IN THE FLORIDA SUPREME COURT

IN RE: AMENDMENTS TO FLORIDA RULES OF APPELLATE PROCEDURE.	))))	**Case No. SC08-147**

WRITTEN COMMENTS IN OPPOSITION TO PROPOSED AMENDMENTS TO RULE 9.310(b)(2)

Jointly submitted on behalf of:

Charlotte County, Florida,
City of Plant City, Florida,
City of Coral Gables, Florida,
City of Tampa, Florida,
City of North Miami, Florida,
City of Gainesville, Florida
City of Kissimmee, Florida
Hillsborough County, Florida
City, County and Local Government Section of The Florida Bar,
Florida League of Cities, Inc.,
Florida Association of Counties, Inc., and
Florida Association of County Attorneys, Inc.

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I. Overview

Pursuant to Florida Rule of Judicial Administration 2.140(b)(5) and (6), Charlotte County, Florida; the City of Plant City, Florida; the City of Coral Gables, Florida; the City of Tampa, Florida; the City of North Miami, Florida; the City of Gainesville, Florida; the City of Kissimmee, Florida; Hillsborough County, Florida; the City, County and Local Government Section of The Florida Bar, the Florida League of Cities, Inc.; and the Florida Association of Counties, Inc. respectfully provide this Honorable Court with written comments in opposition to the proposed amendments to Florida Rule of Appellate Procedure 9.310(b)(2).

On February 1, 2008, Steven L. Brannock, Chair of the Florida Appellate Court Rules Committee, and John F. Harkness, Jr., Executive Director of The Florida Bar, filed the *Triennial Cycle Report of the Appellate Court Rules Committee*. On February 15, 2008, the filed an amended reformatted report (the "***Triennial Report***"). Among other things, the *Triennial Report* proposes to amend the "automatic stay" provision of Florida Rule of Appellate Procedure 9.310(b)(2), as follows:

> Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, or in administrative actions under the Administrative Procedure Act, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose

any lawful conditions, or vacate the stay.

(Underline in original). If approved, this proposed amendment will eliminate the automatic stay now afforded to governmental entities when they appeal orders issued by state agencies in administrative proceedings governed by Chapter 120, Florida Statutes, also known as the Florida Administrative Procedure Act ("**APA**").

According to the *Triennial Report*, the Appellate Court Rules Committee believes that the automatic stay provision of Rule 9.310(b)(2) is inconsistent with Sections 120.68(3) and 120.56(4) of the APA. The stated purpose for the amendment "is to conform the rule to provisions in the Administrative Procedure Act (APA), sections 120.68(3) and 120.56(4), Florida Statutes (2007)…." (*Triennial Report* at p. 13).

As explained herein, there is no inconsistency between the APA and the automatic stay provision of Rule 9.310(b)(2), and no need to clarify that rule. Instead of eliminating the non-existent inconsistency between the APA and Rule 9.310(b)(2), the Appellate Court Rules Committee's proposed amendment will

create a direct inconsistency between Rule 9.190(e)(1)[1] and Rule 9.310(b)(2), as well as other problems apparently not anticipated by the Appellate Court Rules Committee. Further, it is respectfully submitted that this proposed amendment will have a significant adverse impact on Florida counties, cities, and other governmental entities who from time-to-time are parties in administrative proceedings under the APA. Therefore, this Court should reject the proposed amendment and maintain the current version of the rule. Alternatively, if this Court is inclined to amend Rule 9.310(b)(2), this Court should consider adopting the undersigned parties' alternative language, which will: (a) ensure consistency with the current APA stay provisions, (b) provide the Legislature with flexibility to amend the APA stay provisions in the future, and (c) maintain the current automatic stay afforded by Rule 9.310(b)(2).

II. Historical background of the automatic stay rule and related APA provisions

Since the 1940's, Florida law has afforded cities, counties, and other

[1] Florida Rule of Appellate Procedure 9.190(e)(1) states:

(e) Stays Pending Review.

(1) Effect of Initiating Review. The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, **except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2)** or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries. [Emph. added.]

governmental entities an "automatic stay" whenever they sought appellate review of an order. Administrative Law Judge ("**ALJ**") Charles Stampelos (of the Division of Administrative Hearings or "**DOAH**") prepared a chronological history of the statutes and rules governing the automatic stay, and provided it to the Appellate Court Rules Committee (App. C at p. 13-19).[2] As explained by ALJ Stampelos, governmental entities were granted an automatic stay pursuant to Section 59.41, Florida Statues (1941). Originally, that statue only afforded the automatic stay to "constitutional officers of the state, boards of county commission and boards of public instruction of the various counties." *City of Miami v. Lewis*, 104 So. 70, 72 (Fla. 3d DCA 1958). In 1945, Section 59.41 was amended and in doing so, "the legislature intended to broaden the scope of the exemption to 'other public bodies of the state and any of its political subdivisions.'" *Id.*

In 1962, the Florida Supreme Court enacted Florida Appellate Rule 5.12, which was very similar to the automatic stay provisions of Section 59.14(1) and (2). *See, In re Florida Appellate Rules*, 139 So.2d 139 (Fla. 1962). Rule 5.12(1) stated, "When the state or any of its political subdivisions, or any officer, board, commission or other public body of the state or any of its political subdivisions, in a purely official capacity, takes an appeal or petitions for certiorari, the filing of **the notice of appeal or the petition for certiorari as the case may be shall**

[2] Citations herein to "App." refer to the appendices filed by the Appellate Court Rules Committee with the *Triennial Report*.

perfect the same and stay the execution or performance of the judgment, decree or order being reviewed and no supersedeas bond need be given unless expressly required by the court." (Emph. added).

In 1971, the Legislature repealed the automatic stay provisions of Section 59.14(1) and (2). However, the repeal of those statutory provisions did not affect the automatic stay provisions of Rule 5.12, which continued to remain in place.

Thereafter, in 1974, the Legislature totally revised and re-enacted the APA in Chapter 120, Florida Statutes. *See*, Ch. 74-310, Laws of Fla. (1974). The APA authorized appellate review of state agency orders in Section 120.68, Florida Statutes. As originally worded in 1974, Section 120.68(2) stated that proceedings for appellate review would "be initiated by filing a **petition** in the district court of appeal" and that such proceedings would "be conducted in accordance with the Florida Appellate Rules." (Emph. added). The 1974 version of Section 120.68(3) stated that "The filing of the **petition** does not itself stay enforcement of the agency decision…."[3] In contrast to Rule 5.12(1), Section 120.68(3) did not address and

[3] At that time, the APA did not refer to a "notice of appeal." However, it appears that appellate courts treated the "petition" term in Section 120.68 as being the equivalent of a notice of appeal. *See, e.g., Pierce v. Division of Retirement*, 410 So.2d 669, 670 (Fla. 2d DCA 1982); *19838 NW, Inc. v. Division of Alcoholic Beverage and Tobacco of Dept. of Business Regulation*, 410 So.2d 967, 968 (Fla. 4th DCA 1982); *2829 Corp. v. Division of Alcoholic Beverage and Tobacco of Dept. of Business Regulation*, 410 So.2d 539, 541 (Fla. 4th DCA 1982).

was silent about appeals filed by governmental entities.[4]

Not long after the 1974 version of the APA was enacted, the First DCA addressed the stay issue. In *Lewis v. Career Service Commission*, 332 So.2d 371 (Fla. 1st DCA 1976), the First DCA held that a governmental body's appeal of a state agency's order did not automatically stay enforcement of the agency's order under Section 120.68(3).

In 1977, soon after the *Lewis* decision was issued, the Florida Supreme Court totally revised the former "Florida Appellate Rules" and replaced them with the "Florida Rules of Appellate Procedure." Florida Rule of Appellate Procedure

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[4] At this juncture, it should be noted that the current version of Section 120.68(2)(a) states, "All proceedings shall be instituted by filing **a notice of appeal or petition for review** in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed." (Emph. added). Thus, unlike the 1974 version of the APA, the current version expressly distinguishes between a "notice of appeal" and a "petition for review." This important distinction is also noted in Rule 9.190(b)(1) and (2). Moreover, Rule 9.190(b)(1) explains that appeals from final agency orders "shall be commenced in accordance with rule 9.110(c)," which states that the appellate court's appeal jurisdiction is invoked by filing a notice of appeal. In contrast, Rule 9.190(b)(2) states that appellate review of "non-final" agency orders "shall be commenced by filing a petition for review…." In other words, both the current APA and Rule 9.190 recognize that a plenary appeal from an agency's final order is commenced by filing a notice of appeal, and interlocutory review of an agency's non-final order is commenced by filing a "petition for review." This is a critical distinction because Section 120.68(3) merely states, "The filing of the **petition** does not itself stay enforcement of the agency decision…" and does **not** address whether the filing of a **notice** will stay enforcement of the agency's order. In sharp contrast, the automatic stay provision of Rule 9.310(b)(2) is only triggered by a governmental entity "timely filing a **notice**…." and does **not** address the filing of a **petition**. It appears that the Appellate Court Rules Committee may have overlooked this distinction.

9.010 states that as of March 1, 1978, the Florida Rules of Appellate Procedure "shall govern **all proceedings** commenced on or after that date in the supreme court, the district courts of appeal, and the circuit courts in the exercise of the jurisdiction described by rule 9.030(c)."[5] (Emph. added). In 1989, Section 120.68(2) was updated to substitute the obsolete term "Florida Appellate Rules," so that the statute stated, "Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure." Consequently, it is abundantly clear that the Florida Rules of Appellate Procedure apply to and govern all appeals of orders issued by state agencies that are subject to the APA.

As part of the new appellate rules adopted in 1978, the Florida Supreme Court adopted Rule 9.310 to replace former Rules 5.1 through 5.12. In pertinent part, Rule 9.310 stated the following:

> RULE 9.310. STAY PENDING REVIEW
>
> (a) Application. **Except as provided by general law and in subdivision (b) of this rule**, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal, which shall have continuing jurisdiction, in its discretion, to grant, modify, or deny such relief. A stay pending review may be conditioned on the posting of a good and sufficient bond, other conditions, or both.
>
> (b) Exceptions.
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> . . . . .

[5] Florida Rule of Appellate Procedure 9.030(c) describes the circuit court's jurisdiction over appeals from county courts and administrative action by local governments and agencies not otherwise subject to the APA.

> (2) Public Bodies; Public Officers. **The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, when the state, any public officer in an official capacity, board, commission, or other public body seeks review. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.**
> . . . .

(Emph. added). In this regard, it is significant to note that the Committee Notes for the 1977 Amendments expressly state that Rule 9.310 "implements the Administrative Procedure Act, section 120.68(3), Florida Statutes (Supp. 1976)" and that "Subdivision (b)(2) replaces former rule 5.12 … **[and] supersedes *Lewis v. Career Service Commission***, 332 So.2d 371 (Fla. 1st DCA 1976)." *See, In re Proposed Florida Appellate Rules*, 351 So.2d 981 (Fla. 1977) (emph. added).

Shortly after the Florida Rules of Appellate Procedure were adopted, the First DCA issued its decision in *City of Jacksonville Beach v. Public Emp. Relations Com'n*, 359 So.2d 578 (Fla. 1st DCA 1978). In that case, First DCA was called upon to analyze the "possible conflict" between Rule 9.310(b)(2) and Section 120.68(3), and held as follows:

> The 1977 Advisory Committee and Court's Commentary following Fla.R.App.P. 9.310 states, with regard to **subsection (b)(2), that the rule supersedes *Lewis*, supra. To the extent that Rule 9.310(b)(2) is in conflict with the statutory provisions discussed above, the rule must prevail, for any legislative attempt to create rules of practice or procedure would be an intrusion upon the power of the Florida Supreme Court as defined in Article V, Sec. 2(a), Florida Constitution, and, thus, in violation of the doctrine of separation of powers as set forth in Article II, Sec. 3, of that Constitution**. …

City of Jacksonville, 359 So.2d at 578-579 (emph. added). Since the *City of Jacksonville* decision was issued in 1978, the Legislature has not modified the stay provision of Section 120.68(3) in a manner which would override Rule 9.310(b)(2) or the *City of Jacksonville* decision. To the contrary, as explained below, in 1996 and 1997, the Legislature amended Section 120.68(3) in a manner which was consistent with Rule 9.310(b)(2) and the *City of Jacksonville* decision.

The 1995 version of the APA still stated in Section 120.68(3) that "The filing of **the petition** does not itself stay the enforcement of the agency decision…." (Emph. added). In 1996, however, the Legislature revised the APA, and Section 120.68(2) and (3) were substantially amended to state:

> (2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. **All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure** within 30 days after the rendition of the order being appealed. If the appeal is of an order rendered in a proceeding initiated under s. 120.56, the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.
>
> (3) **The filing of a notice or petition does not stay enforcement of the agency decision**. The agency may grant a stay upon appropriate terms, but a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. **Subject to the Florida Rules of Appellate Procedure**, no stay or supersedeas shall be in effect until the party seeking relief files a petition for stay and the agency or court enters an order granting such relief. The order shall specify the conditions, if any, upon which the stay or supersedeas is granted. Where the agency decision has the effect of

> suspending or revoking a license, a stay shall be granted as a matter of right upon such conditions as are reasonable, unless the agency demonstrates that a stay would constitute a probable danger to the public health, safety, or welfare.

Ch. 96-159, §35, Laws of Fla. (1996) (bold added).[6] For purposes of this Court's analysis, the important changes made in 1996 were that the Legislature finally recognized: (1) the distinction between a "notice of appeal" and a "petition for review," and (2) that the APA's stay provisions are "Subject to the Florida Rules of Appellate Procedure…." These important changes are not discussed in ALJ Stampelos' memorandum concerning the chronological history of the statutes and rules governing the automatic stay, or in any of the other memoranda, which the Appellate Court Rules Committee relied upon (App. C at p. 13-19).

In 1996, the Legislature also "substantially reworded" APA Section 120.56, which governs challenges to rules promulgated by state agencies. The 1996 version of 120.56(4)(d) states, "When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." The current version of Section 120.56(4)(d) still says the same thing. Notably, however, Section 120.56(4)(d)

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[6] The session law amending Section 120.68 indicates that this was a "[s]ubstantial rewording" of the statute, and the changes were not identified through the typical use of additions indicated by underlining, and deletions indicated by strike-through. *See*, Ch. 96-196, §35, Laws of Fla. (1996).

does **not** address what happens if the final order in a rule challenge case is appealed. Presumably, this is because Section 120.56 only governs rule challenge proceedings at the trial-level, while Section 120.68 expressly governs "Judicial review," and because Section 120.68(3), Florida Statutes (1996) expressly states that stays pending judicial review are "Subject to the Florida Rules of Appellate Procedure…."

While the Legislature was revamping the APA in 1996, the Florida Supreme Court acted in tandem in 1996 by adopting Florida Rule of Appellate Procedure 9.190, which governs "Judicial Review of Administrative Action" in order to "facilitate administrative appeals." *See, Amendment to Florida Rule of Appellate Procedure 9.020(a) and Adoption of Florida Rule of Appellate Procedure 9.190*, 681 So.2d 1132 (Fla. 1996). Like the 1996 version of Section 120.68(2) and (3), Rule 9.190(b)(1) and (2) expressly distinguish between a notice of appeal (which invokes the appellate court's plenary jurisdiction to review an agency's final order) and a petition for review (which is used to commence the discretionary review of non-final agency orders). *See*, Footnote 4, *infra*; *Amendment*, 681 So.2d at 1133. Again, this issue is not addressed in ALJ Stampelos' memorandum or the other memoranda, which the Appellate Court Rules Committee relied upon (App. C at p. 13-19).

In 1997, the Legislature again substantially amended Section 120.68(3), as follows:

> (3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition for the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted. ~~a notice or petition does not stay enforcement of the agency decision. The agency may grant a stay upon appropriate terms, but a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. Subject to the Florida Rules of Appellate Procedure, no stay or supersedeas shall be in effect until the party seeking relief files a petition for stay and the agency or court enters an order granting such relief. The order shall specify the conditions, if any, upon which the stay or supersedeas is granted. Where the agency decision has the effect of suspending or revoking a license, a stay shall be granted as a matter of right upon such conditions as are reasonable, unless the agency demonstrates that a stay would constitute a probable danger to the public health, safety, or welfare.~~

Ch. 97-176, §17, Laws of Fla. (1997). Thus, in 1997, the Legislature amended Section 120.68(3) to state that filing a "petition" does not create stay (i.e., a petition for review of an APA non-final agency order).[7] However, the 1997 version of 120.68(3) no longer addresses whether a "notice" creates a stay. Nonetheless,

[7] When read in para materia with the rest of Section 120.68, the word "petition" in Section 120.68(3) obviously refers to the "petition for review" mentioned in Section 120.68(2). A "petition for review" is used to commence discretionary review of an APA non-final agency order. *See,* Fla.R.App.P. 9.190(b)(2).

Section 120.68(2)(a) still acknowledges the distinction between a "notice of appeal" and a "petition for review," and recognizes that appellate proceedings are "in accordance with the Florida Rules of Appellate Procedure[.]" ALJ Stampelos' memorandum and the other memoranda relied upon by the Appellate Court Rules Committee are silent about the 1997 amendment to Section 120.68(3).

In 2000, the Florida Supreme Court added subpart (e) to Rule 9.190, which in pertinent part, states:

> (e) Stays Pending Review.
>
> (1) Effect of Initiating Review. The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, **except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2)** or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries.

(Emph. added). Thus, in 2000, the Florida Supreme Court expressly acknowledged that Rule 9.310(b)(2) "shall give rise to an automatic stay" in appeals of final agency orders.

Several years later, in 2005, the Administrative Appeals Subcommittee began considering a proposal to amend Rule 9.310(b)(2)--purportedly "to eliminate inconsistency with provisions in the Administrative Procedure Act." By memoranda dated August 10 and 22, 2006, David K. Miller, as Chair of the Administrative Appeals Subcommittee, analyzed the situation and presented his recommendations to the Appellate Court Rules Committee (App. C at p. 20-32).

Both of Mr. Miller's memoranda are premised upon the erroneous conclusion that there is "an irreconcilable conflict between § 120.68 and Rule 9.310(b)," and recommend that Rule 9.310(b)(2) be amended as follows:

> (2) Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, or in administrative actions under the Administrative Procedure Act, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

(Underline in original). This amendment proposes to eliminate the automatic stay now afforded to governmental bodies when they appeal orders issued by state agencies.

III. Legal Arguments

(a) There is no "inconsistency" with the APA and the automatic stay provision of Rule 9.310(b)(2), and no need for clarification

The Appellate Court Rules Committee's stated reasons for amending Rule 9.310(b)(2) (i.e., to eliminate alleged "inconsistency" with the APA, and to "clarify" the existing rule) are incorrect, and the amendment will adversely affect local governments seeking appellate review of state agency decisions.

First and foremost, it should be noted that the Appellate Court Rules Committee overlooked that the 1996 version of Section 120.68(2) and (3) expressly recognized a distinction between a "notice of appeal" and a "petition for

review," and expressly stated that stays on appeals from agency orders are "[s]ubject to the Florida Rules of Appellate Procedure…." *See*, Footnote 3, *infra*; Ch. 96-159, §35, Laws of Fla. (1996). The 1997-2007 versions of Section 120.68(2) still recognize the distinction between a "notice of appeal" and a "petition for review." Further, the 1997-2007 versions of Section 120.68(3) merely state that "[t]he filing of the **petition** does not itself stay enforcement of the agency decision…." (Emph. added). In sharp contrast, Rule 9.310(b)(2) states, "The timely filing of a **notice** shall automatically operate as a stay pending review" for governmental entities. (Emph. added). Case law explains that the automatic stay provision of Rule 9.310(b)(2) is only triggered when a governmental entity files a "notice" and does not apply when a governmental entity files a "petition" for discretionary review of a non-final order. *See, State, Dept. of Health and Rehabilitative Services v. E.D.S. Federal Corp.*, 622 So.2d 90 (Fla. 1st DCA 1993) (public body is not entitled to automatic stay when it seeks discretionary certiorari or prohibition review in district court of appeal). *See also*, Padovano, *Florida Appellate Practice*, §12.5 (2005 Ed.). Thus, on the face of the current versions of Section 120.68(3) and Rule 9.310(b)(2), there is absolutely no conflict or inconsistency.

Reviewing Section 120.68 and Rule 9.310 in historical context also confirms the lack of any inconsistency. In applicable part, Section 120.68(3), Florida

Statutes (Supp. 1976-1995) stated, "The filing of the petition does not itself stay enforcement of the agency decision…." In *Lewis v. Career Service Commission*, 332 So.2d 371 (Fla. 1st DCA 1976), the First DCA held that a governmental body appellant's appeal of a state agency's order did not automatically stay enforcement of the agency's order under Section 120.68(3). Notably, Section 120.68(3) did not (and still does not) expressly address appeals filed by governmental entities. In contrast, the 1977 Committee Notes to Rule 9.310 expressly states that the current rule "implements the Administrative Procedure Act, section 120.68(3), Florida Statutes (Supp. 1976)" and that "Subdivision (b)(2) replaces former rule 5.12 … [and] **supersedes** *Lewis v. Career Service Commission*, 332 So.2d 371 (Fla. 1st DCA 1976)." (Emph. added). Moreover, since 1989, Section 120.68 has clearly indicated that all appellate proceedings are governed by "the Florida Rules of Appellate Procedure."

Because *Lewis* squarely held that a governmental entity's appeal did not automatically stay enforcement of an agency's order, and because Rule 9.310(b)(2) is expressly intended to supersede *Lewis*, there is no "inconsistency" with Section 120.68(3) or need for clarification. To the extent any clarification was necessary, the issue was clarified in 1978, in the case of *City of Jacksonville Beach v. Public Emp. Relations Com'n*, 359 So.2d 578 (Fla. 1st DCA 1978). In that case, First DCA recognized that Rule 9.310(b)(2) supersedes *Lewis*, and held that to the

extent that Section 120.68(3) and Rule 9.310(b)(2) conflict, "the rule must prevail" and Section 120.68(3) violates the Florida Supreme Court's exclusive rulemaking authority under the Florida Constitution and violates the constitutional separation of powers doctrine. *See also, Wait v. Florida Power & Light Co.*, 372 So.2d 420, 423 (Fla., 1979) ("The granting of a stay, because it is a step in the enforcement of a final judgment, is concerned with 'the means and method to apply and enforce' substantive rights and falls within the definition of procedural law").

The Florida Legislature has always had the power to repeal the automatic stay provision of Rule 9.310(b)(2) "by general law enacted by two-thirds vote of the membership of each house of the legislature." *See*, Art. V, §2(a), Fla. Const. However, the Legislature has not attempted to do so.

Subsequent inaction by the Legislature should not be construed as opposition to the automatic stay provision of Rule 9.310(b)(2). In fact, since the *City of Jacksonville Beach* case was published in 1978, the Florida Legislature has amended Section 120.68 numerous times,[8] but the Legislature has never amended the stay provisions of Section 120.68(3) in a manner which could be deemed to express dissatisfaction with the automatic stay afforded to governmental entities

[8] *See*, §4, Ch. 84-173, Laws of Fla. (1984); §7, ch. 87-385, Laws of Fla. (1987); §36, Ch. 90-302, Laws of Fla. (1990); §6, Ch. 91-30, Laws of Fla. (1991); §1, Ch. 91-191, Laws of Fla. (1991); §10, Ch. 92-166, Laws of Fla. (1992); §35, Ch. 96-159, Laws of Fla. (1996); §15, Ch. 97-176, Laws of Fla. (1997); §8, Ch. 2003-94, Laws of Fla. (2003).

under Rule 9.310(b)(2). To the contrary, the 1996 and 1997 amendments to Section 120.68(3) can only be read as bowing to the superior provisions of Rule 9.310(b)(2). *See*, Ch. 96-159, §35, Laws of Fla. (1996) and Ch. 97-176, §15, Laws of Fla. (1997). *See also*, Footnote 4, *infra.* Similarly, the Florida Supreme Court has likewise not modified Rule 9.310(b)(2) to eliminate the automatic stay afforded to governmental entities appealing agency orders.

Consequently, according to well settled principles of statutory construction, it must be presumed that the Legislature and the Supreme Court both agree with this longstanding judicial interpretation of Section 120.68(3) and Rule 9.310(b)(2). *See, e.g., Gulfstream Park Racing Ass'n, Inc. v. Dept. of Business Reg.*, 441 So.2d 627 (Fla. 1983) (when legislature reenacts statute which has a judicial construction placed upon it, it is presumed that legislature is aware of construction and intends to adopt it, absent a clear expression to the contrary); *Remington v. City of Ocala/United Self Insured*, 940 So.2d 1207 (Fla. 1st DCA 2006) (once a court has construed a statutory provision, subsequent reenactment of that provision may be considered legislative approval of the judicial interpretation); *Wood v. Fraser*, 677 So.2d 15 (Fla. 2d DCA 1996) (in re-enacting a statute, the legislature is presumed to be aware of judicial construction placed upon re-enacted statute, and to have adopted this construction, absent clear expression to the contrary). The Appellate Court Rules Committee's proposed rule amendment fails to apply this important

line of cases, as well as the Legislature's important amendments to Section 120.68 in 1996 and 1997.

In contrast to the lack of any attempts during the past 30 years to supersede the *City of Jacksonville* court's interpretation of Rule 9.310(b)(2) and Section 120.68(3), in *Wait v. Florida Power & Light Co.*, 372 So.2d 420 (Fla.1979), the Florida Supreme Court held that a similar portion of Section 119.11(2), Florida Statutes (1979) providing that a governmental entity's appeal of an order compelling production of public records "shall not operate as an automatic stay," unconstitutionally invaded the Court's rule-making power. Thereafter, in response to a petition filed by members of the media, the Supreme Court amended Rule 9.310(b)(2) to afford the governmental appellant a preliminary 48-hour automatic stay in public meeting and public record cases, which can be extended by the trial court or the appellate court. *See, The Florida Bar Re Rules of Appellate Procedure*, 463 So.2d 1114 (Fla.1984).[9] In contrast, the Appellate Court Rules Committee's currently proposed amendment does not even afford the governmental appellant an automatic stay on a preliminary or short-term basis, and instead, will totally eliminate the automatic stay in appeals of orders issued by state agencies in APA

[9] In response to *Wait*, the Legislature amended Section 119.11(2) to state, "(2) Whenever a court orders an agency to open its records for inspection in accordance with this chapter, the agency shall comply with such order within 48 hours, unless otherwise provided by the court issuing such order, or unless the appellate court issues a stay order within such 48-hour period." *See*, Ch. 83-214, Laws of Fla. (1983).

proceedings.

Far from disagreeing with the *City of Jacksonville* court's interpretation of Section 120.68(3) and Rule 9.310(b)(2), the appellate courts have consistently followed the automatic stay afforded to governmental body appellants in appeals from state agency orders. *See, e.g., City of Delray Beach v. Depart. of Transp.,* 444 So.2d 506 (Fla. 1st DCA 1984) (automatic stay invoked by city's appeal of agency's administrative order reclassifying portion of city street as a collector road, thus transferring jurisdiction and responsibility for the road to the city from the county); *Jess Parrish Memorial Hospital v. Laborers' Intern. Union of North America, Local No. 666, AFL-CIO*, 397 So.2d 989 (Fla.1st DCA1981) (public hospital obtained automatic stay of order of the Public Employees Relations Commission). *See also, Sugarmill Woods Civic Ass'n, Inc. v. Florida Water Services Corp*., 785 So.2d 720 (Fla. 1st DCA 2001) (appellate court granted appellee's motion to vacate automatic stay resulting from Citrus County's appeal of Public Service Commission order). *See also,* Fla.R.App.P. 9.190(e)(1) ("The filing of a notice of administrative appeal or a petition seeking review of administrative action … shall give rise to an automatic stay as provided in rule 9.310(b)(2)…").

In *St. Lucie County v. North Palm Development Corp.,* 444 So.2d 1133, 1135 (Fla. 4th DCA), *rev. den.,* 453 So.2d 45 (Fla. 1984), the Fourth DCA suggested that the automatic stay in favor of public bodies is in place because "any

adverse consequences realized from proceeding under an erroneous judgment **harm the public generally**." (Emph. added). Consequently, appellate courts hold that the automatic stay may be avoided only "under the most compelling circumstances." *St. Lucie County*, 444 So.2d at 1135. *State, Dept. of Environmental Protection v. Pringle*, 707 So.2d 387 (Fla. 1st DCA 1998). The Florida Supreme Court has likewise stressed the importance of the automatic stay:

> … **we cannot agree that supersedeas bond is proper for appellate review of legislative planning-level determinations**. **Requiring a bond in this situation would clearly chill the right of a governmental body to appeal an adverse trial court decision declaring invalid a legislative act.** We distinguished between "operational-level" and "planning-level" governmental functions in *Commercial Carrier Corp. v. Indian River County*, 371 So.2d 1010 (Fla.1979). We find that the distinction also applies in supersedeas bond proceedings under Rule of Appellate Procedure 9.310(b)(2). To rule otherwise would make cities liable for damages resulting from legislative planning-level decisions. This is clearly contrary to existing law. We, thus, construe rule 9.310(b)(2) as allowing trial and appellate courts the discretion to require governmental entities to post supersedeas bonds in suits where the judgment concerns operational-level functions but find that no authority exists to lawfully require such bonds in planning-level governmental functions.
>
> We can conceive of no justification for this Court to require the government to pay for judicial review of legislative actions. **A contrary decision would prove catastrophic for small municipalities and counties**. Even larger governmental entities would be adversely affected. Consider, for example, the situation that was presented in this Court's recent decision in *Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla.1981). The cost of delaying a proposed project with "26,500 dwelling units with an estimated eventual population of 73,500, eleven commercial centers, four marinas, five boat basins, three golf courses, and twenty-eight acres of tennis facilities" would be immense. *Id.* at 1376. Under respondent's

> contention, if the Estuary developers had prevailed in the trial court, Lee County could have been required to post a substantial supersedeas bond. That being the case, **the ultimate effect could have deprived Lee County of the ability to appeal. This Court, in turn, would not have had the opportunity to review the decision and establish clear guidelines in an essential area of the law**.
>
> **It is paramount for governmental bodies to have unrestricted appellate court review of their authority to act in a legislative capacity**. Requiring the payment of damages for such review is not justified in other circumstances and cannot be here. The only exception is when no justiciable issue is present and when the record establishes that the governmental body is seeking review in bad faith solely as a delaying tactic.

City of Lauderdale Lakes v. Corn, 415 So.2d 1270, 1272 (Fla.1982) (emph. added).

In *Corn*, a land developer brought a declaratory judgment action in circuit court, and succeeded in having a municipal zoning ordinance declared invalid. When the City appealed, the circuit court judge required the City to post a $1.4 million supersedeas bond. Although *Corn* did not involve an appeal from a state agency's order, the same rationale expressed above would certainly apply to a local government's decision to appeal an order of the Department of Community Affairs invalidating a local government's comprehensive plan, or an order of the Department of Environmental Protection or a water management district declining to renew an important environmental permit needed to operate a critical public utility facility, or a Public Service Commission order authorizing a company to operate a private utility company that competes with services being provided by a local government.

Local governments are charged with protecting the public health, safety and welfare of their residents, and the automatic stay allows the status quo to be maintained until an appellate court is satisfied that an agency order appealed by a local government should be affirmed. Under Rule 9.310(b)(2), the appellee has the right at any time to file a motion requesting the lower tribunal or the appellate court to modify or vacate the stay and the automatic stay can be vacated if the appellee can "establish an evidentiary basis for the existence of … 'compelling circumstances.'" *Pringle*, 707 So.2d at 390.

Thus, the ultimate effect of the proposed amendment will merely be to eliminate the stay in situations where an appellee would otherwise be unable to demonstrate the existence of any "compelling circumstances" to modify or vacate the stay. In such situations, the proposed amendment will now require local governments to expend scarce financial resources on attorneys' fees and costs and supersedeas bonds, in order to convince a state agency to enter a stay of its own order, pending the outcome of an appeal of that agency's order. Because the current automatic stay provision merely maintains the status quo in situations where there are no compelling circumstances to modify or lift the stay, the proposed amendment will unnecessarily increase the litigation expenses that are paid with public funds.

(b) Instead of eliminating the non-existent inconsistency between the APA and Rule 9.310(b)(2), the Committee's proposed amendment will create a direct inconsistency between Rule 9.190(e)(1) and Rule 9.310(b)(2)

The Florida Supreme Court has clarified and reinforced its intention to grant automatic stays to governmental bodies appealing state agency orders in Florida Rule of Appellate Procedure 9.190. Rule 9.190 was enacted in 1996 to govern appellate review of administrative action. At that time, this Court expressly recognized in the context of judicial review of administrative decisions, that there is a difference between a "notice of appeal" and a "petition for review." In this regard, Rule 9.190(b)(1) explains that appeals from final agency orders "shall be commenced in accordance with rule 9.110(c)," which states that the appellate court's appeal jurisdiction is invoked by filing a notice of appeal. In contrast, Rule 9.190(b)(2) states that appellate review of "non-final" agency orders "shall be commenced by filing a petition for review…." This distinction is also acknowledged in all versions of Section 120.68(2) since 1996. This distinction is important because the automatic stay provision of Rule 9.310(b)(2) is only triggered upon the filing of a "notice," and because Section 120.68(3) merely states that a "petition" will not trigger a stay.

In 2000, this distinction became even clearer. In 2000, this Court added subpart (e)(1) to Rule 9.190, and that provision expressly states, "The filing of a notice of administrative appeal ... seeking review of administrative action shall not

operate as a stay, **except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2)** ..." (Emph. added). At the very least, the Committee's proposed amendment will create a glaring inconsistency between Rule 9.190(e)(1) and the amended version of Rule 9.310(b)(2).

At a meeting of the Appellate Court Rules Committee held in Tampa, Florida on September 7, 2007, counsel for Charlotte County addressed the Committee and pointed out the inconsistency between Rule 9.190(e)(1) and the proposed amendment to of Rule 9.310(b)(2). At that time, David K. Miller, Chair of the Administrative Appeals Subcommittee, argued in response that the automatic stay provision of Rule 9.310(b)(2) would still apply in situations where a governmental entity appeals an order issued by an agency that is not governed by the APA. Unfortunately, Mr. Miller was given the last word and Charlotte County's counsel was not given any opportunity to provide rebuttal. However, the argument is clearly incorrect.[10]

Judicial review of non-APA administrative agency action is commenced by filing a petition for certiorari, prohibition or mandamus, not by filing a notice of appeal. *See*, Fla.R.App.P. 9.190(b)(3). *See also*, Fla.R.App. P. 9.100(c)(2). This is

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[10] After the September 7, 2007 meeting, Mr. Miller submitted a memorandum dated November 1, 2007 (App. H at p. 9-10), and stated therein, "**I have not canvassed the law to find out what other administrative actions exist that can be appealed outside the APA**, but as to any such actions, the general principle of an automatic stay for appeals by public officers and bodies would still apply, even if the proposed amendment is adopted" (App. H at p. 9; emph. added).

significant because the plain language of Rule 9.310(b) states, "[t]he timely filing of a **notice** shall automatically operate as a stay pending review" for governmental entities. Case law confirms that the filing of a "petition" for discretionary judicial review does **not** trigger the automatic stay provisions of Rule 9.310(b)(2). *See, State, Dept. of Health and Rehabilitative Services v. E.D.S. Federal Corp.*, 622 So.2d 90 (Fla. 1st DCA 1993) (public body is not entitled to automatic stay when it seeks discretionary certiorari or prohibition review in District Court of Appeal). *See also*, Padovano, *Florida Appellate Practice*, §12.5 (2005 Ed.). Thus, Rule 9.310(b)(2) does **not** apply to judicial review of non-APA agency decisions. Consequently, if this Court approves the proposed amendment to Rule 9.310(b)(2), the provisions of Rule 9.190(e)(1) will be in bitter conflict.

(c) Administrative Appeals Subcommittee's analysis is incorrect

As previously noted, David K. Miller, as Chair of the Administrative Appeals Subcommittee, is a proponent of the proposed amendment and authored two supporting memoranda. In concluding that Rule 9.310(b)(2) and Section 120.68(3) are "inconsistent," the Administrative Appeals Subcommittee appears to have overlooked the constitutional separation of powers doctrine, which vests the Florida Supreme Court with exclusive rulemaking authority over procedural matters. Thus, to the extent an inconsistency exists between Rule 9.310(b)(2) and Section 120.68(3), the rule trumps the statute, unless the Legislature repeals the

rule by two-thirds vote of both houses. *See,* Art. V, §2(a), Fla. Const. *See also*, Padovano, *Florida Appellate Practice*, §12.5. As previously noted, it does not appear that the Legislature has attempted to obtain such a two-thirds vote to repeal Rule 9.310(b)(2). To the contrary, the 1996 and 1997 amendments of Section 120.68(2) and (3) indicate that the Legislature understands that the Florida Rules of Appellate Procedure prevail.

Mr. Miller's August 21, 2006 memorandum suggests that the Florida Supreme Court has engaged in "efforts to accommodate statutes" that would purport to eliminate the automatic stay (App. C at p. 24-26). However, that argument overlooks the legal effect and implications of the many cross-references to Rule 9.310(b)(2) contained within the Florida Rules of Appellate Procedure and the accompanying Committee Notes and Commentary, which repeatedly reinforce the Florida Supreme Court's clear intent to apply the automatic stay in appeals from state agency orders.

For example, at page 7, Mr. Miller quotes the portion of Rule 9.310(a) which states, "Except as provided by general law" a party seeking a stay must file a motion with the lower tribunal. However, in quoting the "Except as provided by general law" provision of Rule 9.310(a), Mr. Miller omits the provision of that exact same rule which expressly states, "Except as provided … in subdivision (b)

of this rule…."[11] In other words, the Florida Supreme Court has allowed the stay provisions set forth in general law (i.e., statutes) to apply, **except** to the extent that a general law would attempt to circumvent Rule 9.310(b).

For this same reason, it appears that Mr. Miller also misplaced his reliance on the case of *Anderson v. Department of Highway and Motor Vehicles*, 751 So.2d 749 (Fla. 5th DCA 2000) for the proposition that Rule 9.310(a) allows general laws to supersede Rule 9.310(b). In *Anderson*, the state agency suspended a motorist's driving privileges. The motorist sought certiorari review of that decision in the circuit court, and requested a stay of the agency's license suspension order. Although Section 332.28(5), Florida Statutes (1999) prohibited a court from staying the administrative suspension of a driver's license pending review of the agency's order, the motorist contended that the statute was unconstitutional. The circuit court upheld the constitutionality of Section 322.28(5) and denied the motorist's motion to stay the agency's order. The motorist then sought certiorari review of the circuit court's order. Before Section 322.28(5) was enacted in 1999, the Fifth DCA had held that the courts had inherent power and authority to stay an agency's order pending certiorari review and pursuant to Florida Rule of Appellate Procedure 9.310. *See, Department of Safety v. Stockman*, 709 So.2d 179 (Fla. 5th

[11] Rule 9.310(a) states, "Except as provided by general law and in subdivision (b) of this rule, a party seeking to stay a final or non-final order pending review shall file a motion in the lower tribunal…."

DCA 1998). *Stockman* further noted that any conflict between the statute and rules regarding court procedure must be resolved in favor of the rules. In *Anderson*, however, the Fifth DCA noted that Rule 9.310(a) "provides for stays pending appellate review but allows a general law to prevail over the rule." (Emph. added). Because Section 322.28(5) is a "general law," the *Anderson* court held that the statutory stay prohibition in that statute is permitted by the express language of Rule 9.310(a). In *Anderson*, however, the appellant was a private citizen, not a governmental body. Consequently, the *Anderson* case did not implicate the automatic stay provision of Rule 9.310(b)(2), and there was no reason to address that rule. Because Rule 9.310(a) expressly states that it applies "[e]xcept as provided by general law and in subdivision (b) of this rule" (emph. added), Rule 9.310(a) obviously prohibits any general law from attempting to negate the automatic stay provisions of Rule 9.310(b)(2). Because Section 120.68(3) is a general law, it is superseded by Rule 9.310(b)(2). Again, the Legislature is presumed to be aware of this longstanding interpretation and to be in agreement with it.

Indeed, the Legislature has signaled its acceptance of Rule 9.310(b)(2). As previously noted, the 1996 version of Section 120.68(2) and (3) expressly acknowledge that there is a difference between a "notice of appeal" and a "petition for review," and expressly acknowledge that appeals are governed by the Florida

Rules of Appellate Procedure. In 1997, the Legislature amended Section 120.68(3) to state that filing a "petition" does not trigger an automatic stay, whereas Rule 9.310(b)(2) states that only a "notice" triggers a stay.

(d) Section 120.56(4)(d) is not inconsistent with Rule 9.310(b)(2)

Section 120.56, Florida Statutes governs APA proceedings to challenge the validity of a state agency's rules. The 1996 version of 120.56(4)(d) states, "When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action."[12] The current version of Section 120.56(4)(d) still says the same thing.

Notably, Section 120.56(4)(d) does **not** address what happens if the final order in a rule challenge case is appealed and is silent as to whether a stay will arise from such an appeal. Presumably, this is because Section 120.56 only governs

[12] An "agency statement" that violates Section 120.54(1)(a) is commonly referred to as an "unadopted rule" or an "unwritten rule." *See, e.g., Osceola Fish Farmers Ass'n, Inc. v. Division of Administrative Hearings*, 830 So.2d 932 (Fla. 4th DCA 2002); *Machata v. Dept. of Environmental Protection*, 1994 WL 1027526. ¶200 (DOAH 1994). In contrast, the APA defines a final order" to mean "a written final decision which results from a proceeding under s. 120.56, s. 120.565, s. 120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. …." Thus, the reference to "agency statements" in Section 120.56(4)(d) does not include a final order issued by a state agency following an administrative proceeding.

rule challenge proceedings at the trial-level, while Section 120.68 expressly governs "Judicial review," and because Section 120.68(3), Florida Statutes (1996) expressly states that stays pending judicial review are "Subject to the Florida Rules of Appellate Procedure…." Well settled principles of statutory construction state that the more specific statutory provisions take priority over general statutory provisions. *See, e.g., Adams v. Culver*, 111 So.2d 665, 667 (Fla.1959) (recognizing "well settled rule of statutory construction, … that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms"). The Legislature was certainly aware of this principle of statutory construction when it adopted Section 120.56(4)(d).

Moreover, because Section 120.56(4)(d) is completely silent about appeals and stays, this Court should be very slow to agree with the suggestion that Section 120.56(4)(d) is inconsistent with Rule 9.310(b)(2), and should give cautious reflection on how the proposed amendment will apply in the context of a rule challenge case. For example, in the case of *Southwest Florida Water Management Dist. v. Charlotte County*, 774 So.2d 903 (Fla. 2d DCA), *rev. den.*, 800 So.2d 615 (Fla. 2001), an administrative law judge issued a final order declaring invalid numerous rules regulating the environment and natural resources promulgated by the Southwest Florida Water Management District. The District appealed that

decision in 1997, and the Second DCA finally reversed in January 2001, and upheld the previously invalidated rules. During the 3-4 year time period that the appeal was pending, the District continued to enforce its rules, even though they were invalidated. This Court must ask itself what is going to happen in similar cases if the proposed amendment to Rule 9.310(b)(2) is adopted? Will a state agency be required to abandon its rules during the appeal? What happens to the agency's regulatory operations during that appeal? What happens if the appellate court later reinstates the agency's rules? Obviously, the better and safer course of action is to maintain the status quo during the appeal, and allow affected parties to file a motion to modify or vacate the stay for good cause. This is the process established by Rule 9.310(b)(2) and that process has served the citizens of Florida very well for approximately 30 years.

(e) The proposed rule amendment would give non-lawyer agency heads greater deference than that which is afforded to county court and circuit court judges

It should be underscored that agency orders are issued by "agency heads," who are typically political appointees and are usually not even required to be licensed to practice law.[13] Thus, under the Committee's proposed rule amendment,

[13] Section 20.05, Florida Statutes provides that "the appointment of a secretary appointed by the Governor to serve as the head of a department must be confirmed by the Senate." *See also,* §20.10, Fla. Stat. (requiring that the Secretary of the State shall be appointed by the Governor, confirmed by the Senate, and serve at the pleasure of the Governor); §20.255, Fla. Stat. (requiring that the Secretary of

an order issued by a county court or circuit court judge would be automatically stayed by a governmental entity's appeal, but an order issued by a politically appointed, non-attorney agency head would not be stayed. This appears to be an arbitrary and absurd result.

Further, if the proposed rule amendment is passed, governmental entity appellants will be forced to incur attorneys' fees and costs to request politically appointed, non-attorney agency heads to suspend enforcement of their own orders

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Environmental Protection be appointed by the Governor, with the concurrence of three or more members of the Cabinet, confirmed by the Senate, and serve at the pleasure of the Governor); §20.23, Fla. Stat. (requiring that the Secretary of Transportation be appointed by the governor from among three persons nominated by the Florida Transportation Commission, be confirmed by the Senate, and serve at the pleasure of the Governor. The secretary is also required to be a proven administrator and through a combination of education and experience possess a broad knowledge of administrative, financial, and technical aspects of the development, operation, and regulation of transportation systems and facilities or those that are comparable); §20.19, Fla. Stat. (requiring that the Secretary of Children and Family Services be appointed by the Governor, confirmed by the Senate, and serve at the pleasure of the Governor); §373.073, Fla. Stat. (requiring that the governing board of each water management district be comprised of 9 members who reside in the district and are appointed by the Governor and confirmed by the Senate. Membership on the board shall be selected from candidates with experience in one or more of the following areas: agriculture, the development industry, local government, government-owned or privately owned water utilities, law, civil engineering, environmental science, hydrology, accounting or financial business and shall be filled in accordance with the residency requirements). In contrast, in order to qualify to act as a county court judge in a county with a population of more than 40,000, an individual must currently be and have been a member in good standing of the Florida Bar for 5 years prior to seeking office. If the county has a population of 40,000 or less, the individual must be a member in good standing of the Florida Bar. §34.021, Fla. Stat.; Art. V, §8, Fla. Const. Circuit court judges must also currently be and have been for the preceding 5 years a member of the Florida Bar. Art. V, §8, Fla. Const.

during the appeal process, and if a stay is granted, the governmental appellant will undoubtedly be forced to pay for bond premiums with much greater frequency than currently occurs, at public expense. Thus, the additional attorneys' fees and bond premiums that will arise from the proposed rule amendment will negatively impact governmental entities at a time when they are struggling to financially respond to reduced revenues from state and local sources.

(f) The Court should consider alternative language because the Committee's proposed amendment to Rule 9.310(b)(2) will bind the Legislature and thwart the Committee's stated purposes

Although the Appellate Court Rules Committee suggests that Rule 9.310(b)(2) should give deference to the Legislature on APA matters (*See, e.g.*, App. C at p. 24-27), the Committee's proposed rule amendment does not adopt the same standards set forth in the APA, and merely changes one judicially imposed procedural rule with another. If the Florida Supreme Court approves the Committee's proposed amendment to Rule 9.310(b)(2), the Legislature will still not have any ability to lawfully change the statutory stay provisions in the future. *See, City of Jacksonville*, 359 So.2d at 578-579.

It is the position of the undersigned entities that Rule 9.310(b)(2) should remain "as is." Article V, Section 2(a) of the Florida Constitution vests in the Florida Supreme Court the power to adopt procedural rules governing appellate proceedings, and that power should be zealously guarded. The procedural rules

that govern the judiciary and litigants should not be subject to change depending on which way the political winds happen to be blowing in a given year.

However, if the Florida Supreme Court is inclined to delegate or defer its procedural rulemaking powers to the Legislature, it would be more logical to simply amend the rule in a manner that ensure consistency with the APA and that will actually give the Legislature the power to amend the APA stay provisions in the future. For example, Rule 9.310(b)(2) could be amended by adding the words "or as otherwise provided by chapter 120, Florida Statutes" after the words "except in criminal cases."[14] This would give the Legislature the ability to establish and amend the statutory APA stay procedures without seeking approval from the Florida Supreme Court. The language of the currently proposed amendment, if adopted, will set the stage for future conflicts between the rules and statutes, whenever the Legislature decides to amend Section 120.68(3) or Section 120.56(4)(d).

As previously explained, the current version of Section 120.68(3) only addresses whether a stay is triggered by filing a "petition" for review; Rule 9.310(b)(2) only addresses whether a stay is triggered by filing a "notice" of appeal; and Section 120.56(4)(d) is completely silent about stays pending appellate review. The Appellate Court Rules Committee's proposed amendment does not

[14] Similarly, Rule 9.190(e)(1) could be amended by inserting "or chapter 120, Florida Statutes," after the words "rule 9.310(b)(2)".

adopt the same language as Sections 120.68(3) and 120.56(4)(d), but goes one step further by eliminating the automatic stay of Rule 9.310(b)(2) in a manner not addressed by Sections 120.68(3) and 120.56(4)(d) and in a manner which the Legislature will be powerless to change. On the other hand, if this Court adopts the alternative language suggested by the undersigned parties, Rules 9.310(b)(2) and 9.190(e)(1) will always be consistent with the current and future versions of the APA, and unless the Florida Legislature elects to amend Sections 120.68(3) and 120.56(4)(d) to expressly eliminate the automatic stay for governmental entity appellants who file a "notice" seeking judicial review of an APA agency's order, the automatic stay currently available to governmental entity appellants under Rules 9.310(b)(2) and 9.190(e)(1) will remain in effect. Accordingly, the alternative language proposed by the undersigned parties will eliminate the alleged "inconsistency" that troubles the Appellate Court Rules Committee and achieve the Committee's stated purpose of "conform[ing] the rule to provisions in the Administrative Procedure Act (APA)…" (*Triennial Report* at p. 13), without eliminating the current automatic stay provisions that local governments seek to preserve.

Conclusion

WHEREFORE, Charlotte County, Florida; the City of Plant City, Florida; the City of Coral Gables, Florida; the City of Tampa, Florida; the City of North Miami, Florida; the City of Gainesville, Florida; the City of Kissimmee, Florida; Hillsborough County, Florida; the City, County and Local Government Section of The Florida Bar; the Florida League of Cities, Inc.; the Florida Association of Counties, Inc.; and the Florida Association of County Attorneys, Inc. respectfully request this Honorable Court to reject the Appellate Court Rules Committee's proposed amendment to Rule 9.310(b)(2), and maintain the current language of that rule. Alternatively, this Honorable Court should consider adopting the alternative language set forth in Section (f) above.

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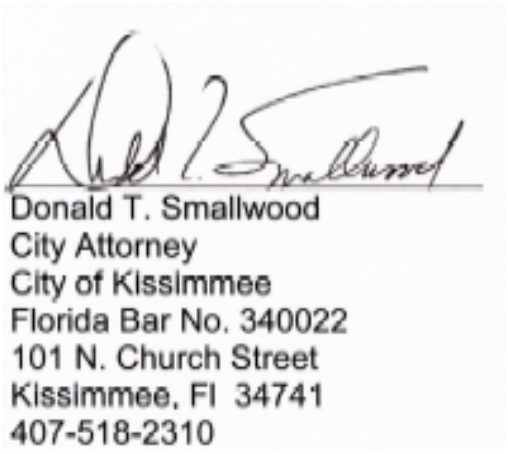

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof was served **by U.S. Mail** on Steven L. Brannock, Chair of the Florida Appellate Court Rules Committee, Post Office Box 1288, Tampa, Florida 33601-1288; John F. Harkness, Jr., Executive Director of The Florida Bar, 651 E. Jefferson St., Tallahassee, FL 32399-5600; Joanna A. Mauer, Esquire, Bar Staff Liason, Appellate Court Rules Committee, 651 E. Jefferson St., Tallahassee, FL 32399; Gregory Grossman, Esquire, 701 Brickell Ave., 16th Floor, Miami, FL 33131; Louis K. Rosenbloum,

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_____
David M. Caldevilla

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the text herein is printed in Times New Roman 14-point font, and this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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