl. Rules & Regs., CS for SB 2288 and 2290 (1996) Staff Analysis 25 (Jun. 14, 1996) (on file with comm.) (evaluating FLA. STAT. § 120.52(8) (Supp. 1996)).

95. *See id.*

96. *Id.* at 23-24, 25 (citing *General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063 (Fla. 1984); *Department of Labor & Employ. Sec. v. Bradley*, 636 So. 2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Public Serv. Comm'n*, 473 So. 2d 237 (Fla. 1st DCA 1985); *Department of Prof. Reg., Bd. of Med. Exam'rs v. Durrani*, 455 So. 2d 515 (Fla. 1st DCA 1984); *Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200 (Fla. 1st DCA 1975)).

97. *See Act effective Oct. 1, 1996*, ch. 96-159, 1996 Fla. Laws 147 (current version at FLA. STAT. ch. 120 (1997 & Supp. 1998)).

98. *See Fla. H.R. Comm. on Govtl. Rules & Regs.*, CS for SB 2288 and 2290 (1996) Staff Analysis 1 (Jun. 14, 1996).

99. *See APA COMM'N REPORT*, *supra* note 36; *see also* Donna E. Blanton, *Major Test of New APA Pending at First DCA*, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Jan. 1998, at 2.

100. *See Boyd*, *supra* note 27, at 310 (noting that although the amendments relating to legislative checks on the rulemaking process had drawn little attention, "they alone have the potential to substantially alter the structure of administrative law in Florida"); *see also* Rossi, *supra* note 53, at 296 (referring to the rulemaking restriction as "remarkable" and a serious limitation of agency authority).

V. RULEMAKING AND RULE CHALLENGES AFTER THE 1996 REVISIONS:  
*CONSOLIDATED-TOMOKA* AND OTHER CONSIDERATIONS RAISED BY THE  
APA REVISIONS

*Consolidated-Tomoka* is one of the first cases to place the new rulemaking standard before a reviewing court.<sup>101</sup> The case highlights two of the problems inherent in the new standard. First, section 120.536 is facially unclear as to how specific a statute must be to denote the “particular powers and duties” of an agency. Second, applying the new rulemaking standard requires a new level of statutory interpretation, making it difficult to justify judicial deference to the ALJ rather than the administrative agency. Though not raised in *Consolidated-Tomoka*, other considerations are also discussed below, including the constitutionality of the legislative review of existing rules under section 120.536(2) and the impact of the new rulemaking standard on agency willingness to make rules.

A. *The Background of Consolidated-Tomoka*

West of the Intracoastal Waterway on the eastern side of Florida, the Tomoka River and Spruce Creek flow past the cities of Ormond Beach and Port Orange through farmland and undeveloped forests. Though some development is present, the area still supports habitat for many of the state’s familiar wildlife—migratory birds, manatee, and white-tailed deer.<sup>102</sup> The development of the land bordering the Tomoka River and Spruce Creek was at the center of *Consolidated-Tomoka*. The case involved a dispute between the St. Johns River Water Management District and private landowners.<sup>103</sup>

The District, one of five in Florida,<sup>104</sup> operates under the authority of chapter 373, *Florida Statutes*, for the purposes of flood control, re-

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101. Though the appeal was filed prior to that in *Consolidated-Tomoka*, the opinion in *Department of Business and Professional Regulation v. Calder Race Course, Inc.*, 23 Fla. L. Weekly D1745 (Fla. 1st DCA July 29, 1998), was ultimately filed shortly after that of *Consolidated-Tomoka*.

102. See Ludmilla Lelis, *A Ruling About the Rules; Environmental Case Could Limit the Bureaucracy*, ORLANDO SENT., Nov. 30, 1997, at G1.

103. The land owners are Consolidated-Tomoka Land Co.; Indigo Development Group Inc.; Indigo Group Inc.; Indigo Group Ltd.; Patricia Lagoni as Trustee of Trust Nos. IDI-2, IDI-3, and IDI-4; Sea View Development Corp.; Leroy E. Folsom; James S. Whiteside, Jr., and Joan W. Whiteside; Susan Spear Root; Susan R. Graham and Chapman J. Root, II, Trustees of the Chapman S. Root 1982 Living Trust; Daniel P. S. Paul, Individually and as Trustee of the Daniel P. S. Paul Charitable Remainder Trust; Ava and Rufus, Inc.; and Samuel P. Bell, III, and Anne Moorman Reeves, as Tenants in Common.

104. The St. Johns River Water Management District is located in northeastern Florida. The remaining four water management districts are the Northwest Florida Water Management District, the Suwanee River Water Management District, the South Florida Water Management District, and the Southwest Florida Water Management District. For an overview of the various water management districts and the areas they oversee, see Florida Dep’t of Env’tl. Prot., *Water Management Districts* (visited Jan. 30, 1999) <<http://www.dep.state.fl.us/org/watman/index.htm>>.

source management, and water management.<sup>105</sup> The water management district maintains a permitting program through which the agency regulates development activity to protect water resources.<sup>106</sup> The Consolidated-Tomoka Land Company is based in Daytona Beach, Florida, and is engaged in the citrus and real estate industries, including property leasing, real estate development, and sales.<sup>107</sup> Consolidated-Tomoka and the other land owners, or trustees, all owned or oversaw real property within the Tomoka River and Spruce Creek area that would be affected by the water management district's proposed rules.<sup>108</sup>

The *Consolidated-Tomoka* case arose as a result of several proposed rules and amendments to the District's applicant permitting handbook. The proposed rules, which created more stringent standards for development in the Tomoka River and Spruce Creek areas, were seen by Consolidated-Tomoka and the other landowners as exceeding the District's rulemaking authority.<sup>109</sup> The landowners challenged the proposed rules on most of the grounds listed in section 120.52(8), including the new rulemaking standard.<sup>110</sup> The ALJ held that the statutes cited by the water management district as its rulemaking authority satisfied the portions of sections 120.52(8) and 120.536(1), which mandate that a grant of rulemaking authority is necessary.<sup>111</sup> The ALJ also found that the proposed rules were not arbitrary or capricious,<sup>112</sup> were supported by competent substantial evidence,<sup>113</sup> and did not vest unbridled discretion in the agency.<sup>114</sup> The ALJ concluded, however, that the proposed rules did not specify which "particular powers and duties" were being implemented, as required under the new rulemaking standard of section 120.536(1) and, as a result, most of the proposed rules and several of the related Handbook provisions were invalid exercises of delegated legislative authority.<sup>115</sup>

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105. See FLA. STAT. ch 373 (1997 & Supp. 1998).

106. See FLA. STAT. §§ 373.413, 416 (1997).

107. See *Market Guide Snapshot for Consolidated-Tomoka Land* (visited Mar. 17, 1999) <<http://biz.yahoo.com/p/c/cto.html>>.

108. Consolidated-Tomoka owns approximately 20,000 acres in the Tomoka River basin that would be affected by the proposed rules. See Lelis, *supra* note 102, at G1.

115. See Final Order, *supra* note 8, at 7.

110. See *id.*

111. See *id.* at 46-47.

112. See *id.* at 18, 20-22, 24, 25, 30.

113. See *id.* at 30.

114. See *id.* at 33-34.

115. The following were found to have exceeded the agency's grant of rulemaking authority: proposed rules 40C-4.091(1)(a), 40C-41.0011, 40C-41.023, and 40C-41.063(6)(a)-(d); and sections 11.0(e), 11.5, 11.5.1, 11.5.2, 11.5.3, 11.5.4, 18.1, and Appendix K of the HANDBOOK. See *id.* at 59. Proposed rules 40C-4.041(2)(b)3 and (2)(b)6, 40C-4.041(2)(g) (permit required thresholds), 40C-4.051(7) (exemptions), and 40C-41.052(2) (exemptions) were not invalidated. See *id.*

*B. The New Rulemaking Standard as Applied in Consolidated-Tomoka: How Specific Must the Enabling Statute Be?*

The primary problem with the new rulemaking standard is the ambiguity of section 120.536. The numerous briefs<sup>116</sup> filed in the *Consolidated-Tomoka* case focused mainly on this point, each urging the court to adopt a certain definition of the “particular powers and duties” language of section 120.536(1).<sup>117</sup> For example, the amicus brief submitted by the Florida Legislature stated that the new rulemaking standard is more clear because it further constrains agency action and provides a better understanding of what is required for rulemaking authority.<sup>118</sup> Yet, while it is obvious that the new rulemaking standard was meant to further constrain the rulemaking authority of agencies, *more* restrictions do not necessarily mean *clearer* standards.

Not all of the language in section 120.536(1), however, is ambiguous. The first sentence is plainly stated and understandable. It reads that “[a] grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required.”<sup>119</sup> Thus, an agency must be granted general rulemaking authority in order to adopt rules in a certain area, and an agency may only adopt rules that implement statutes other than the general rulemaking authority statute. True to the statements made in the final bill analysis, this first sentence of section 120.536(1) would appear to overrule the earlier precedent that permitted agencies to make rules which were simply “reasonably related to the purpose of the enabling legislation, and . . . not arbitrary and capri-

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116. Due to the importance of the court’s decision and the impact the ruling will have on various private and public interests, many amicus briefs were filed with the court. Those amici who filed briefs in support of the District included the Department of Environmental Protection, the Department of Legal Affairs/Attorney General, the Department of Community Affairs, the South Florida Water Management District, the Southwest Florida Water Management District, the Governor’s Office, 1000 Friends of Florida, the Sierra Club, and the Florida Wildlife Federation. Amicus briefs supporting Consolidated-Tomoka were filed by a group of corporations and industry associations including the Florida Citrus Processors Ass’n; the Florida Fruit and Vegetable Ass’n; U.S. Sugar Corp.; Sunshine State Milk Producers; the Florida Forestry Ass’n; the Florida Fertilizer and Agrichemical Ass’n; the Florida Farm Bureau Federation; the Florida Poultry Federation, Inc.; the Florida Nurserymen and Growers Ass’n; Florida Citrus Mutual; the Florida Land Council, Inc.; and A. Duda and Sons, Inc. The Florida Legislature also submitted an amicus brief, mainly in response to the issue raised in the brief of the Governor’s office that the Department of Administrative Hearings (DOAH) should not issue final orders in rule challenges. See Amicus Brief for the Florida Legislature at 3-7, *Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist.*, 717 So. 2d 72 (Fla. 1st DCA 1998) (No. 97-2996).

117. See, e.g., Brief for Consolidated-Tomoka at 29-30, Brief of Amicus Curiae Florida Department of Environmental Protection at 12-13, Brief of Amicus Curiae Attorney General Department of Legal Affairs at 10-12, *Consolidated-Tomoka* (No. 97-2996).

118. See Amicus Brief for the Florida Legislature at 3, *Consolidated-Tomoka* (No. 97-2996).

119. FLA. STAT. § 120.536(1) (1997).

cious."<sup>120</sup> The rules promulgated by the District in *Consolidated-Tomoka* arguably meet this standard in that the water management district relied on the general rulemaking authority to adopt rules pursuant to sections 373.044,<sup>121</sup> 373.113,<sup>122</sup> and 373.418(3),<sup>123</sup> *Florida Statutes*, and the specific authority to promulgate the proposed rules addressing permitting criteria for the Tomoka River and Spruce Creek basins pursuant to sections 373.413(1)<sup>124</sup> and 373.416(1), *Florida Statutes*.<sup>125</sup>

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120. See generally *General Tel. Co. v. Florida Pub. Serv. Comm'n*, 446 So. 2d 1063 (Fla. 1984); *Department of Labor and Employ. Sec. v. Bradley*, 636 So. 2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Public Serv. Comm'n*, 473 So. 2d 237 (Fla. 1st DCA 1985); *Department of Prof. Reg., Bd. of Med. Exam'rs v. Durrani*, 455 So. 2d 515 (Fla. 1st DCA 1984); *Agrico Chem. Co. v. State Dep't of Env'tl. Prot.*, 365 So. 2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200 (Fla. 1st DCA 1975).

121. Section 373.044, *Florida Statutes*, provided in part:

Rules and regulations; enforcement; availability of personnel rules.—

In administering this chapter, the governing board of the district is authorized to make and adopt reasonable rules, regulations, and orders which are consistent with law; and such rules, regulations, and orders may be enforced by mandatory injunction or other appropriate action in the courts of the state.

FLA. STAT. § 373.044, (1995).

122. *Id.* § 373.113. Section 373.113 provided in part:

Adoption of regulations by the governing board.—

In administering the provisions of this chapter the governing board shall adopt, promulgate, and enforce such regulations as may be reasonably necessary to effectuate its powers, duties, and functions pursuant to the provisions of chapter 120.

123. *Id.* § 373.418(3). Section 373.418(3) provided:

The department or governing boards may adopt such rules as are necessary to implement the provisions of this part. Such rules shall be consistent with state water policy and shall not allow harm to water resources or be contrary to the policy set forth in s. 373.016.

124. *Id.* § 373.413(1). Section 373.413(1) provided:

Permits for construction or alteration.—

(1) Except for the exemptions set forth herein, the governing board or the department may require such permits and impose such reasonable conditions as are necessary to assure that the construction or alteration of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto and will not be harmful to the water resources of the district. The department or the governing board may delineate areas within the district wherein permits may be required.

125. *Id.* § 373.416(1). Section 373.416(1) provided:

Permits for maintenance or operation.—

(1) Except for the exemptions set forth in this part, the governing board or department may require such permits and impose such reasonable conditions as are necessary to assure that the operation or maintenance of any stormwater management system, dam, impoundment, reservoir, appurtenant work, or works will comply with the provisions of this part and applicable rules promulgated thereto, will not be inconsistent with the overall objectives of the district, and will not be harmful to the water resources of the district.

### 1. *Specificity Relative to the Powers Conveyed*

The second sentence of section 120.536(1) is most troublesome, as it provides that “[a]n agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.”<sup>126</sup> This language was the focus of the court’s decision in *Consolidated-Tomoka*. The First District Court of Appeal acknowledged the possibility of two distinct interpretations of the phrase “particular powers and duties,” offering that the “statute could mean that the powers and duties delegated by the enabling statute must be particular in the sense that they are identified (and therefore limited to those identified) or in the sense that they are described in detail.”<sup>127</sup>

In his final order, the ALJ adopted the latter approach, interpreting the phrase to mean that the enabling statute must “detail” the powers and duties that would be the subject of the rule.<sup>128</sup> Under this interpretation, the ALJ concluded that the rules proposed by the agency were invalid because the language of the enabling statute was “merely a general, nonspecific description of the agency’s duties.”<sup>129</sup> According to the ALJ, in order to be valid, rules must implement “statutes which describe more specific programs.”<sup>130</sup> The First District Court of Appeal, however, chose the former, less restrictive interpretation, finding that “the term ‘particular’ . . . restricts rule-making authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.”<sup>131</sup> In choosing the less restrictive interpretation of “particular powers and duties,” the court stated that “[a] standard based on the sufficiency of detail in the language of the enabling statute would be difficult to define and even more difficult to apply.”<sup>132</sup> The court stated that the concept of specificity is one that is relative and what is specific enough in one circumstance may be too general in another.<sup>133</sup>

This aspect of the First District’s rationale is supported by a reading of *B.H. v. State*,<sup>134</sup> in which the Florida Supreme Court struck down a statute delegating authority to the Department of Health and Rehabilitative Services to define actions constituting a

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126. FLA. STAT. § 120.536(1) (Supp. 1996).

127. *Consolidated-Tomoka Land Co. v. St. Johns River Water Mgmt. Dist.*, 717 So. 2d 72, 79 (Fla. 1st DCA 1998).

128. Final Order, *supra* note 8, at 48.

129. *Id.*

130. *Id.*

131. *Consolidated-Tomoka*, 717 So.2d at 79.

132. *Id.* at 80.

133. *See id.*

134. 645 So. 2d 987 (Fla. 1994).

crime pursuant to a juvenile escape statute.<sup>135</sup> In *B.H.*, the court held the statute unconstitutional because granting an administrative agency the authority to define a crime was found to be of a different magnitude than regulation in a noncriminal context.<sup>136</sup> Though the defect in the statutory delegation was quite obvious in *B.H.*, the court stated that it would be “impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine. . . . [I]n some instances, the subject matter of the statute may be such that greater discretion must be delegated.”<sup>137</sup> Citing the complexities of modern society, the court pointed out that flexibility in administering a legislatively articulated policy is essential, and that such flexibility is most necessary and permissible in areas such as land use regulations.<sup>138</sup>

It would follow that under the rationale of *B.H.*, agencies such as the water management district should be granted greater flexibility to implement the Legislature’s stated policies regarding land use issues, such as permitting and the designation of areas in which permitting would be required.<sup>139</sup> The actions of the Legislature since the enactment of the rulemaking provision support such a reading. Despite the presence of the new rulemaking standard and the statement of the Legislature that there should be consideration in staff analyses as to whether there would be enough guidance for agencies in proposed legislation,<sup>140</sup> the Legislature continues to enact legislation granting broad powers to a variety of agencies.<sup>141</sup> “[S]pecific legislative direction,” agrees administrative law professor Jim Rossi, “just doesn’t happen.”<sup>142</sup>

## 2. *Specificity in Harmony with Presumptive Rulemaking Under Section 120.54, Florida Statutes*

The First District Court of Appeal also favored the less restrictive definition of “particular powers and duties” to avoid conflict with the

135. See *id.* at 994.

136. See *id.* at 993.

137. *Id.*

138. See *id.* (citing *Askew v. Cross Key Waterways*, 372 So. 2d 913, 924 (Fla. 1978)).

139. See FLA. STAT. §§ 373.413(1), .416(1) (1997) (authorizing the Department of Environmental Protection and the water management districts to require permits for the construction, operation, and maintenance of specifically enumerated kinds of activities which could harm water resources).

140. See *supra* text accompanying notes 91-93.

141. See Brief for the Department of Community Affairs as Amicus Curiae at 8-11, *Consolidated-Tomoka* (No. 97-2996) (discussing the recent amendments to the Accessibility Act and the Building Codes Act).

142. Lelis, *supra* note 102, at G1 (quoting Florida State University College of Law Professor Jim Rossi).

presumptive rulemaking provisions contained in Florida's APA.<sup>143</sup> Under the Florida APA, rulemaking is not a matter of agency discretion.<sup>144</sup> Since 1991,<sup>145</sup> each agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of an agency must be adopted by the rulemaking procedure set forth in the APA as soon as feasible and practicable.<sup>146</sup> This legislative imperative was retained in the 1996 APA, despite pressure from Governor Lawton Chiles to remove the requirement.<sup>147</sup> Thus, with the creation of the more restrictive rulemaking language, agencies were faced with two almost polar imperatives: first, make rules as soon as practicable and feasible, but second, make only those rules that fall under the domain of the particular powers and duties granted by the Legislature.

Because the APA requires rulemaking even where there is an agency statement of general applicability, the *Consolidated-Tomoka* court reasoned that rulemaking authority could not be restricted to situations in which the enabling statute precisely details the subject of a proposed rule.<sup>148</sup> Therefore, the court concluded, the legislative presumption in favor of rulemaking necessarily implies that agencies have authority to adopt rules "*within the class of powers conferred by the applicable enabling statute.*"<sup>149</sup> Having read sections 120.536 and 120.54, *Florida Statutes*,<sup>150</sup> *in pari materia* to reach the definition of the restriction contained in the phrase "particular powers and duties" as that of identifiable classifications within the enabling statute, the District Court of Appeal set forth the following test to determine the validity of a rule "based on the nature of the power or duty at issue":

The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in

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143. *Consolidated-Tomoka*, 717 So. 2d at 76 (citing FLA. STAT. § 120.56(2)(a) (Supp. 1996), which required "the agency to establish the validity of a proposed rule once it has been properly challenged").

144. See FLA. STAT. § 120.54(1)(a) (Supp. 1996).

145. See Act effective Jan. 1, 1992, ch. 91-30, § 3, 1990 Fla. Laws 241, 244 (codified at FLA. STAT. § 120.535 (1991), and current version at FLA. STAT. § 120.54(1) (Supp. 1998)); see also Rhea & Imhof, *supra* note 36, at 5-7.

146. See FLA. STAT. § 120.54(1) (Supp. 1998) (requiring rulemaking); *id.* § 120.52(15) (1997 & Supp. 1998) (defining agency statements that meet the definition of a rule). See, e.g., *Matthews v. Weinberg*, 645 So. 2d 487, 489 (Fla. 2d DCA 1994) (concluding that HRS exceeded its rulemaking authority by enacting policies dealing with homosexual and unmarried couples without following statutory rulemaking procedures).

147. See discussion *supra* Part IV.B.

148. See *Consolidated-Tomoka*, 717 So. 2d at 80.

149. *Id.* (emphasis added).

150. FLA. STAT. §§ 120.536, .54 (Supp. 1996).

the statute to be implemented. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that agencies will have the authority to perform the essential functions assigned to them by the Legislature.<sup>151</sup>

The court declared, "The Legislature gave the District authority to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas, and the District did just that."<sup>152</sup> Thus, the enabling statutes<sup>153</sup> granted the District the following powers: (1) the power to regulate development activity in order to protect water resources; (2) the *class of powers* necessary to promulgate rules that classify areas of special concern; (3) the power to impose more stringent permitting standards; and (4) the power to set water recharge standards and riparian habitat protection zones.<sup>154</sup> Agencies, challengers, and ALJs may now focus on the class of powers granted to the agencies rather than the presence or absence of more specific programs or policy.

### C. *The Role of the Division of Administrative Hearings in Rule Challenges and Judicial Deference to the Administrative Law Judge's Interpretation*

Though inapposite to the central issue in *Consolidated-Tomoka*, the case has led some observers to revive the question of the correctness of allowing ALJs to issue final orders in rule challenge cases.<sup>155</sup> Under the Florida APA, challenges to rules or proposed rules are generally raised before the Division of Administrative Hearings (DOAH) prior to judicial review.<sup>156</sup> Rule challenges are significantly distinct from agency adjudication challenges. In rule challenges, the presiding ALJ issues a final order;<sup>157</sup> in adjudication challenges, the ALJ issues a recommended order which is then forwarded to the agency for issuance of a final order.<sup>158</sup> In a different context than in *Consolidated-Tomoka*, the practice of DOAH issuing a final order has

151. *Consolidated-Tomoka*, 717 So. 2d at 80.

152. *Id.* at 81.

153. See FLA. STAT. §§ 373.413, .416 (1995).

154. See *Consolidated-Tomoka*, 717 So. 2d at 75.

155. See Blanton, *supra* note 99, at 2 ("The Governor's Office brief initially questioned—in a footnote—the validity of section 120.54(4)(c), which gives final order authority to ALJs in rule challenge cases. The brief suggests that ALJs should only enter recommended orders in rule challenges, as they do in adjudicatory matters.")

156. See FLA. STAT. § 120.54 (Supp. 1998). Parties may choose to wait the prescribed period of time until the agency action becomes final to seek judicial review, but the lack of a record may be damaging.

157. See *id.* § 120.54(c).

158. See *id.* § 120.57 (stating the procedure for an appeal of agency adjudication).

been criticized but upheld by the First District Court of Appeal.<sup>159</sup> However, the practice of DOAH issuance of final orders coupled with the APA revisions and the scope of review in Florida courts, creates a key difference regarding who issues the final order effectively limits the ability of the agency to apply expertise to matters of statutory interpretation.

### 1. *The Initial Question of DOAH Authority to Issue a Final Order*

In *Department of Administration v. Stevens*,<sup>160</sup> the First District Court of Appeal found that the issuance of a final order by an ALJ did not usurp the role of the judiciary or violate the separation of powers doctrine.<sup>161</sup> In *Stevens*, the Department of Administration and the Department of Health and Rehabilitative Services challenged the ALJ's authority to decide whether agency guidelines were invalid rules because they were not adopted according to statutory procedure.<sup>162</sup> The court upheld the ALJ's final order on the grounds that the key in the control of administrative agencies is checked power. The court quoted Kenneth Culp Davis, "As long as we continue to emphasize the principle of check, we may safely continue our increasingly deep-seated habit of allowing the blending of three or more kinds of power in the same agency."<sup>163</sup> In making its decision, the court also relied upon Article V, section 1 of the Florida Constitution and pronounced that "[c]ommissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices."<sup>164</sup>

*Stevens* is inapplicable to cases like *Consolidated-Tomoka* because *Stevens* speaks to the problem of executive encroachment on another branch of the government. In cases like *Consolidated-Tomoka*, executive encroachment is not a problem for the judiciary, but for another arm of the executive branch: the executive branch becomes split against itself. Thus, the *Stevens* court's reliance on Professor Davis's *Administrative Law Treatise* is erroneous because Professor Davis discusses different powers within the agency, not within the executive.<sup>165</sup>

In challenges to agency adjudication, the agency always has the ability to issue a final order inconsistent with the ALJ's recom-

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159. See *Department of Admin. v. Stevens*, 344 So. 2d 290, 291 (Fla. 1st DCA 1977) (upholding an ALJ's final order which concluded the Department's guidelines were rules that were improperly adopted and thus invalid).

160. 344 So. 2d 290 (Fla. 1st DCA 1977).

161. See *id.* at 294.

162. See *id.* at 292.

163. *Id.* at 294 (quoting 1 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 68 (1958)).

164. *Stevens*, 344 So. 2d at 293 (citing FLA. CONST. art. V, § 1).

165. See DAVIS, *supra* note 29, at 68.

mended order.<sup>166</sup> This allows the agency to apply its experience and expertise by taking exception to the ALJ's recommended order. By contrast, when DOAH issues a final order in the context of rule challenges, the agency is deprived of the ability to revisit the issue and apply its expertise.

## 2. *Complicating the Question with the APA Revisions*

In addition to the problems already inherent in depriving the agency of the ability to issue final agency action in rule challenges, the recent APA revisions make a difficult situation even worse. With the expansion of the definition of an invalid exercise of legislative authority under section 120.536(1) and the express removal of a presumption of validity attached to proposed rules under section 120.56(2)(c),<sup>167</sup> agency discretion in matters of statutory interpretation are even more at risk. The new rulemaking standard of section 120.536 raises the issue of who is entitled to deference in matters of statutory construction when the agency's rules fall within the scope of the particular powers and duties delegated by the Legislature. In cases where interpretation is required, Florida courts have, to some degree, followed the federal doctrine articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*,<sup>168</sup> which requires courts to give considerable weight to the agency's construction of the statutes the agency is entrusted to administer.<sup>169</sup>

In *Chevron*, the Supreme Court imposed a two-part test for judicial review of an agency's construction of the statutes it administers.<sup>170</sup> First, a court must determine whether the legislature has directly spoken to the precise question at issue.<sup>171</sup> If the court determines that the legislature has not directly addressed the precise question at issue, the court cannot simply impose its own construction on the statute, as it would in the absence of an administrative

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166. See FLA. STAT. § 120.57(1)(J) (Supp. 1998), stating in part:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules over which it has substantive jurisdiction. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire 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 essential requirements of law.

167. See *id.* § 120.56(2)(c).

168. 467 U.S. 837 (1984).

169. See *id.* at 845.

170. See *id.* at 843-44.

171. See *id.* at 843.

interpretation.<sup>172</sup> If the statute is silent or ambiguous with respect to a specific issue, the question for the court is whether the agency's interpretation is based on a permissible construction of the statute.<sup>173</sup>

Echoing the *Chevron* test, the First District Court of Appeal in *Department of Health and Rehabilitative Services v. Framat Realty, Inc.*<sup>174</sup> upheld an interpretive rule of the Department because it represented a "permissible interpretation" that was validated by the rulemaking process and designed to refine agency policy.<sup>175</sup> In delivering the opinion of the court, Chief Judge Robert Smith noted that the goal of the 1974 APA was "to encourage agencies of the executive branch to interpret statutes in their regulatory care deliberately, decisively, prospectively, and after consideration of comments from the general public and affected parties—that is, to interpret their statutes by rulemaking."<sup>176</sup> In upholding the agency's rule, the court placed particular value on the agency's permissible interpretation of a statute in which the APA provides incentives for rulemaking and further provides a deliberative process for the development of agency policy:

Otherwise, the elaborate statutory scheme, pressing for rulemaking and prescribing how it shall be accomplished with maximum public and private participation, has no productive purpose, and it has become only a snare for agency action, a device for the evasion, avoidance, or postponement of effective agency action in its authorized field of responsibility.<sup>177</sup>

The court noted that the remedy available to those opposed to the permissible interpretation of a statute was an appeal not to the judiciary, but to the politically responsive branches of the legislature and the executive.<sup>178</sup>

The question of which entity interprets the statute was put before the First District Court of Appeal again in *Department of Insurance v. Insurance Services Office*,<sup>179</sup> in which a rule of the Department of Insurance was found to have invalidly extended the statute.<sup>180</sup> The three judge panel was divided,<sup>181</sup> with Chief Judge Smith dissenting on the ground that there were twelve reasonable constructions of the

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172. See *id.* at 844.

173. See *id.*

174. 407 So. 2d 238 (Fla. 1st DCA 1981).

175. *Id.* at 239.

176. *Id.* at 241.

177. *Id.* at 242.

178. See *id.*

179. 434 So. 2d 908 (Fla. 1st DCA 1983).

180. See *id.* at 911 (invalidating a rule of the Department of Insurance that prohibited varying insurance rates based upon sex, marital status, or scholastic achievement of the insured).

181. See *id.* at 914.

term “unfairly discriminate,” some of which would not have represented an “extension.”<sup>182</sup> The Chief Judge favored deference in upholding the Department’s construction:

At this stage in the maturity of our judicial system, a modest disclaimer of judicial hegemony in matters of statutory interpretation would seem to be required by a decent respect for the executive as a coordinate branch of government, made more responsive to the public, and more disciplined, by APA processes.<sup>183</sup>

Chief Judge Smith based his dissent in part on the decisions in *Department of Administration v. Nelson*<sup>184</sup> and *Framat*.<sup>185</sup> In addition, he recognized the danger of allowing individual judges to select the single “correct” interpretation of a generally-worded statute that lends itself to several permissible interpretations: “[A]s we judges grow more numerous . . . the folly of three judges or a majority of them declaring the ‘one right answer’ to a question of statutory interpretation, when the executive branch has spoken another permissible answer through rulemaking, becomes more evident and more dangerous.”<sup>186</sup>

Though the dissent in *Insurance Services Office* called for deference to the agency versus the judiciary, the need for agency deference is the same where individual ALJs, acting in a quasi-judicial capacity, are granted greater deference than the agency and where the individual ALJ’s opinion is accorded greater deference by reviewing courts. This is precisely the result where, in cases like *Consolidated-Tomoka*, the ALJ, rather than the agency, issues a final order. The reviewing court applies a different standard of review dependent upon the route by which the administrative appeal reaches the court. As made clear in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*:<sup>187</sup>

[W]hen reviewing a hearing officer’s determination arising out of . . . a quasi-judicial rule challenge proceeding, the appellate court’s standard of review is whether the hearing officer’s findings are supported by competent substantial evidence. . . . On the other hand, when reviewing on direct appeal an agency’s adopted rule

182. *Id.* at 916-17 (Smith, C.J., dissenting).

183. *Id.* at 927 (Smith, C.J., dissenting).

184. 424 So. 2d 852 (Fla. 1st DCA 1982).

185. *See id.* at 918-19 (citing *Nelson*, 424 So. 2d at 858). The court in *Nelson* reversed a hearing officer’s order invalidating an agency rule as being beyond its legislative authority and reiterated the principle that “when the agency committed with statutory authority to implement a statute has construed the statute in a permissible way under APA disciplines, that interpretation will be sustained though another interpretation may be possible. When the agency so interprets the statute through rulemaking, the presumption of correctness is stronger.” *Nelson*, 424 So. 2d at 858.

186. *Insurance Servs. Office*, 434 So. 2d at 927 (Smith, C.J., dissenting).

187. 553 So. 2d 1260 (Fla. 1st DCA 1989).

arising from a quasi-legislative rule enactment proceeding . . . the appellate court's standard of review is that the rule should be sustained as long as it is reasonably related to the purposes of the enabling legislation and is not arbitrary or capricious.<sup>188</sup>

Though the standard of review has been altered as far as the agency interpretation is concerned, there is still a difference in whose opinion is granted deference. Removing the agency's ability to issue a final order and granting great deference to the ALJ's final order creates the problem addressed in Chief Judge Smith's *Insurance Services Office* dissent—individual judges' interpretation of a statute is valued above that of the agency and the potential for meaningful review is essentially nonexistent.

#### D. The "Look Back" Provision

The implications of the new rulemaking authority standard are even greater due to the inclusion of a "look back" provision that imposed application of the new standard to existing agency rules as well as proposed rules.<sup>189</sup> In a state with close to 26,000 rules in place,<sup>190</sup> the look back provision immediately impacted agencies in three ways. First, upon the effective date of the APA revisions, each agency was given a year to review all of its existing rules and submit a list of rules or portions of rules which were in violation of the rulemaking standard to the Legislature's agency oversight committee, the Joint Administrative Procedures Committee (JAPC).<sup>191</sup> JAPC then combined and submitted the listings to the Legislature.<sup>192</sup> JAPC submitted approximately 5,850 rules to the President of the Senate and Speaker of the House of Representatives for determining whether specific legislation authorizing the rules or portions of rules should be considered during the 1998 session.<sup>193</sup>

Second, the agency was required to initiate proceedings by January 1, 1999, to repeal any rule which was submitted to the JAPC and the Legislature for more specific authorization and was not so authorized during the most recent session of the Legislature.<sup>194</sup> Third, if the Legislature did not enact a more specific authorization

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188. *Id.* at 1274.

189. See FLA. STAT. § 120.536(2) (1997) (requiring each agency to review rules and to provide a listing to the Joint Administrative Procedures Committee (JAPC) of each rule or portion thereof which exceeds the new rulemaking authority standard by October 1, 1997).

190. See Lelis, *supra* note 102, at G1.

191. See FLA. STAT. § 120.536(2) (1997).

192. See Robert M. Rhodes, FLA. BAR ADMIN. L. SEC. NEWSLETTER, Jan. 1998, at 1.

193. See *id.*

194. See FLA. STAT. §120.536(2) (1997). Thirty-six "Rules Authorization Bills" were introduced in the 1998 Legislature, 29 of which passed and became law. See generally Legislative Information Services, *Final 1998 Bill Citator* (visited Jan. 22, 1999) <<http://www.leg.state.fl.us/session/1998/citator/final/subindex.pdf>>.

for a rule and an agency does not initiate repeal proceedings as of July 1, 1999, JAPC or any substantially affected person may petition the agency for repeal of the rule on the basis of a lack of legislative authority.<sup>195</sup>

The requirements of the look back provision raise potential separation of powers issues similar to that discussed in the landmark U.S. Supreme Court separation of powers case, *Immigration and Naturalization Services v. Chadha*,<sup>196</sup> in which a legislative body asserted a type of veto power over previously delegated executive authority.<sup>197</sup> In *Chadha*, a federal statute permitted one house of Congress, by resolution, to invalidate the decision of the executive branch to allow a particular deportable alien to remain in the United States.<sup>198</sup> The Supreme Court found the statute unconstitutional because the decision of the Attorney General was made pursuant to authority delegated by Congress.<sup>199</sup> To comply with constitutional requirements of separation of powers, the Court stated that Congress must abide by its delegations of authority until such delegation is legislatively revoked or altered.<sup>200</sup>

The look back provision of the APA is similar to the legislative veto in *Chadha* in that the Legislature has statutorily created a process in which rules that were previously considered valid exercises of delegated legislative authority may be repealed in cases where the Legislature does not enact new authorizing legislation.<sup>201</sup> This process allows the Legislature to revisit rules and potentially second-guess the agency's implementation processes without following the typical procedure for altering or revoking the enabling legislation in any way. Although the actual results of the look back provision and rule repeal activity are as yet unknown, the process is potentially devastating to the preservation of agency discretion in implementing statutes.

#### *E. Comparable State and Federal Legislation and the Potential for Rulemaking Avoidance*

Florida is not the only state to seek greater accountability through the restriction of agency rulemaking authority. In 1995 the Washington Legislature passed a regulatory reform bill that, among other things, required agencies to have clearer statutory authority to write

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195. See FLA. STAT. §120.536(2) (1997).

196. 462 U.S. 919 (1983).

197. See *id.* at 923.

198. See *id.* at 925 (describing the effect of 8 U.S.C. § 1254(c)(2)).

199. See *id.* at 953.

200. See *id.* at 953-54.

201. See FLA. STAT. § 120.536(2) (1997).

rules.<sup>202</sup> In adopting the law, the Washington Legislature pronounced, “[S]ubstantial policy decisions affecting the public [are to] be made by those directly accountable to the public; namely the legislature . . . state agencies [are] not to use their administrative authority to create or amend regulatory programs.”<sup>203</sup> Several sections of the Washington Regulatory Reform Act impose a restriction on certain agency heads similar to that in section 120.536, *Florida Statutes*. In Washington the agency administrator “may not rely solely on a section of law stating a statute’s intent or purpose, on the enabling provisions of the statute establishing the agency, or on any combination of such provisions, for statutory authority to adopt any rule.”<sup>204</sup>

The number of new rules promulgated in Washington has declined since the adoption of the Regulatory Reform Act.<sup>205</sup> It has been suggested that the decline seems to be caused in part by uncertainty about how strictly courts will interpret the new requirements.<sup>206</sup> There is also some evidence that agencies are seeking alternatives to rulemaking—in the form of guidelines, interpretive rules, and adjudication—in order to formulate new policy.<sup>207</sup> A similar response has been predicted in Florida, where agencies may respond to the new rulemaking standard by employing nonrulemaking mechanisms, when possible, to the exclusion of traditional rulemaking.<sup>208</sup>

As a result of the APA revisions, administrative agencies in Florida now have two reasons to resort to alternatives to rulemaking. First, as in the Washington administrative system, Florida agencies rightfully may be unsure how ALJs and courts will interpret their “particular powers and duties” contained in the new rulemaking standard. Agencies are less likely to promulgate rules when there is uncertainty as to whether the rule will fail to meet the new rulemaking standard in the eyes of the ALJ or reviewing court. Second, with the inclusion of a new provision in Florida’s APA for the award

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202. See Regulatory Reform Act of 1995, 1995 Wash. Legis. Serv. Ch. 403 (West).

203. *Id.* § 1.

204. See WASH. REV. CODE § 43.12.045 (1997) (addressing the Commissioner of Public Lands); *id.* § 43.20A.075 (addressing the Secretary of Social and Health Services); *id.* § 43.23.025 (addressing the Director of Agriculture); *id.* § 43.24.023 (addressing the Director of the Department of Licensing); *id.* § 43.70.040 (addressing the Secretary of Health).

205. See William R. Andersen, *Of Babies and Bathwater—Washington’s Experiment with Regulatory Reform*, ADMIN. & REG. L. NEWS, Fall 1996, at 15.

206. See *id.*

207. See *id.*

208. See Rossi, *supra* note 53, at 304 (stating that agencies will abandon rulemaking to the extent that Florida law allows). *But see* FLA. STAT. § 120.54(1)(a) (Supp. 1998) (stating that rulemaking is not a matter of agency discretion and that agencies shall adopt agency statements that meet the definition of a “rule” as a rule as soon as feasible and practicable). See also *Matthews v. Weinberg*, 645 So. 2d 487, 489 (Fla. 2d DCA 1994) (finding that HRS exceeded delegated authority by applying policies of general applicability and not rulemaking procedures).

of attorney's fees in the event the agency loses a rule challenge,<sup>209</sup> agencies have reason to be doubly wary of initiating rulemaking where a rulemaking alternative may suffice. Not only will the agency rule or proposed rule be invalidated, but the agency could potentially lose financially as well. The budgets of most state agencies are not large enough to support a number of judgments for attorney's fees. Combined together, the new rulemaking standard and attorney's fees award provision produce a result that runs counter to the express desire of the Legislature and the community at large<sup>210</sup>—when an agency promulgates a statement of general applicability that “implements, interprets, or prescribes law or policy,”<sup>211</sup> the agency must adopt the statement by rulemaking “as soon as feasible and practicable.”<sup>212</sup>

In a similar effort to curb agency abuse of rulemaking authority, the Minnesota Legislature enacted a provision in 1995 that requires agencies to publish a notice of intent to adopt rules within eighteen months of receiving new statutory authority to adopt rules.<sup>213</sup> Under the new law, if notice is not published within the time limit, the authority for the rule expires.<sup>214</sup> Additionally, agencies are prohibited from using laws existing at the time of the expiration of rulemaking authority as authority to adopt, amend, or repeal rules.<sup>215</sup> Although the statute prevents an agency from dragging its heels when rulemaking is necessary, it prohibits the agency from engaging in a period of incipient policy development longer than eighteen months. The statute may also create situations in which rules require amendment if a poorly drafted rule is noticed and adopted simply to meet the time limitations. Finally, if an agency is unable to notice a rule within the time limit, it will be forced to utilize rulemaking alternatives that are less efficient and clear than a rule. Like Minnesota, Florida also has a “use it or lose it” provision that requires rules to be drafted and formally proposed within 180 days of the enactment of any legislation requiring agency implementation, unless the

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209. See FLA. STAT. § 120.595(2), (3) (1997). Attorney's fees may be awarded in challenges to proposed rules and existing rules, unless the agency can show its actions were “substantially justified.” *Id.* An agency's actions are “substantially justified” if there was “a reasonable basis in law and fact at the time the actions were taken by the agency.” *Id.*

210. See APA COMM'N REPORT, *supra* note 36, at 19 (“The Commission believes that published rules help provide certainty to the regulated community and also help inform the general public of an agency's policies. The rulemaking process provides interested persons the opportunity to comment on proposed rules and give necessary input to an agency as it develops its policies.”).

211. FLA. STAT. § 120.52(15) (Supp. 1998) (defining “rule”).

212. *Id.* § 120.54(1)(a) (setting forth the presumption of rulemaking).

213. See Act of May 23, 1995, ch. 233, 1995 Minn. Sess. Law Serv. Ch. 233, art. 2, § 12 (West) (codified at MINN. STAT. § 14.125 (1997)).

214. See MINN. STAT. § 14.125 (1997).

215. See *id.*

statute provides otherwise.<sup>216</sup> The provision does not apply to emergency rules,<sup>217</sup> and existing rules may be modified without violating the provision.<sup>218</sup> Similarly, the APA allows agencies to develop the knowledge and experience necessary before a rule is proposed.<sup>219</sup> However, the situation may arise where a new rule needs to be made based upon long-standing statutory authority. Will a nonrule policy statement be sufficient where the rule could not practicably or feasibly be made, given the 180-day limitation? The answer is uncertain as no courts have ruled on this question.

Attempts to limit agency rulemaking have also occurred at the federal level, as evidenced by the stalled Federal Comprehensive Regulatory Reform Act introduced by Senator Bob Dole in 1995.<sup>220</sup> The bill proposed that "any rule that expands Federal power or jurisdiction beyond the level of regulatory action needed to satisfy statutory requirements shall be prohibited."<sup>221</sup> Like the new Florida rulemaking standard, this proposed federal standard is ambiguous, as the "regulatory action needed to satisfy statutory requirements"<sup>222</sup> would likely lack a universal definition.

## VI. CONCLUSION

The *Consolidated-Tomoka* ruling has been predicted to extend beyond the environmental context, affecting "everybody's rules"<sup>223</sup> and thereby impacting the entire administrative scheme in Florida. Because *Consolidated-Tomoka* was the first case to define the new rulemaking standard, the test set forth by the First District Court of Appeal will likely serve as the guideline used by agencies in their promulgation of rules, by opponents in their challenges of rules, and by ALJs in their interpretation of whether rules are authorized under the particular powers and duties granted to agencies. However, even though *Consolidated-Tomoka* was a victory of sorts for administrative agencies, the new rulemaking standard is not without teeth. Though the court found for the agency, the court made clear that there were greater restrictions placed on agencies, and that rules must be identifiable with the class of powers delegated by the Legis-

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216. See FLA. STAT. § 120.54(1)(b) (Supp. 1998).

217. Section 120.54(1)(b) is applicable to all rules other than emergency rules. See *id.* § 120.54(1).

218. Section 120.54(1)(b) only requires that necessary rules be "drafted and formally proposed" within the 180-day window.

219. See *id.* § 120.54(1)(a) (requiring rulemaking as soon as "feasible and practicable").

220. See S. 343, 104th Cong. § 627 (1995).

221. *Id.*

222. *Id.*

223. See Lelis, *supra* note 102, at G1 (quoting Scott Boyd, senior staff attorney for JAPC).

lature. This restriction of the new rulemaking standard was applied in a decision handed down on the heels of *Consolidated-Tomoka*.

In *Department of Business and Professional Regulation v. Calder Race Course, Inc.*,<sup>224</sup> the First District Court of Appeal reviewed the actions of another agency in the context of the new rulemaking standard.<sup>225</sup> *Calder* involved a proposed rule challenge brought by several entities that held permits and licenses to operate pari-mutuel facilities and conduct pari-mutuel wagering.<sup>226</sup> These entities<sup>227</sup> challenged a proposed rule of the Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (DBPR), that set guidelines for searching people and stables, rooms, lockers, vehicles, automobiles, or other places within a pari-mutuel wagering permitted facility.<sup>228</sup> The ALJ found that the particular powers and duties required under the new APA were not specifically granted to the DBPR under the same rationale employed by the ALJ in *Consolidated-Tomoka*.<sup>229</sup> The First District Court of Appeal, however, affirmed the decision of the ALJ in *Calder*, finding that the rule at issue was not authorized by the statute that allowed the agency to conduct investigations:

[T]here is nothing in the class of powers and duties identified in [the statute] that delegates to the Division the right to search persons or places within pari-mutuel wagering facilities, or any provision in the statute deeming a licensee of same to have waived the protections of the Fourth Amendment by consenting to such searches.<sup>230</sup>

Though the result in *Consolidated-Tomoka* will likely relieve agency rule drafters to some degree, the result in *Calder* serves as a warning to agencies to carefully appraise the class of powers granted to them by statute before promulgating rules. *Consolidated-Tomoka* and *Calder* will not be the only cases to interpret the 1996 revisions to the APA. These and the other issues raised by this Note are likely to be raised many times in the future as the most recent version of Florida's APA is adapted to the workings of the administrative scheme.

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224. 23 Fla. L. Weekly D1795 (Fla. 1st DCA July 29, 1998).

225. *See id.*

226. *Id.*

227. *Calder Race Course, Inc., Tropical Park, Inc., Gulfstream Racing Association, Investment Corporation of Florida, Florida Horsemen=s Benevolent Association, Inc., and the Florida Veterinary Medical Association* were either petitioners or intervenors in the rule challenge itself. Initial Brief of Appellant at 1, *Department of Bus. & Prof. Reg. v. Calder Race Course, Inc.*, 23 Fla. L. Weekly D1745 (Fla. 1st DCA July 29, 1998) (No. 97-2705).

228. *See id.* (discussing proposed rule 61D-2.002).

229. *Calder*, 23 Fla. L. Weekly at D1795.

230. *Id.* at D1797.