IN THE FLORIDA SUPREME COURT

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

ACRC's RESPONSE TO WRITTEN COMMENTS CONCERNING PROPOSED AMENDMENTS TO RULE 9.310(b)(2)

Submitted on behalf of:

The Appellate Court Rules Committee of The Florida Bar

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INTRODUCTION AND OVERVIEW

Pursuant to Rule 2.140(b)(6), Fla. R. Jud. Adm., the Appellate Court Rules Committee (ACRC) responds to comments by the objectors opposing the ACRC's proposed amendment to Rule 9.310(b)(2), Fla. R. App. P. ("the Rule").[1] The ACRC, voting via e-mail, voted 44-0 to file this response to those comments.

The proposed amendment to the Rule is supported by comments from Senator Michael Bennett and Representative Greg Evers, Alternating Chairs of the Legislature's Joint Administrative Procedure Committee; and from Associated Industries of Florida and the Florida Homebuilders Association. The ACRC and the Florida Bar Board of Governors unanimously approved the proposed change based on the ACRC's initiative and neutral legal analysis, not based on advocacy from any particular interest group. The only interest groups to appear on this issue were the objectors, whose written and oral arguments were fully considered in the ACRC and whose written argument was considered by the Florida Bar Board of Governors.

[1] The opposing comments are presented on behalf of Charlotte County, City of Plant City, City of Coral Gables, City of Tampa, City of North Miami, City of Gainesville, City of Kissimmee, Hillsborough County, the City, County and Local Government Section of The Florida Bar, Florida League of Cities, Florida Association of Counties, and Florida Association of County Attorneys (collectively the "objectors").

The objectors spend almost 35 pages developing a complex argument that there is no conflict between the Rule, which states that "a timely filing of a notice shall automatically operate as a stay pending review," and § 120.68(3), which states that "[t]he filing of the petition does not itself stay enforcement of the agency decision." As shown in Point I below, the Rule in fact conflicts with § 120.68(3). The statute applies to review of "agency decisions," which means *final* administrative decisions. The statute's use of the term "petition," on which the objectors focus their argument, is explained by the context, *i.e.*, when the statute was enacted, judicial review of final administrative orders was initiated by a petition rather than by a notice as the current rules provide. This intent is confirmed by both the Reporter's Comments (legislative history), Committee Notes to the 1977 Rules, and contemporaneous court rulings applying the statute. Although the Court has changed the rules' nomenclature and format for initiating administrative appeals, that cannot cause any change in the legislative intent for the operation of the statute.

Point II discusses the Rule's conflict with § 120.56(4)(d). The statute clearly provides that final administrative orders within its scope (a determination that an agency statement violates rulemaking requirements), are immediately effective and thus not stayed.

Point III addresses the merits of the proposed amendment. The issue of conflict aside, the objectors fail to address merits arguments supporting the proposed amendment. The ultimate question is whether cities and counties should have the benefit of an automatic stay in Administrative Procedure Act ("APA") appeals where the Legislature has directed otherwise. Simply put, the decision by the Legislature not to afford an automatic stay in APA cases makes perfect sense. The objectors forget that in APA cases, they are just another litigant because an administrative tribunal is charged with the duty of making the final decision in the case. The APA and the ACRC's proposed amendment defer to the tribunal that serves as the neutral decision-maker by giving effect to its decision, rather than to a litigant whose position was rejected by that tribunal. A city or county may obtain a stay, based on the same showing as any other party.

Point IV discusses the objectors' argument concerning the consistency of the proposed Rule amendment with Rule 9.190(e)(1), and explains why the ACRC did not believe any change to the latter rule is needed.

Point V discusses the ACRC's reasons for not adopting the objectors' alternative proposal for amending Rule 9.310(b)(2).

I. Section 120.68(3), Florida Statutes, conflicts with Rule 9.310(b)(2) (Responding to Objectors' Point III(a) and (c))

It is helpful to start with the statute's plain language before discussing its legislative history. The current (2007) version of §120.68(3) retains the following language unchanged from the original 1974 statute:

> The filing of the ***petition*** does not itself stay enforcement of the ***agency decision***… (e.s.)

The term "agency decision" means the final agency decision. Non-final administrative orders are normally made by DOAH Administrative Law Judges (ALJs), which culminate in the ALJ's recommended order, but these non-final orders are not "agency decisions." The agency head adopts or modifies the ALJ's recommended order as the final "agency decision."

This analysis is even clearer from the rest of the same sentence, which was enacted soon after, in Ch. 76-131, Laws of Florida:

> … 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 and welfare of the state.

Decisions to suspend or revoke a license are final agency decisions, so the statute's reference to "agency decisions" must mean final agency decisions.

The objectors contend § 120.68(3) is consistent with the Rule, because the statute denies an automatic stay only for review of administrative orders

initiated by "*petition*." Under current rules, review of *non-final* orders is initiated by petition, while review of *final* administrative orders initiated by a "*notice*." When § 120.68(3) was enacted in 1974, the term "petition" was used for review of final administrative orders, consistent with the Florida Appellate Rules of that time, which designated such final review by petition for writ of certiorari. The intent of the statute was to apply to review of final administrative orders. That intent has not changed, even though the Court later adopted a different nomenclature and format for the initiating review of final agency decisions.

The objectors rely largely on their discussion of the history of Section 120.68(3) and Rule 9.310(b)(2). The history may be considered if the statute is ambiguous. However, a more complete analysis of the legislative history and contemporaneous case law (both discussed below) support the ACRC's reading of the statute to apply to review of final agency decisions.

According to commentary by ALJ Charles Stampelos (App. C-13-19 to the Triennial Report), the original source of the automatic stay for government appeals was a ***statute***, ***not a court rule of procedure***. Specifically, this concept originated in Section 59.14, Florida Statutes (1941), which, as amended, remained in effect for 30 years until 1971. Apparently, during the century prior to this 1940's legislation, supersedeas

pending appeal was considered a sovereign immunity issue, that the Legislature could waive when it saw fit, or not, and the Courts followed the legislative directive. Municipal litigants, at least in some cases, asked for supersedeas to stay rulings pending appeal, just like other litigants. See, *e.g.*, City of Miami v. Huttoe, 40 So. 2d 899 (Fla. 1949); City of Safety Harbor v. State ex rel. Smith, 187 So. 173 (Fla. 1939), and City of Deland v. Moorhead, 116 So. 10 (Fla. 1928), all referring to a city's supersedeas bond pending appeal. The Courts apparently had no standard policy or practice to grant automatic stays for municipal litigants, even during the era of great public economic hardship prior to 1941.[2]

In 1962, the Court adopted Florida Appellate Rule 5.12. In Re Florida Appellate Rules, 139 So. 2d 139, 143 (Fla. 1962). The impetus for adopting this rule was to conform to the statute. See Wainwright v. Parker, 226 So. 2d 876, 877 (Fla. 2d DCA 1969) (Rule 5.12 was "patterned specifically" on Section 59.14, Florida Statutes, and statute and rule are practically identical).

[2] In Safety Harbor, a Depression-era appeal from a writ of mandamus, the Court held that the writ is governed by equitable principles, so the city's showing of public mischief or irreparable injury or embarrassment in the orderly functioning of government financial affairs could be considered in deciding the relief due and timing thereof. The proposed amendment to Rule 9.310(b)(2) would not foreclose governments, in appropriate cases, from showing public harm to justify a stay pending appeal.

In 1971, the Legislature repealed Section 59.14, but Fla. App. Rule 5.12 remained in effect.

In 1974, as part of an overhaul of the Administrative Procedure Act, the Legislature enacted Section 120.68(3) to govern appellate review of administrative orders. The original version of Section 120.68 provided in subsection (2) that "all proceedings for review shall be instituted by filing a petition" and in subsection (3) that "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…." Section 120.68(3), by its plain language and legislative history, was clearly intended to govern review of final administrative orders. Although government litigants are present in every case, the statute expressly states the petition does not create an automatic stay, and. there is no exception for a government litigant's petition for review (appeal).

The Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, March 9, 1974, provide insight into the intent behind the word "petition" in this statute:

> Because the term "certiorari" generally connotes discretionary review, the term "petition for review" will better describe appeals as of right from agency action. It would be desirable to allow reviewing courts to entertain all petitions for review

> without regard to the formalities of their title, and subsections (2) and (3) are intended to allow review of cases which may be wrongly denominated. The principal reason for prescribing one form of review is to make proceedings uniform…. The proposed provision will necessitate (and depend on) a change in Florida Appellate Rule 4.1, which now uses the term "certiorari" to label the judicial review of agency actions.

Reporter's Comments, reprinted in 3 England and Levinson, Florida Administrative Practice Manual, App. C at p. 3 F Ad 102 (1999). The Reporter's Comments are recognized as a primary source of legislative intent. 1 Florida Administrative Practice Manual, above, Section 1.05.

Contemporary cases show Section 120.68(3) applies to final appeals.

The First District Court of Appeal, which handles most appeals from state agency administrative orders under the APA, promptly recognized that the APA's provision for judicial review by petition should be honored, over the different provision for review by a discretionary "petition for writ of certiorari" in Florida Appellate Rule 4.1, because the Constitution gives the Legislature authority to prescribe the courts' powers of direct review of administrative action "by law." Yamaha Int'l Corp. v. Ehrman, 318 So. 2d 196 (Fla. 1st DCA 1975), citing Art. V, Section 4(b)(2), Florida Constitution. Thus the Court deferred to the Legislature's constitutional power to prescribe the process for initiating review of administrative orders by statute, and treated the difference in nomenclature as immaterial.

As the objectors note, other cases following enactment of the statute treated a "petition" as a notice invoking appellate review of final administrative action. Objectors' Comments p. 5 n. 3.

The new statute obviously conflicted with Florida Appellate Rule 5.12. Cases promptly arose in which the appellate Courts had to decide which should prevail, the statute or the rule. The First DCA repeatedly held that the statute prevailed over the rule, as an exercise of legislative power over administrative procedure and the rights of government as a party litigant in administrative actions. See Lewis v. Career Service Comm'n, 332 So. 2d 371 (Fla. 1st DCA 1976); City of Panama City v. PERC, 333 So. 2d 470 (Fla. 1st DCA 1976); and Duval Cty. School Board v. PERC, 346 So. 2d 1087 (Fla. 1st DCA 1977), all holding Section 120.68(3) precludes an automatic stay for review of administrative action, even though then-exiting Rule 5.12 allowed government appeals without bond. Importantly, each of these cases was a final plenary review on the merits that today would be commenced by a "notice" rather than a "petition."

1977 Rules of Appellate Procedure intended to follow APA statutes

In 1977, the Court's Advisory Committee proposed an overhaul of the appellate rules which the Court adopted. In the 1977 amendments to Rule 9.110, governing appeals from final orders of lower tribunals, the Committee

Notes cited Ehrman as authoritative and explained that the change in the nomenclature for filing an administrative appeal is not intended to be different from the statutory procedure, and that a "notice" under the newly adopted rule constitutes the "petition" contemplated by Section 120.68:

> 1977 Committee Note to Rule 9.110
>
> This rule works significant changes in the review of final administrative action. The former rules required that a traditional petition for the writ of certiorari be filed if supreme court review was appropriate, and the practice under the Administrative Procedure Act, section 120.68, Florida Statutes (Supp. 1976), has been for the "petition for review" to be substantially similar to a petition for the writ of certiorari. See *Yamaha Int'l Corp. v. Ehrman*, 318 So. 2d 196 (Fla. 1st DCA 1975). ***This rule eliminates the need for true petitions in such cases. Instead, a simple notice is filed, to be followed later by briefs. It is intended that the notice constitute the petition required in section 120.68, Florida Statutes (Supp. 1976).*** There is no conflict with the statute because the substance of the review proceeding remains controlled by the statute, and the legislature directed that review be under the procedures set forth in these rules. (e.s.)

In re Proposed Florida Appellate Rules, 351 So. 2d 981, 994 (Fla. 1977).

The intent was that a "notice" under the Rule is the "petition" under Section 120.68(3).[3]

[3] The 1977 Committee Note to Rule 9.100 explained that rule allows review of non-final administrative orders because "It was the opinion of the Advisory Committee that such right of review is guaranteed by the statute and is not dependent on a court rule, since Article V, Section 4(b)(2) of the Florida Constitution provides for legislative grants of jurisdiction to the district courts to review administrative action without regard to the finality

The 1977 Committee Note to Rule 9.310(b)(2) states that this rule "implements the Administrative Procedure Act, Section 120.68(3)." Standing alone, this statement would be consistent with the other Committee Notes and would give effect to Section 120.68(3), as repeatedly construed by the First DCA to mean there is no automatic stay.

However, the 1977 Committee Note then states that the new rule provides an automatic stay for public official or public body appeals without bond, and is intended to supersede Lewis, above, 332 So. 2d 371. This statement conflicts with the Committee Note language quoted above that the rules are intended to implement the statute. When this Court adopted new Rule 9.310(b)(2), the Committee Notes were published without any corrective action to eliminate the internal inconsistency.

Case holding Section 120.68(3) conflicts with Rule 9.310(b)(2)

After the adoption of Rule 9.310(b)(2), a case promptly arose in which the Court was asked to decide whether the statute or the newly adopted Rule would prevail. In City of Jacksonville Beach v. PERC, 359 So. 2d 578 (Fla. 1st DCA 1978) (also a final administrative appeal), the Court relied on the second statement in the 1977 Committee Note (mistakenly described as "Court's Commentary," id. at 578) to hold that the

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of that action." Thus the Advisory Committee felt the Legislature may constitutionally prescribe review of administrative orders by statute.

stay provision is procedural, so the new Rule prevails over Section 120.68(3). The Court was unable to harmonize the statute with the new rule, so it felt it had no choice but to hold the statute unconstitutional as a last resort. Obviously, if the Court felt it could avoid this constitutional ruling and reconcile the statute and the rule by adopting the interpretation that the objectors now offer, it would have done so.[4] However, the Court was bound by the statute's clear intent, confirmed by the Court's own prior rulings applying it to final administrative appeals. The absence of any effort to construe the statute as objectors now do clearly shows that everyone at the time understood the word "petition" in Section 120.68(3) meant proceedings for review of final administrative orders.

Finally, Jess Parrish Mem. Hosp. v. Laborers' Int'l Union, 397 So. 2d 989 (Fla. 1st DCA 1981), rev. den., 411 So. 2d 383 (Fla. 1981), held in a final administrative appeal governed by former Rule 5.12 (before the new rule took effect), that the statute controls so there was no automatic stay. The Court noted its concern that under the new rule, an automatic stay could produce mischievous results, if PERC orders are stayed and union elections delayed pending court review. Id. at 989-90.

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[4] Cf., *e.g.*, Lidsky v. Fla. Dept. of Insurance, 643 So. 2d 631, 634-35 (Fla. 1st DCA 1994) (whenever it is possible to do so, court will construe statute in such a manner as to avoid any constitutional invalidity).

Rules of statutory interpretation show conflict remains

The evolving nomenclature in the court rules for initiating appeals cannot change the intent of the statute to cover final administrative appeals. The general rule of construction is that words of a statute should be taken in the sense in which they were understood at the time the statute was enacted. State v. City of Jacksonville, 50 So. 2d 532, 536 (Fla. 1951). Moreover, this rule is subject to a qualification that when the statute is couched in broad, general and comprehensive terms and is prospective in nature, it applies to new situations, cases, conditions, things, subjects and methods coming into existence after the enactment that are of the same general class as those treated in the statute and can be reasonably said to come within the general purview, scope, purpose and policy of the statute, and there is nothing in the statute indicating a contrary intention. Id. (citing cases). Thus the term "petition" at the time the APA was enacted is the functional equivalent of a "notice" to appeal a final administrative order under current rules, so such appeals were intended to be covered, and are still covered now.

The objectors cite a different rule of statutory construction that re-enactment of a statute after a judicial interpretation is presumed to approve the judicial interpretation. The ACRC has no quarrel with this rule. To the extent it could apply, it supports the ACRC's position, not the objectors'

position. The flaw in the objectors' argument is that there is no court decision adopting their interpretation of Section 120.68(3). To the contrary, beginning with Lewis, above, 332 So. 2d 371, the Courts have interpreted the statute exactly as intended, to apply to appeals of final administrative orders. City of Jacksonville Beach, above, 359 So. 2d 578, did not interpret the statute narrowly as objectors advocate, and ultimately had no choice but to hold the statute unconstitutional ***because it is in conflict with Rule 9.310(b)(2)***. The Court interpreted the statute exactly right. The Legislature left the statute on the books, despite the First DCA's ruling that it is unconstitutional. The only logical inference from Legislative inaction is not acquiescence in the Rule, but that the Legislature hoped the Court would change the Rule to conform to the statute, or otherwise decide to give the statute precedence.

The objectors also contend that because the Legislature did not repeal Rule 9.310(b)(2) by a two-thirds vote under Fla. Const. Art. V, Section 2(a), that indicates the Legislature's approval of the application of the rule to provide for an automatic stay. This is not a proper analysis. The Legislature can only repeal rules, not modify or fine-tune them. Raymond v. State, 906 So. 2d 1045, 1051 (Fla. 2005). The Legislature apparently has no quarrel with Rule 9.310 or even subdivision (b)(2), except within the purview of the

two APA provisions, so a complete repeal would be unwarranted. The absence of repeal does not support any logical inference that the Legislature presently approves the application of the rule in all possible situations.

Subsequent amendment to Section 120.68(2)(a) does not resolve conflict

The objectors cite a different subsection of the statute, Section 120.68(2)(a), which 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," as showing the Legislature intended to differentiate between "petitions" and "notices of appeal." This language is inconclusive. It can just as easily imply the opposite, that the Legislature uses these two terms interchangeably. This sentence simply directs that the party initiating appellate review should satisfy the filing time and place requirements of the Court procedural rules. Subsection (2)(a) does not purport to override subsection (3), which specifically controls stays pending final review and has not been changed to reflect any different intent.

In sum, the text and history of Section 120.68(3) and the case law applying the statute show that the term "petition" refers to proceedings to review final administrative orders. Therefore there is conflict between

Section 120.68(3) and the Rule, and the question is squarely presented, whether the Court should amend the Rule to conform to the statute.[5]

II. Section 120.56(4)(d), Florida Statutes, conflicts with Rule 9.310(b)(2) (Responding to Objectors' Point III(d))

Section 120.56(4)(d), Florida Statutes (2007), provides:

> 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.

This statute governs cases in which an ALJ is the final administrative decision-maker, and declares an agency statement that constitutes a "rule" violates Section 120.54(1)(a) because it has not been adopted by the required rulemaking procedure (an "unadopted rule"). See Section 120.56(4) (procedure for challenging unadopted rule).

Once an ALJ declares such a statement invalid as an unadopted rule, Section 120.56(4)(d) plainly requires the agency to "immediately" discontinue "all" reliance on the statement or any substantially similar statement as a basis for agency action. This statute is contrary to Rule

[5] During consideration of this issue, the ACRC asked the Florida Bar Administrative Law Section for comments. (Triennial Report p. 20) The Section is composed of government and private lawyers, law professors and judges who have interest or expertise in the APA. No one from the Section commented that the Rule amendment was unnecessary because the statute and current Rule are consistent or made any other objection to the proposal.

9.310(b)(2); if the Rule's automatic stay were given effect, the statute could not be given "immediate" effect. The objectors argue that Section 120.56(4)(d) does not expressly deal with appeals, but the statute does not except orders that are appealed. Indeed, the specific requirement that the agency "immediately" discontinue "all" reliance on the invalid rule would be superfluous unless an appeal of the final order were available. The statute should not be construed in a manner that makes it superfluous.[6]

III. Legal and Policy Arguments for Amending Rule 9.310(b)(2) (Responding to Objectors' Point III(e))

Once conflict between the Rule and the APA statutes is recognized, the Court must decide whether to defer to the statutes or leave the conflict unresolved. Many policy arguments support amending the Rule to defer to the statutes, and the ACRC does not see any countervailing legal or policy reason for allowing the conflict continue unresolved.

In essence, the Court must consider why its rule of procedure should grant this special privilege to government litigants, and automatically stay government tribunals' final orders while a government litigant seeks review,

[6] Compare Section 120.54(3)(b), which provides that when an ALJ determines an adopted rule is invalid, such rule becomes void when the time for filing an appeal expires.

when the Legislature has waived such procedural favors and directed that that the lower tribunal's presumably correct order should be given effect, at least unless the appellant shows cause for a stay,.

The starting point for analysis is the Legislature's constitutional powers over administrative proceedings. The statutes are presumed valid. They are part of a comprehensive scheme in the APA to promote respect for the administrative tribunal and equality among litigants, and make the administrative process fair as a substitute for court process. The Legislature has the constitutional authority to delegate adjudicative proceedings to state agencies under legislatively prescribed standards and decide the litigants' procedural rights in such proceedings. See Art. V Section 1, Fla. Const.: "Commissions established by law, or administrative officers or bodies may be granted quasi-judicial power in matters connected with the functions of their offices." See also Art. V Section 4(b)(2), Fla. Const.: "District Courts of Appeal shall have the power of direct review of administrative action, as prescribed by general law." Thus there is a constitutional basis for statutes governing parties' procedural rights in administrative appeals.

The Legislature also has constitutional authority to control the duties and liabilities of local government bodies. See Art. VIII Section 1 (f) and (g), Fla. Const. (counties) and Art. VIII Section 2(b), Fla. Const.

(municipalities). All administrative litigants, including local governments as well as private litigants, are equally bound by the administrative procedures set forth in the statutes, subject to appeal to the courts.

In addition, the Legislature has constitutional power to waive sovereign immunity of governmental bodies. Art. X Section 13, Fla. Const. This power is relevant, because it appears the automatic stay is an outgrowth of sovereign immunity. Judge Stampelos' commentary shows the origin of the automatic stay is statutory. It appears that the stay was intended to protect the government's fiscal interest in not having to post a supersedeas bond to stay collection of money judgments during appeal, as an aspect of sovereign immunity. In this circumstance, an automatic stay generally did not cause irreparable harm to opposing parties, because the government can normally pay court-adjudicated financial obligations. However, if forced to pay the obligation before the appeal is resolved, the government may suffer unfair loss if the judgment is reversed, but the opposing party cannot repay it. Thus it made sense for government to have an automatic supersedeas on court adjudicated financial obligations that it can ultimately pay if required.

However, where the Legislature has waived sovereign immunity, state and local governments are bound by the waiver, even if they feel their fiscal interests are better served by immunity. Moreover, the fiscal policy

argument for a stay is irrelevant in cases where the government has no fiscal exposure, as in administrative cases deciding private rights under the police power, such as permits and licenses.

Indeed, the stated reason for the automatic stay is to protect government "planning level" functions" from having to post a supersedeas bond during appellate review. Corn v. City of Lauderdale Lakes, 415 So. 2d 1270 (Fla. 1982). The concept of "planning level" functions is taken from the law of sovereign immunity in tort, see id. p. 1272, citing Commercial Carrier Corp. v. Indian River Cty., 371 So. 2d 1010 (Fla. 1979). However, in administrative practice, the planning level decision is not the government litigant's position, but the considered position of the administrative tribunal whose ruling is the final action under legislatively delegated authority. The administrative order is presumed correct on appeal, and it is logical that the appellant should have the burden to seek a stay upon showing that the appeal has substantial merit (the appealed order is doubtful). However, if the administrative tribunal's order is automatically stayed, that defeats protection of "planning level" functions and thwarts, rather than furthers, the protection of "planning level" action, which is the conceptual purpose for an automatic stay under Corn.

It seems likely that the Legislature could direct that the administrative decision is presumed correct pending appeal, which is really no different than directing that the appellant must make a sufficient showing to obtain a stay. This is at least a mixture of substantive and procedural issues where the Legislative view merits deference under its constitutional powers. The objectors do not offer any constitutional argument why the Legislature should not be allowed to exercise its powers, including the power to waive sovereign immunity, to require local governments to request a stay, if it chooses to do so.

The objectors argue that it is unfair or unwise to allow agency heads, who are politically appointed and not always lawyers, to make final administrative decisions that are effective to bind them (the cities and counties) during the time of appellate court review. This is really an attack on the wisdom of the APA itself, and the multitude of substantive statutes that delegate administrative adjudicative authority to agency heads who are responsible to the elected state executive officers and the Legislature. Such attacks on the wisdom of statutes are generally reserved for political branches, not for Court procedural rulemaking. The Legislature can make cities and counties play by the same rules as everyone else in administrative proceedings.

The concern that the state agency heads are not necessarily lawyers makes no sense, because if the automatic stay were observed, that would simply substitute non-lawyer city or county officials' policy preferences for the decisions of the state agency heads, who are delegated the adjudicative power by law and whose decisions are presumed correct. Status as a lawyer (or even a trial judge) is hardly any guarantee of infallibility. State agency head decisions are informed by ALJs' recommended orders with legal analysis of a record, and agency heads are also subject to political and legal accountability that trial judges are immune from, which gives agency heads adequate information and incentive to follow the law in most cases.

If cities and counties find the administrative process objectionable, then they may ask the Legislature to allow court jurisdiction, or to grant them an automatic stay under the APA. It should not be the Court's function to grant special procedural privileges to government bodies that the Legislature does not think are appropriate.

These statutes are an integral part of a statutory scheme to make administrative procedures fair and even-handed, as a way to assure that private litigants receive fair treatment. The Court has deferred to procedural statutes that are integral parts of a statutory scheme. See St. Mary's Hospital, Inc. v. Phillipe, 769 So. 2d 961 (Fla. 2000) (upholding Section

766.212, Florida Statutes); Caple v. Tuttle's Design-Build, Inc., 753 So. 2d 49, 54 (Fla. 2000) (rejecting challenges to procedural statutes that are intertwined with laws protecting substantive rights).

In Wait v. Florida Power and Light Co., 372 So. 2d 420 (Fla. 1979), the Court held that a statute requiring a public body to promptly disclose public records in compliance with a court order despite appeal intruded on Rule 9.310(b)(2). This ruling concerned a purely judicial action (appeal from a trial court order), and is not precedent for an administrative action covered by the APA. Nonetheless, it still presented a close question. Three of the Justices - Sundberg, England and Adkins - dissented, stating that while an exercise of judicial discretion as to whether a stay should be imposed is a matter of practice and procedure, the statute fell in a "twilight zone" between substantive and procedural matters, and the general policy in the rule should yield to the specific policy of the statute. Id. at 425-26.

Later the Court recognized that the Legislature's policy was a better way to implement public records rights, and amended Rule 9.310(b)(2) to defer to the statute. The Florida Bar Re: Rules of Appellate Procedure, 463 So. 2d 1114 (Fla. 1985). There is no reason why the same deference should not be shown in this case to give effect to the statutory scheme in the APA.

The objectors argue that to deny the automatic stay exposes them to hardship in the form of extra litigation costs to file and support motions to institute a stay. This is also a policy argument for the Legislature. The Courts generally reject pleas that litigation costs and fees constitute irreparable injury – as in many types of cases dismissing petitions to review non-final orders.

Under the statute and the proposed amendment, the lower tribunal may balance the relative hardships of the parties, and the appellate Court can grant a stay if the lower tribunal does not. The lower tribunal or Court can recognize fiscal hardship as a reason to grant a stay in appropriate cases, but should not presume the government appellant will suffer hardship, or that the appellee will not. An automatic stay may severely injure an appellee, for example, where a permit, license, exemption or approval is delayed for a year or more pending appeal.[7] Because the government appellant is

[7] Cities and counties may unfairly use the automatic stay to extort concessions from opponents who cannot practically wait for the outcome of the appellate process. In an extreme example of abusive practice, City of Miami v. Cuban Vill-Age Co., 143 So. 2d 69 (Fla. 3d DCA 1962), the city appealed an injunctive order that the private party was entitled to a license, and while the appeal was pending, tried to arrest the private party for operating without a license. The city invoked Rule 5.12 to stay the injunctive order during appeal. The appellate court refused to honor such an unfair argument, and despite the Rule, prohibited the city from acting against the private party during the appeal. However, most appellees cannot show, at the outset of the appeal, the "compelling circumstances" required to override

normally under no obligation to compensate the appellee for the delay losses or litigation costs if the administrative order is affirmed, irreparable hardship may result.

The objectors' concern that the proposed amendment would deprive them of appellate review is simply incorrect. A stay is not a prerequisite to appellate review under Section 120.68(3). They may have to make a showing to get a stay, or choose to proceed with review but without a stay.

This is not a sudden shift in "political winds." Cf. Objections p. 35. The Legislature has kept Section 120.68(3) on the books for over 30 years as a fair policy. The Rule should defer to the Legislature's view with respect to stays of final agency decisions under the APA, because the Legislature has constitutional power to decide procedural litigation rights and duties of government bodies, including cities and counties, in administrative forums, which promotes fair and even handed litigation rights under the APA and fosters public confidence in the administrative process.

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the automatic stay. See St. Lucie Cty. v. North Palm Dev. Corp., 444 So. 2d 1133, 1135 (Fla. 4th DCA 1984) (requiring a showing of "compelling circumstances" to override the automatic stay).

IV. The proposed amendment does not conflict with Rule 9.190(e)(1) (Responding to Objectors' Point III(b)

The ACRC did not see any conflict between the proposed amendment to Rule 9.310(b)(2) and existing Rule 9.190(e)(1). The latter Rule states:

> 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)*** …. (e.s.)

Rule 9.190(e) simply defers to Rule 9.310(b)(2), so there is no logical possibility of conflict. If Rule 9.310(b)(2) is amended as proposed, the amended Rule will still provide for an automatic stay, except in cases governed by the APA, if the APA directs otherwise. The Legislature can carve out exceptions if it wants.[8] In such cases, if Rule 9.310(b)(2) is

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[8] For example, Assistant Attorney General Cathy Lannon pointed out to the ACRC that proceedings under the Florida Birth-related Neurological Injury Compensation (NICA) Law, § 766.301 *et seq*., Fla. Stat., are administrative proceedings under the APA (App. A attached). However, NICA awards are automatically stayed pending appeal by statute, and thus are not subject to the provisions of § 120.68(3). See § 766.311(2), Fla. Stat. (2007):

> (2) In case of an appeal from an award of the administrative law judge, the appeal shall operate as a suspension of the award, and the association shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined.

This specific statute normally controls, for proceedings within its scope, over the general provisions in § 120.68(3). Such proceedings would remain subject to an automatic stay under both Rule 9.190(e)(1) and amended 9.130(b)(2).

amended to defer to the terms of the APA, then Rule 9.190(e)(1) likewise defers to the terms of the APA.

If the Court thinks there might be confusion, then a conforming amendment to Rule 9.190(e)(1) can be adopted, *e.g.*, as suggested by the objectors, in their comments at p. 35 n. 14. However, this is not a reason to reject the proposed amendment to Rule 9.310(b)(2) in any case.

V. Objectors' Proposed Rule Amendment is not a Satisfactory Alternative as it fails to Recognize Current Statutes (Responding to Objectors' Point III (f)

The objectors suggest, as an alternative, that the Court should leave the conflicting language in Rule 9.310(b)(2), but add language that would recognize the Legislature's power to limit the scope of the automatic stay in the future. The alternative proposal ignores the problem that necessitated the Rule amendment in the first place, that the Legislature has already clearly stated its preference that deference should be afforded to the neutral administrative tribunal's order rather than to a city or county litigant's position that the tribunal rejected. The Courts have recognized this is what the Legislature intended. The Legislature has expressed its policy preference and needs no further invitation from the Court. See argument in Points I and II above. The Legislature has the constitutional power to regulate administrative procedure, and no rule amendment is necessary to

give the Legislature permission to do so. See Point III above. The ACRC and Board of Governors unanimously determined that a conflict exists between the Rule and Sections 120.68(3) and 120.56(4)(d), and recommended the proposed change to resolve the conflict. [9]

However, even if the Court should find there is no current conflict as the objectors argue, the ACRC believes that there would be benefit to clarifying the Rule to recognize the Legislature's constitutional power in regulating the administrative process, including stays of final administrative orders pending appeal, and overrule the First DCA decision in City of Jacksonville Beach, 359 So. 2d 578, which holds that the Legislature cannot constitutionally eliminate a government agency's automatic stay of administrative orders provided by a Court rule.

[9] As far as the wording of the amended Rule is concerned, the objectors argue that the ACRC's proposed amendment to the Rule does not adopt the same language as Section 120.68(3) and 120.56(4)(d). However, it would be unnecessarily cumbersome drafting to adopt identical language to these statutes. The objectors' alternate proposal does not track the statutory language either, apparently for the same reason.

Respectfully submitted on April 21, 2008.

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CERTIFICATE OF COMPLIANCE

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

/s/ J. Craig Shaw
J. Craig Shaw