Administrative Adjudication: Decisions Affecting Substantial Interests

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I. Introduction

This article explains the administrative adjudicatory process affecting "substantial interests" available under the Florida Administrative Procedure Act ("APA"), chapter 120 of the Florida Statutes. A substantial interest hearing,[2] also called a section 120.569 or 120.57 proceeding, begins when an agency takes some action with regard to a party. These hearings are adversarial in nature and bear many similarities to civil bench trials.

The APA sets the standards on how agencies take action on various matters. Once an agency takes an action that affects someone's substantial interests, that person can pursue an administrative hearing under the APA. Sections 120.569 and 120.57 are the primary sections addressing the procedures to be followed in these hearings. In addition to the APA, the Uniform Rules of Procedure ("Uniform Rules"), in Chapters 28-101 through 28-110 of the *Florida Administrative Code*, also apply. Depending on the subject matter or the governmental entity involved, there may be other administrative procedures that apply in lieu of or in addition to those in the Florida APA but lie outside the scope of this article.[3] In addition, many agencies have adopted exceptions to the Uniform Rules. To fully comprehend all the standards and processes governing one's hearing, careful review must be given to not just chapter 120 and the Uniform Rules, but also the agencies' statutes and rules.

A. *Types of Administrative Hearings*

Hearings affecting substantial interests are classified into two categories under the current version of section 120.57, "hearings involving disputed issues of material fact" and "hearings not involving disputed issues of material fact." *See*, §§ 120.57(1)-(2), Fla. Stat. (2020). In practice, these two types of hearings are commonly referred to as: (a) "formal hearings," referring to the trial-like

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[2] Formerly, such proceedings were called "120.57 hearings," since the main provisions of the Administrative Procedure Act appeared in section 120.57 of the Florida Statutes, before its amendment in 1996. *See*, § 120.57, Fla. Stat. (1995); Ch. 96-159, §§ 18-19, Laws of Fla. The APA was amended again, in 2016, to provide further procedures regarding rule agency rulemaking and challenges, as discussed further elsewhere in this Chapter. *See*, §§ 120.54, 120.55, 120.56, and 120.57, Fla. Stat. (2016); Ch. 2016-116, §§ 1-6, Laws of Fla.

[3] Attorneys may wish to refer to the other chapters of this *Treatise* specifically relating to the different permits, approvals, or enforcement actions, for guidance on the requirements that may apply in a particular case. For further discussion of administrative law in general, see the practice manual published by the Continuing Legal Education Committee of The Florida Bar, *Florida Administrative Practice* (12th ed. 2019).

evidentiary proceedings, and (b) "informal hearings" for proceedings not involving any issues of material fact, although these terms were removed from the APA in 1996.[4] *See, e.g.*, *Schafer v. Dep't of Bus. & Prof'l Reg.*, 844 So. 2d 757, 758 (Fla. 1st DCA 2003) (continuing to use the terms in question, holding that even when a party requests a formal hearing, an agency may proceed informally rather than refer the matter to Division of Administrative Hearings ("DOAH"), when material facts are not disputed), cited with approval by, *Lopez v. Dep't of Agric. & Consumer Servs, Div. of Licensing*, 305 So. 3d 591 (Fla. 3d DCA 2020).

Cases involving disputed issues of material fact generally are referred to the DOAH for a trial-like formal evidentiary hearing before an independent Administrative Law Judge ("ALJ" or "Judge"). The ALJ works for DOAH rather than the agency that referred the matter for hearing. After the formal hearing, the ALJ sends a recommended order to the referring agency for a final decision by the agency ("Final Order.")

Exceptions to this procedure exist, such that DOAH has Final Order authority, regarding the following matters:

- Proposed, existing or unadopted rule challenges under § 120.56,[5] Fla. Stat.;
- Attorney's and costs for small business parties under § 57.111, Fla. Stat.;
- Attorney's fees when determined that the facts and/or law did not support the claims or defenses made pursuant to § 57.105, Fla. Stat.;
- Attorney's fees and costs to prevailing parties when matters are brought for improper purpose pursuant to § 120.595, Fla. Stat.;
- Florida Department of Environmental Protection requests for administrative penalties under § 403.121, Fla. Stat.;
- Florida Fish and Wildlife Conservation Commission requests for imposition of penalties under § 379.502, Fla. Stat. for violations of § 379.501, Fla. Stat.;
- Election cases pursuant to Chapters 104 and 106, Fla. Stat.;
- Establishment of paternity and or child support establishment under § 409.256, Fla. Stat.;
- Specified matters involving charter schools under § 1002.33, Fla. Stat., other than non-renewal or termination of charter schools;
- Medicaid third party recovery cases under § 409.910, Fla. Stat.;
- Neonatal Injury Compensation Act (NICA) cases under § 766.304, Fla. Stat.;
- Florida Department of Transportation contract crimes under § 337.165(2)(d), Fla. Stat.;
- Discriminatory vendors under § 287.134, Fla. Stat.;
- Summary proceedings under §120.574, Fla. Stat.;
- Continued involuntary placement of patients in mental health facilities under the Baker Act, under § 394.467, Fla. Stat.; and
- Exceptional education cases brought under the Federal Individuals with Disabilities in Education Act (IDEA) under § 1003.57, Fla. Stat.

[4] On November 1, 1996, The APA was substantially revised, changing many long-standing concepts such as Hearing Officer to "ALJ;" provisions on rule challenges; and the standards to declare a rule invalid.
[5] Attorneys may wish to refer to the "Rule Challenges" section of this *Treatise* for further discussion of rule challenges.

Section 120.57 was amended in 2016 to provide that rule challenges may be pled by the Petitioner or as an affirmative defense in substantial interest proceedings and may be consolidated with substantial interest proceedings. When rule challenges are part of a consolidated proceeding involving one or more other (i.e., non-rule) agency decisions, the ALJ's final order authority generally extends to the subject matter of the rule challenge but not to the agency's other decisions. *See*, *e.g.*, *Fla. Standardbred Breeders & Owners Assoc. v. Dep't of Bus. & Prof'l Reg.*, DOAH Case No. 18-6339 (DOAH R.O. Mar. 12, 2020; DOAH F.O., Mar. 12, 2020; DBPR F.O., June 8, 2020).

Proceedings that do not involve any disputed issues of fact are not sent to DOAH. Such proceedings are typically referred to as "informal proceedings." Instead, section 120.57(2) requires the agency proposing the action to give all affected parties an opportunity to present written or oral "evidence" and proceed quickly to a final decision. If the matter truly involves no issue of fact, such "evidence" might consist of arguments and any documents or testimonial statements required to explain the undisputed facts on which the arguments were based, or "mitigating" testimony and documents offered in an enforcement proceeding to reduce a penalty.[6]

It is important to note that if a disputed issue of fact arises during such an informal proceeding, the petitioner must affirmatively demand that the informal proceeding be terminated and that the matter be referred for a formal administrative proceeding. Failure to do so waives the petitioner's right to a formal proceeding, and the existence of a disputed issue of fact cannot be raised for the first time on appeal. *Goodson v. Florida Dept. of Bus. & Prof'l Reg., Div. of Real Estate*, 978 So. 2d 195, 196 (Fla. 1st DCA 2008).

II. Jurisdictional Issues in Administrative Hearings

To commence an administrative proceeding to challenge an agency decision, a party[7] must file a petition for hearing. Although such a petition must comply with numerous requirements imposed by statute and rule, this section of the article focuses on the jurisdictional requirements that allow a hearing to proceed. As explained below, the requirements of a "decision" determining "substantial interests" involve the timing and nature of the action proposed by an agency, as well as the standing of the petitioner to challenge that action.

A. *Agency Action*

The first requirement for any petition for an adjudicatory hearing is that the agency decision must have been a final agency action but for the filing of the petition. Many day-to-day decisions of agency staff are not final, but rather are preliminary and cannot provide a basis for filing a petition for hearing. They fall within the category of "free-form proceedings," the "informal process between the time an application is filed, and the notice of proposed agency action is issued." *See*, *Friends of the Everglades. v. State Dep't of Cmty. Affairs*, 494 So. 2d 262 (Fla. 1st DCA 1986)

[6] For more information on proceedings not involving issues of fact, which differ from the proceedings discussed here, see the practice manual on administrative law cited in footnote 3 above.

[7] "Party" is a term defined in section 120.52(13) of the Florida Statutes. Ordinarily, an attorney files the petition for the party. Although this article addresses members of The Florida Bar, the APA authorizes non-lawyers, referred to as "qualified representatives," to represent parties in these proceedings upon meeting certain criteria. *See*, *Fla. Pub. Emps. Council 79 v. Jacksonville Emps. Together*, 738 So. 2d 489 (Fla. 1st DCA 1999); § 120.57(1)(b), Fla. Stat. (2020); Fla. Admin. Code R. 28-106.106.

("until an application for a license or permit has been filed and notice of proposed agency action has been issued, there is no right (under than section 403.12(5), Florida Statutes) on behalf of citizens to a section 120.57 hearing"); *now*, § 403.412(5) Fla. Stat. ("In any administrative, licensing, or other proceedings . . . a citizen of the state shall have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state."). *Greene v. State Dep't of Nat. Res.*, 414 So. 2d 251 (Fla. 1st DCA 1982) (interpreting and applying § 403.412(5)).

As stated by the court in *Capeletti Bros. v. State Dep't of Transp.*, 362 So. 2d 346, 348 (Fla. 1st DCA 1978), *cert. denied*, 368 So.2d 1374 (Fla. 1979):

> "Free-form" proceedings are nothing more than the necessary or convenient procedures, unknown to the APA, by which an agency transacts its day-to-day business . . . Without summary letters, telephone calls, and other conventional communications, the wheels of government would surely grind to a halt. Yet the agency's rules must clearly signal when the agency's free-form decisional process is completed or at a point when it is appropriate for an affected party to request [a hearing]. In other words, an agency must grant affected parties a clear point of entry, within a specified time after some recognizable event in investigatory or other free-form proceedings, to formal or informal proceedings under Section 120.57.

Thus, the processing of applications and other agency procedures leading up to the announcement of a proposed decision lies outside the formal process of administrative adjudication. *J.H. Williams Oil Co. v. Dep't of Envtl. Prot.*, 707 So. 2d 904 (Fla. 2d DCA 1998) (case was unripe despite agency's inordinate delay in rendering decision on a request for reimbursement). But note that if an agency has made a sufficiently final decision to give rise to a right to hearing, the failure of the agency to give affected persons any notice of such a right will not preclude them from filing a petition once they learn of the action and their right to a hearing. *See*, *Friends of Lake Hatchineha, Inc. v. Dep't of Envtl. Prot.*, 580 So. 2d 267 (Fla. 1st DCA 1991). (The third party had a right to file petition challenging letter stating department's concurrence that particular driveway construction was exempt from dredge-and-fill permitting requirements, despite department's position that its acknowledgment of the applicability of the exemption did not constitute agency action and provided no basis for requesting a hearing).

Courts often discuss the nature and finality of the decision in terms of "agency action," but practitioners must take care to distinguish between the finality of an agency action required for filing a petition from the "final agency action" required as a basis for judicial review. "Agency action" is defined in section 120.52(2), as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request made under section 120.54(7) [Petition to initiate rulemaking]." Most administrative adjudication involves either a challenge to an agency order or an agency's attempt to enforce its order through an administrative complaint. The statute sheds further light on this issue by defining "final order" as "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. A final

order includes all materials explicitly adopted in it. The clerk shall indicate the date of filing on the order." § 120.52(7), Fla. Stat. (2013).

Such a final order is defined as a "final agency action" that is considered a sufficient basis for judicial review, under section 120.68. Such "final agency action" differs from the finality requirement for filing a petition for an administrative hearing. The finality required for a petition is that the agency has taken or proposed an action that will automatically become final if notice of the action is given and no petition is filed within the allowed time. The filing of a petition challenging a decision reverts a "final" action into a proposed agency action, under cases interpreting former section 120.57 (now codified at section 120.569(2)(a)). *See, e.g.*, *Capeletti Bros.*, 362 So. 2d at 348. After the administrative proceedings commenced by the petition resulting in a new final decision by the agency, the agency action is final within the meaning of section 120.68 and a party may file a notice of appeal and obtain judicial review.[8]

B. *Point of Entry and Notice of Rights*

In the context of environmental and land use law, agencies are required to provide a "notice of rights" to persons potentially affected by a proposed action. The notice of rights details the opportunity and requirements for obtaining a hearing, including the deadline, the place for filing a petition, and the content required for any petition. Regardless of whether the agency has called its decision final, however, if a person whose substantial interests would be affected has not received notice of the action and of a right to a hearing, the order in most cases will *still* be subject to possible administrative challenge. Accordingly, when the option to use publication notice is available, the prudent practitioner should consider encouraging the client to publish notice of the agency's intent to grant a permit, particularly for larger projects, to ensure that the window for affected persons to challenge the permit will close on a date certain, rather than simply relying on a mailed notice. *See*, *e.g.*, R. 62-110.106(10), F.A.C. (applicant's option to publish notice for FDEP final agency action).[9] *See*, *Accardi v. Dep't of Envtl. Prot.*, 824 So. 2d 992, 995 (Fla. 4th DCA 2002) (reversing agency's dismissal of petition, in part because allegation that petitioners had never received agency's mailed notification letter raised a disputed issue of fact); *Wentworth v. Dep't of Envtl. Prot.*, 771 So. 2d 1279, 1280-81 (Fla. 4th DCA 2000) (petition was timely because petitioners did not receive the mailed notice and disputed permittee's right to a build dock as soon as they had actual notice); *see also*, *Friends of Lake Hatchineha*, 580 So. 2d at 269, 271-72 (implicit); *Capeletti Bros*., 362 So. 2d at 348-49; and *Gardner v. Sch. Bd. of Glades Cty.*, 73 So. 3d 314, 316–17 (Fla. 2d DCA 2011) (where a school board failed to provide a disciplined

[8] If no petition is filed within the time allowed for filing a petition has expired, the proposed action becomes final but not appealable by any person who had notice of it because of the failure to exhaust administrative remedies, unless grounds exist for the petitioner to make a claim for equitable tolling. *See*, *e.g.*, *Machules v. Dep't of Admin.*, 523 So.2d 1132, 1134 (Fla. 1988) ("Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."); *Pro Tech Monitoring, Inc. v. State, Dep't of Corr.*, 72 So.3d 277, 280 (Fla. 1st DCA 2011); and *see*, *Williams v. Dep't of Corr.*, 156 So.3d 563, 565 (Fla. 5th DCA 2015) ("The doctrine of equitable tolling can be applied to extend an administrative filing deadline."); and *see also*, R. 28-106.111(4), F.A.C. ("Any person who receives written notice of an agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.")

[9] For statutory requirements related to publication of legal notices, see sections 50.011 and 50.031, Fla. Stat. 1995). In other words, an inadequate written notice of rights does not make what would otherwise be a final action non-final. *Gardner*, 73 So. 3d at 316-17.

teacher of written notice of rights to administrative review and the associated relevant time limits, the deadline to initiate administrative process was tolled and the teacher retained the right to file a petition for an administrative hearing, holding that the affected party must receive sufficient notice to commence running of the time period to seek administrative review) (citing *Henry v. Dep't of Admin., Div. of Retirement*, 431 So.2d 677, 680 (Fla. 1st DCA 1983)). In addition, a notice of rights that is inadequate or does not fully apprise a party of its rights or timeframes will not trigger the commencement of the administrative process, and therefore, the order accompanying those rights will also be deemed defective. In these cases, courts have held that such a defective notice of rights did not start the time clock for filing a petition. *Latin Express Service, Inc. v. Dep't of Revenue*, 660 So. 2d 1059, 1060 (Fla. 1st DCA

C. *Substantial Interests: Standing Requirements Under the Florida APA*

1. THE AGRICO STANDING TEST

In general, the substantial interests requirement necessary to petition for a hearing under section 120.569 must relate to the category of matters regulated or protected by the statutes and rules under which the agency has taken or proposes to take in the action being challenged.[10] An applicant for a permit or other approval will always have a substantial interest in the issuance of the permit or approval and thus have standing to challenge a denial. *See*, *Sakelson v. Dep't of Envtl. Prot.*, 790 So. 2d 1206 (Fla. 2d DCA 2001) (even a former owner and holder of a lease would have the standing to challenge a denial of a modification of a lease and the subsequent termination of a lease upon the showing that a petitioner still had an interest in the lease at the time of the agency's decision) and *see also*, *Wollard v. Metro. Dade County*, 234 So. 2d 719, 720 (Fla. 3d DCA 1970) (an application for a zoning change initiated by seller of property could be continued by purchaser and a challenge of the denial by certiorari could be brought jointly by seller and purchaser). In order for a third party (non-applicant) to have standing to challenge the issuance of an environmental permit, the petitioner must show that the agency's proposed issuance of the permit would adversely affect the environmental interests of the petitioner and that those interests are substantial.

Agrico Chem. Co. v. Dep't of Envtl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981), *review denied*, 415 So. 2d 1359, 1361 (Fla. 1982), sets forth the two-part test for third-party standing used in Florida courts. Under *Agrico*, the petitioner must show that: (1) the individual will suffer injury in fact which is of sufficient immediacy to entitle said individual to a hearing and 2) the individual's substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test addresses the degree of injury. Recent Florida appellate decisions interpret this standard.

In short, for a third-party to demonstrate standing to challenge agency action in an administrative proceeding, the evidence must prove that the petitioner has substantial rights or interests that reasonably could be affected by the agency's action. *See*, *Bluefield Ranch Mitigation Bank Tr. v. S. Florida Water Mgmt. Dist.*, 263 So. 3d 125, 128 (Fla. 4th DCA 2018) ("It is well established that mere economic interests and the general interests of citizens are insufficient to

[10] A full discussion of standing requirements under the Florida APA is beyond the scope of this article, but this section provides an overview of the standing requirements in the APA. Understanding the term "substantial interests" in the context of environmental and land use law is essential to practicing in this area. *See Agrico Chem. Co. v. Dep't of Envtl. Prof'l Reg.*, 406 So. 2d 478 (Fla. 2d DCA 1981).

establish standing.") (citing *Mid-Chattahoochee River Users v. Fla. Dep't of Envtl. Prot.*, 948 So.2d 794, 796-99 (Fla. 1st DCA 2006)); *City of Sunrise v. S. Fla. Water Mgmt. Dist.*, 615 So.2d 746, 748 (Fla. 4th DCA 1993)). *St. Johns Riverkeeper, Inc. v. St. Johns River Water Mgt.*, 54 So. 3d 1051, 1054 (Fla. 5th DCA 2011) (quoting § 403.512(5) Fla. Stat. (2020) ("A citizen's substantial interests will be considered to be determined or affected if the party demonstrates it may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter. No demonstration of special injury different in kind from the general public at large is required. A sufficient demonstration of a substantial interest may be made by a petitioner who establishes that the proposed activity, conduct, or product to be licensed or permitted affects the petitioner's use or enjoyment of air, water, or natural resources[.] ")*; Palm Beach County Envtl. Coalition v. Dep't of Envtl. Prot.*, 14 So. 3d 1076, 1078 (Fla. 4th DCA 2009) (to show standing, third-party need only establish that it "'could reasonably be affected by . . . [the] proposed activities.'") (*quoting Peace River/Manasota Reg'l Water Supply Auth. v. IMC Phosphates Co.*, 18 So. 3d 1079, 1083 (Fla. 2d DCA 2009) (standing is demonstrated where petitioner is "possessed of a legal right to withdraw water from the Peace River [the water body whose integrity would be challenged by the government action]," because the petitioner "inarguably ha[d] a substantial interest in the river's environmental integrity, and this interest could be injured by [the contemplated] changes[.]"); *but see Friends of Matanzas, Inc. v. Dep't of Envtl Prot.*, 729 So. 2d 437 (Fla. 5th DCA 1999); *City of Sunrise v. S. Fla. Water Mgmt. Dist.*, 615 So. 2d 746 (Fla. 4th DCA 1993) (no standing was established where residents (petitioners) would not be affected by or asked to pay for proposed construction of sewer and water lines along U.S. 1, SR 206 and Interstate 95).

The second aspect of standing deals with the nature of the injury. Besides showing that the agency decision will cause such an "injury in fact," affecting petitioner's substantial interests, the petitioner must also show that the interests are of the kind that the proceeding was meant to protect - i.e., that they fall within the "zone of interests" protected by the enabling statute for the proceeding. *See AmeriSteel Corp. v. Clark*, 691 So. 2d 473, 478 (Fla. 1997) (there was no standing where petitioner's claimed interest in the case was not the "kind designed to be protected" by the proceedings). *But see Gregory v. Indian River Cty.*, 610 So. 2d 547 (Fla. 1st DCA 1992) (stating that responsibility of court is to "analyze the appropriate purpose and scope of the proceeding, the type and nature of the injury, as well as the reasons for the *Agrico* test"; holding that property owner had standing to intervene in proceeding on dredge-and-fill permit sought by the county, because the issue of the extent of wetlands on present owner's property and amount of mitigation required for county's permit could affect owner's use of property that would remain after the county obtained portion of property needed for the permit).

It has been stated in environmental cases that "mere economic interests and the general interests of citizens are insufficient to establish standing." *Bluefield Ranch Mitigation Bank Tr. v. S. Florida Water Mgmt. Dist.*, 263 So. 3d 125, 128 (Fla. 4th DCA 2018) (citing *Mid-Chattahoochee River Users*, 948 So.2d at 796-99; *City of Sunrise v. S. Fla. Water Mgmt. Dist.*, 615 So.2d 746, 748 (Fla. 4th DCA 1993)).

2. ASSOCIATIONAL STANDING – THE FLORIDA HOME BUILDERS TEST

Associations and trade organizations have been determined to have standing, as a group, in administrative proceedings. In order for an association to prove standing under the APA, they must demonstrate the following: 1) that a substantial number of its members, although not

necessarily a majority, are substantially affected by the agency action; 2) the matter to be challenged is within the association's general scope of interest and activity; and 3) the relief requested must be of the type appropriate for the association to receive on behalf of its members. *Fla. Home Builders Assoc. v. Dep't of Labor and Employment Sec.*, 412 So. 2d 351, 353-54 (Fla. 1982); *Florida League of Cities v. Dept. of Envtl Reg*., 603 So. 2d 1363 (Fla. 1st DCA 1992); *Friends of the Everglades, Inc. v. Bd. of Trustees of Int'l Imp. Tr. Fund*, 595 So. 2d 186, 188 (Fla. 1st DCA 1992).

While there is no strict definition of what constitutes a "substantial number" of members for purposes of the first prong of the test, cases in which associations were determined to lack standing for failure to satisfy the first prong of the *Florida Home Builders* test are instructive. In *Protect Key West and the Florida Keys, Inc. v. Monroe Cty*, 2009 WL 1097830, at *23 (DOAH R.O. Apr. 20, 2009; *adopted in toto* F.O. June 9, 2009), the ALJ concluded that only about 13 members, out of a total of 230, or slightly more than five percent, did not satisfy the standing test. See also, e.g., *Lambou v. Dept. of Envtl Prot.*, 2003 WL 21467299, at *25 (DOAH June 24, 2003; F.O. Sept. 22, 2003) ("less than ten percent of the County membership [of the Sierra Club] can hardly be considered to be substantial").

The Florida Supreme Court reasserted its preference for an expanded view of associational standing in administrative proceedings in *NAACP, v. Fla. Bd. of Regents,* 863 So. 2d 294, 300 (Fla. 2003). There, the Court stated that the individual members of the association are not required to participate in the proceeding, but rather that the substantial impact must be demonstrated on the members in general. The Court also rejected a requirement that to prove associational standing a group must prove that one of its members would actually prevail on the merits.

3. SPECIAL STATUTORY REQUIREMENTS – SECTIONS 163.3184, 163.3125, 380.07, AND 403.412

In addition to the above well-settled standing tests, certain statutes may also establish specific standing requirements under section 120.569. This results from the different categories of the definition of "party" in section 120.52(13). There are 120.52(13)(a) parties - individuals whose "substantial interests" will be determined; and there are 120.52(13)(b)-(d) parties - individuals who have the right under a rule, statute or the constitution to participate in a proceeding and thus do not have to show "substantial interests." The most salient statutes that expressly grant standing in the environmental and land use context are sections 163.3184, 163.3215, 380.07 and 403.412 of the Florida Statutes, all of which have been significantly amended since the last update to this article.[11]

[11] Note, however, that chapter 163 imposes requirements that a petitioner must meet before challenging a land development regulation as being inconsistent with the comprehensive plan (under section 163.3184). Specifically, the petitioner must not only be impacted but must also have submitted oral or written comments, recommendations or objections to the local government during the time period beginning with the transmittal hearing and ending with the adoption of the plan or plan amendment. *See*, *Veal v. Escambia Cty*, 773 So. 2d 625 (Fla. 1st DCA 2000) (upholding ALJ's dismissal of petition for failure to file formal and factually detailed petition with local government at least thirty days before filing with DCA under section 163.3213(3); mere notice letter did not suffice). The presuit notice requirement for challenging a development order under section 163.3125 was deleted in 2002. Ch. 02-296, 2002 Fla. Laws § 10.

Section 163.3184 sets forth the methodology for a petitioner to challenge various types of comprehensive plan amendments and defines the procedures for adoption and compliance criteria for various plan amendments. *See*, *e.g.*, *Semmer v. Lee Cnty*, 2021 WL 880890, at *26, Case No. 20-3273GM (DOAH R.O. Mar. 4, 2020) (finding the plan amendment not "in compliance" with Community Planning Act as violative of statutory density standards in coastal high hazard area). Section 163.3125 provides that a petitioner may challenge development orders as inconsistent with the adopted comprehensive plan by way of petition for declaratory or injunctive relief.[12]Section 380.07 provides standing requirements for appealing a local government decision on a development of regional impact or in an area of critical state concern. That statute enumerates the parties that may file an administrative appeal to Florida Land and Water Adjudicatory Commission (FLAWAC). The provision limits standing to the owner, the developer or the state land planning agency - currently the Department of Economic Opportunity). *See*, *Sarasota Cnty v. Beker Phosphate Corp.*, 322 So. 2d 655 (Fla. 1st DCA 1975) (county had no standing because it was not enumerated in statute); *cf. Suwannee River Area Council v. DCA*, 384 So. 2d 1369 (Fla. 1st DCA 1980) (there was no standing to challenge a binding letter-decision for persons not enumerated in chapter 380); *South Fla. Reg'l Planning Council v. Div. of State Planning*, 370 So. 2d 447 (Fla. 1st DCA 1979), *cert. denied,* 381 So. 2d 770 (Fla. 1980) (same); *but see*, *Edgewater Beach Owners Ass'n, Inc. v. Bd. of Cty Com'rs of Walton Cty*, 645 So. 2d 541, 543 (Fla. 1st DCA 1994) ("Appellant is an 'owner' whose land (retention pond) would be 'developed' by appellee's building activities. That is, the 'intensity' of the use of the retention pond would increase beyond its current use[.]"). When an appeal involves issues of material fact, the Commission follows the practice of most agencies in referring the matter to DOAH for hearing and this same provision gives petitioners establishing their identity as one of the parties enumerated in section 380.07(2) automatic standing for the DOAH proceeding under section 120.569.

Similarly, section 403.412 of the Florida Statutes provides for automatic standing once the petitioner makes the requisite allegations set forth in the statute. Specifically, section 403.412(5) states that any citizen shall have standing to intervene in any administrative or licensing proceeding authorized for environmental protection under state law by filing a verified complaint alleging that the activity to be approved will cause pollution or will harm the environment including natural resources.[13] The Florida legislature amended § 403.412 in 2002, making clear that intervention is the proper avenue for third-parties to stake their interest in the outcome in these administrative proceedings. *But see Wildlife Fed'n v. Dep't of Envtl. Reg*., 390 So. 2d 64 (Fla. 1990) (holding that once a petitioner made the requisite allegations of citizenship and the causation of environmental harm, no further showing had to be made for standing to commence an adjudicative proceeding); *Cape Cave Corp. v. Dep't of Envtl Reg*., 498 So. 2d 1309 (Fla. 1st DCA 1986), *review denied*, 509 So. 2d 1117 (Fla. 1987); *ManaSota-88 v. DER*, 441 So.2d at 1111). To that end, citizens must establish their standing under sections 120.569 and 120.57, to commence an adjudicative hearing although the amendment added that they may do so (i.e., may show that their substantial interests are affected) by alleging that they "may suffer an injury in fact which is of sufficient immediacy and is of the type and nature intended to be protected by this chapter" (i.e., chapter 403 of the Florida Statutes), which may be established by showing "that the proposed activity . . . affects the petitioner's use or enjoyment of air, water, or

[12] This topic is further discussed elsewhere in this Treatise.

[13] Environmental groups incorporated in Florida for at least one year before the application (not the petition) was filed may require the commencement of a proceeding, so long as it has at least twenty-five members residing in the county where the activity at issue is proposed. *See*, § 403.412(6), Fla. Stat. (2020).

natural resources protected by this chapter." *See* § 403.412(5). Finally, the amendment also provided that a citizen may commence an adjudicative proceeding in any matter related to a federally delegated or approved program by meeting the federal "case or controversy" requirements for judicial standing. *See* § 403.412(7). The showing required by this latter provision, of course, is a far cry from automatic standing. Section 403.412 was amended again in 2020 to clarify that local governments cannot grant legal rights that are enforceable under section 403.412 unless authorized in general law or specifically granted the power to do so by the Constitution of the State of Florida.

It is important to note that section 403.412 does not grant standing to file a petition involving non-permitting or non-licensure matters as the court articulated in *Conservation All. of St. Lucie Cty, Inc. v. Florida Dept. of Envtl Prot.*, 144 So. 3d 622, 624 (Fla. 4th DCA 2014). In that case, the Court affirmed the ALJ's dismissal of the non-profit group's petition seeking to challenge FDEP's settlement of an enforcement matter against the owners of contaminated property. The Court stated that section 403.412 "is clearly premised upon an application for the permit, license, or authorization that the complaining party seeks to challenge. This case . . . involves a third-party challenge to a settlement agreement. Accordingly, we hold that Appellants do not have standing to challenge the settlement agreement under section 403.412[.]" *Id*., at 624-25.

III. How to Properly File an Administrative Petition

If a petition is not properly drafted, agencies are likely to dismiss such petitions with leave to amend under the mandates in section 120.569(2)(c) and the Uniform Rules. R. 28-106.201, Fla. Admin. Code. Although this requirement may not be followed uniformly, practitioners should not expect much leniency on the pleading requirements. *Compare Kelly v. Dep't of Children & Fam. Servs.*, 824 So. 2d 941 (Fla. 3d DCA 2002) (requiring the agency to grant pro se petitioner hearing where petitioner's letter disputed the agency's position but did not formally "request" a hearing), *with Cann v. Dep't of Children & Fam. Servs.*, 813 So. 2d 237 (Fla. 2d DCA 2002) (petition filed one day late had to be dismissed under the mandate of the 1998 amendment to section 120.569(2)(c)). The right to at least one dismissal without prejudice is limited under section 120.569(2)(c), such that a petition which is conclusively defective on its face may be dismissed with prejudice at the outset if the defect is not curable.

In order to request a hearing to challenge the agency's proposed action, a person whose substantial interests will be affected by the action must file "a petition or request" with the clerk of the agency. *See*, § 120.569(2)(a), Fla. Stat. (2020); R. 28-101.001(2)(d)-(e); and 28-106.104(1), Fla. Admin. Code. The initial pleading must contain a caption showing the style of the proceeding, the docket, case or file number, if any, the name of the party on whose behalf the pleading is filed, the name, address, any e-mail address and phone number of the party filing the pleading in addition to a certificate of service in compliance with subsection (4) of the rule. R. 28-106.104(2) and (4). Because the first pleading is a petition, the filing party is a petitioner, and the challenged agency is a respondent. If a third party challenges the issuance of a permit, the petition should name the permit applicant as a co-respondent along with the agency. The petition is filed with the agency's clerk and not DOAH, unless the APA specifically requires such filing. *Compare* § 120.569(2)(a) (requiring substantial interest petitions to be filed with the agency clerk, *with* § 120.56(1)(c), Fla. Stat. (2020) (requiring rule challenge petitions to be filed directly with DOAH, not the agency). It is necessary to check the procedural rules of the pertinent agency to

determine if any exceptions to the Uniform Rules have been approved that would affect the format or filing of the petition. Note that section 120.54(5)(b)(4) of the Florida Statutes similarly sets forth and mandates the categories of content required for a petition as recited in the Uniform Rules. *See*, R. 28-106.201. Also, if an issue is not raised in the initial petition, it may not be raised for the first time on appeal. Therefore, many petitioners include numerous allegations in the initial petition. *See*, *e.g.*, *Cole Vision Corp. v. Dep't of Bus. and Prof. Reg*., 688 So. 2d 404 (Fla. 1st DCA 1997).

A. *Pleading Requirements*

Rule 28-106.201 of the *Florida Administrative Code* specifies the proper content for an administrative petition. The term "petition" includes any document that requests an evidentiary proceeding and asserts the existence of a disputed issue of material fact. R. 28-106.201(1), Fla. Admin. Code. In addition to the allegations in the body of the petition (discussed below), the petition must contain a certificate of service, be printed or typed on white paper measuring 8½ by 11 inches and comply with the filing requirements of the Uniform Rules or pertinent exceptions for a particular agency, as appropriate. *See*, *e.g.*, R. 28-106.104(4), (6), Fla. Admin. Code.

For hearings involving disputed issues of material fact, petitions must contain the following content:

(a) The name and address of each agency affected and each agency's file or identification number, if known;
(b) The name, address, any e-mail address, any facsimile number, and telephone number of the petitioner, if the petitioner is not represented by an attorney or a qualified representative; the name, address, and telephone number of the petitioner's representative, if any, which shall be the address for service purposes during the course of the proceeding; and an explanation of how the petitioner's substantial interests will be affected by the agency's determination;
(c) A statement of when and how the petitioner received notice of the agency's decision;
(d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
(e) A concise statement of the ultimate facts alleged including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
(f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes; and
(g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's proposed action.

R. 28-106.201(2), Fla. Admin. Code.

Although a petition that fails to meet these requirements is subject to a motion to dismiss, the first dismissal must be without prejudice, "unless it conclusively appears from the face of the

petition that the defect cannot be cured." *See*, § 120.569(2)(c), Fla. Stat. (2020); *see also McIntyre v. Seminole Cty Sch. Bd.*, 779 So. 2d 639 (Fla. 5th DCA 2001) (upon dismissing a petition, the agency must provide specific findings, conclusions, and reasons for the dismissal in the order and allow the affected party to amend the petition).

For petitions involving no disputed issues of fact, the requirements of rule 28-106.301(2) are similar, except they include a required explanation of how the petitioner's substantial interest will be affected by the agency decision and a statement that no material facts are in dispute. Practitioners should be aware that a request for an "informal" hearing or a failure of the petition to assert a material issue of fact may be deemed a waiver of the right to an evidentiary hearing. *See*, *Stueber v. Gallagher*, 812 So. 2d 454, 456 (Fla. 5th DCA 2005); *Fabry v. Dep't of Health and Rehab. Servs.*, 703 So. 2d 502 (Fla. 5th DCA 1997); *but see*, *Meller v. Fla. Real Estate Comm'n*, 902 So. 2d 325, 328 (Fla. 5th DCA 2005) (holding that where a disputed issue of fact existed and there was no record waiver of right to formal hearing, petitioner was entitled to a formal hearing), *contra.*, *Rosenzweig v. Dep't of Transp.*, 979 So. 2d 1050, 1056 (Fla. 1st DCA 2008) (rejecting *Meller* to the extent it can be read to mean that a party may raise the issue of failure to grant a formal hearing without making such a request before the agency). If an agency does hold a hearing on questions of law and the petitioner then specifically requests an evidentiary hearing, the agency should dismiss the first petition and allow the petitioner to amend it; if the amended petition then complies with rule 28-106.201(2), the agency should refer it to DOAH. *See*, *Stueber,* 812 So. 2d at 456 (implied).

B. *Timeliness*

To participate in an administrative hearing, the administrative petition must be timely filed. Presumably, the notice of rights that accompanied the proposed agency action provides the various points of entry and their respective timeframes for filing. If a party fails to timely file a petition requesting a hearing, that failure may result in the right to hearing being waived. R. 28-106.111(4). *See, e.g.*, *Envtl. Res. Assocs. of Fla., Inc. v. Dep't of Gen. Servs.*, 624 So. 2d 330, 331 (Fla. 1st DCA 1993), *review denied*, 634 So. 2d 623 (Fla. 1994) (in absence of facts showing excusable neglect, petitioner waived right to hearing); *accord Vantage Healthcare Corp. v. Ag. for Health Care Admin.*, 687 So. 2d 306 (Fla. 2d DCA 1997).

The Uniform Rules provide twenty-one days for filing the petition or a request for extension of time. *See*, R. 28-106.111(2)-(3), Fla. Admin. Code. Various statutes and exceptions to the Uniform Rules provide different periods for filing. *See* § 380.07, Fla. Stat. (2020) (forty-five days for filing administrative appeal of development order on development of regional impact); Fla. Stat. § 62-110.106 (providing various deadlines for filing petitions to challenge DEP's actions under chapters 373, 403 or other statutes). Also, of import in determining a timely filed petition, Rule 28-106.104, states that any document received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day. Therefore, not only should practitioners pay special attention to the time clocks, but they must also ensure that the petition arrives at the agency clerk before 5:00 p.m. or risk an untimely petition.

C. *Equitable Tolling*

In general, the time for filing an administrative petition is not jurisdictional. *See, e.g.*, *Puckett Oil Co. v. Dep't Envtl Reg.*, 577 So. 2d 988 (Fla. 1st DCA 1991). Section 120.569(2)(c) mandates

dismissal of an untimely filed petition, although the doctrine of equitable tolling may provide relief for extraordinary circumstances, for example, in the event that the late filing resulted from misleading statements by the agency or other governmental misconduct beyond the petitioner's control. *Machules v. Dep't of Admin*., 523 So. 2d 1132 (Fla. 1988). While, previously, courts were more apt to apply the more lenient doctrine of excusable neglect, the ruling in *Cann v. Dep't of Children & Fam. Servs.*, 813 So. 2d at 238-39, concluded that there is no basis in the APA for applying excusable neglect. The current view among administrative lawyers is that excusable neglect is not available, but equitable tolling is. *But see*, *Patz v. Dep't of Health*, 864 So. 2d 79, 80-82 (Fla. 3d DCA 2003) (following *Cann* in noting that the doctrine did not apply to the facts before the court, because the petitioner had failed to show that any reason for applying the doctrine existed in that case); *contra*, *Garcia v. Dep't of Bus. & Prof'l Reg., Div. of Real Estate*, 988 So. 2d 1199, 1201 (Fla. 3d DCA 2008) (finding record evidence supporting equitable tolling compelled reversal under the specific facts). Rather than rely on such a last resort, however, if counsel is not certain that the petition will be completed and filed by the applicable date, a request for extension should be filed with the agency by that same deadline. A letter or e-mail suffice, but whatever the form of the request, it must be received by the agency before the close of business on the day of the deadline. Faxed filings are acceptable. *See*, R. 28-106.104(7)-(8), Fla. Admin. Code.

IV. Prehearing Matters

The Uniform Rules adopt the discovery provisions of the Florida Rules of Civil Procedure, and therefore many similarities exist between administrative trials and civil litigation.

A. *Amendments to Petitions*

Regardless of whether the agency dismisses the petition at the outset, the dismissal must be with leave to amend unless the petition is incurably defective on its face - meaning there is no conceivable way that the petitioner could repair the deficiencies in the original petition. § 120.569(2)(c), Fla. Stat. (2011). Petitions may be amended prior to the designation of an ALJ by filing and serving the amended petition in the same manner prescribed for filing and serving the original petition; that is, prior to assignment of an ALJ, the petition can be amended any number of times, without leave from the agency, unless it has been dismissed with prejudice. R. 28-106.202, Fla. Admin. Code. Once an ALJ has been assigned, petitions may be amended only with leave. *Id*. The proper procedure is to file a motion for leave to amend the petition and to attach the proposed amended petition to the motion.

B. *Pretrial and Initial Orders*

Unlike the civil practice of setting an action for trial only after the completion of initial motion practice and substantial discovery, the practice of DOAH is for ALJs to issue initial orders within a week or so of receiving the petition from the referring agency. The initial order is a short, boilerplate form that requires the parties or their counsel to consult and then file a response to the order informing the judge of the length of time required for the hearing, the appropriate location for the hearing, and the dates when all parties will be available for the hearing (or, as the order puts it, the dates on which each party will not be available for hearing, during the period from 30 days after the order to 70 days after it). Venue ordinarily must be where the non-governmental parties reside or in the location most convenient to all parties but may be deemed waived by any

party failing to file a timely response to the initial order. *See*, R. 28-106.207, Fla. Admin. Code. Soon after the response, the judge notifies all parties of the time and place for the hearing and issues a prehearing order governing discovery and other prehearing procedures, as further discussed below. Therefore, in administrative hearings, the trial is usually set before any discovery or motion practice has occurred.

C. *Motions*

Rule 28-106.204 governs motion practice under the Florida APA, along with subsection 120.569(2)(e) of the Florida Statutes. The rule authorizes written motions, oral motions if made on the record during a hearing, and the filing of a response within seven days of the filing of any written motion. The usual kinds of motions (or analogues to them) found in a civil action are available. For example, a party may move for the ALJ's recusal based on alleged bias. *See*, *e.g.*, *Charlotte Cty. v. IMC Phosphates Co.*, 824 So. 2d 298 (Fla. 1st DCA 2002) (secretary of DEP should have recused himself after commenting on merits of case on the same day that ALJ issued the recommended order that secretary would have to review and rule upon in the final order); *Dep't of Agric. & Consumer Servs v. Broward Cty.*, 810 So. 2d 1056, 1058-59 (Fla. 1st DCA 2002) (reversing denial of such motion).

Non-movants typically are allowed seven (7) days to file a response to a motion "[w]hen time allows." R. 28-106.204(1), Fla. Admin. Code. Unless otherwise provided by law, motions to dismiss the petition must be filed no later than 20 days after assignment of the presiding officer. R. 28-106.204(2). All motions, except motions to dismiss the petition, must include a statement that the movant has conferred with all other parties of record and must state as to each party whether the party has any objection to the motion. R. 28-106.204(3).

Subsection (4) of the rule addresses motions for extensions of time. It requires that such a motion state good cause and be filed before the expiration of the deadline to be extended. Under the decisions in *Puckett Oil* and *Machules*, discussed above in reference to the timeliness of the filing of a petition, the deadline for filing a motion for extension of time is no more absolute than that of any other administrative rule, but only extraordinary circumstances will excuse a failure to meet the deadline. *See Machules*, 523 So. 2d at 1134-35, 1137; *Puckett Oil*, 577 So.2d at 991-93. Given that the filing of a request for an extension of time should be held to the same standard of timeliness as the filing of a petition, such circumstances will probably not prevent dismissal of a late-filed petition (at least in the Second District) unless they support an application of equitable tolling under *Machules*. *See Patz*, 864 So. 2d at 80 n.3; *Cann v. Dep't of Children & Fam. Servs.*, 813 So. 2d at 238-39.

If a settlement is reached, it is appropriate to file a motion to relinquish jurisdiction to the agency. In proceedings where the ALJ has final order authority, when there are no longer any material facts in dispute, any party may move for summary final order. 120.57(1)(i), Fla. Stat. While there is no statutory authority for issuance of a summary recommended order, such orders have been granted in the past. *See*, *e.g.*, *Rhinehart Equipment Co. v. Dep't of Revenue*, Case No. 11-2567 (Summary R.O. Aug. 27, 2012). As with motions for summary judgment under the civil rules, a motion for summary order (or for an order relinquishing jurisdiction to referring agency, under section 120.57(1)(i)) must be based on showing the absence of any genuine issue of material fact and may make the showing through supporting affidavits.

An attorney representing a respondent (usually either the applicant or the agency itself) may choose to encourage the agency to grant a motion to dismiss or to strike all or part of a petition before forwarding the petition to DOAH, or to issue a summary final order or grant an informal hearing on the ground that the petition raises no genuine issue of material fact, without waiting for the agency to refer the petition and the motion to DOAH for assignment to an ALJ.[14] *See*, R. 28-106.204(2), Fla. Admin. Code. While this action is consistent with the mandate of section 120.569(2)(c) that a petition be dismissed if it does not substantially comply with the requirements for a petition (and with the prohibition of section 120.569(2)(d) against an agency referring such a deficient petition to DOAH in the first place) -this path is not free from risk. If counsel filing a dispositive motion before the DOAH referral has incorrectly gauged the flaws in the petition and an appellate court reverses the dismissal, the matter will be remanded for referral to DOAH, and the client will have incurred increased costs and delay. *See*, *Accardi*, *824 So. 2d at 996*; *Friends of the Everglades*, 595 So. 2d at 190. Rather than streamlining the process, the preemptive motion for dismissal may result in substantial delay and the additional expense of the appeal. Therefore, in practice, dismissal with prejudice is usually a last resort option of the agency used when the facts clearly mandate a dismissal.

Other options in early motion practice include filing motions to strike portions of the petition. These motions are particularly useful if the petition raises irrelevant issues like another agency's regulations or allegations from final agency action not at issue in the proceeding. Motions to strike may be filed with the agency prior to transferring the case to DOAH or they can be filed with the ALJ, after the agency has transferred the case. Some agencies may choose not to rule on motions filed before them and simply transfer the petitions filed and all motions filed to DOAH.

One difference between the motion practice under the Florida APA and civil litigation is that most motion hearings before DOAH are telephonic, or, since the era of COVID-19, via web conference. The ALJs of DOAH cover matters all around the state, but their offices are all located in the DeSoto Building in Tallahassee. Judges travel to other cities for evidentiary hearings when the venue is outside Tallahassee, as appropriate. Although hearing rooms are available at the DOAH offices, most environmental and land use matters subject to DOAH jurisdiction arise outside Tallahassee, and most parties choose to argue their motions and responses by telephone, rather than incur traveling expenses.

D. *Answers*

Answers are rarely filed in administrative proceedings and neither the referral to DOAH nor the issuance of DOAH's initial order depends on the filing of an answer. Formerly, various administrative rules provided that a party could file dispositive motions or an answer only within the first twenty days after the filing of the petition. *See, e.g.*, Fla. Admin. Code R. 60Q- 2.004(5) (former rule of DOAH). In rule 28-106.203, the Uniform Rules now authorize the filing of an answer (along with any affirmative defenses) without imposing a deadline for its filing.

[14] Once the matter is referred to DOAH, the referring agency can take no further action with respect to the case (except as a party litigant) until the assigned judge submits DOAH's recommended order or some other order relinquishing jurisdiction to the agency. *See*, § 120.569(2)(a), Fla. Stat. (2020). But a party may move for an order relinquishing jurisdiction back to the referring agency if there are no material issues of fact under section 120.57(1)(i), and the agency then can resolve any legal issues within its jurisdiction, upon a motion to dismiss.

E. *Discovery*

As noted above, Rule 28-106.206 incorporates the Florida Rules of Civil Procedure on Discovery. All the usual forms of discovery in civil proceedings are available under the Florida APA and the Uniform Rules, and all the restrictions and sanctions apply, too, except for the ALJ's lack of authority to impose the sanction of contempt. *See, e.g.*, *Dep't of Agric. & Consumer Servs. v. Broward Cty.*, 810 So. 2d 1056, 1057-58 (Fla. 5th DCA 2005) (in adversarial proceeding to resolve rule challenge, the agency had the right to a protective order against deposition of agency head under "apex doctrine," in absence of showing that the deposition of a deputy agency head would not suffice).[15] In addition, the agency may prohibit discovery within the last fifteen days before the final evidentiary hearing and may impose other restrictions on discovery. Many ALJs are using a more detailed Prehearing Order, providing for deadlines on depositions, exchange of exhibits, finalization of expert opinions and the like. While not all ALJs may use this detailed Prehearing Order, a practitioner is certainly free to request that the ALJ issue an order with detailed discovery limits. These orders are particularly helpful in complex matters with numerous experts and parties.

Counsel may also consider using requests under the Public Records Act Chapter 119 of the Florida Statutes) to supplement its discovery requests. Under section 119.07, agency personnel must permit all public records to be inspected and copied, except for those covered by the exemptions enumerated in that section. The exemptions include only one that commonly applies in administrative proceedings on issues of environmental and land use law, for the attorney work product privilege. *See*, § 119.071(1)(d), Fla. Stat. (2020). However, other exemptions may become relevant, such as those for certain blueprints (under subsection 119.071(3)(b)1) or certain documents related to competitive solicitations (under subsection 119.071(1)(b)). Of course, the fee schedules prescribed for copying public records will apply in this context, which is usually not the case in the context of discovery, particularly electronic document production. *See*, § 119.07(2)(c) and (4), Fla. Stat.

F. *Intervention*

Rule 28-106.205 authorizes intervention by persons based on a standing requirement almost identical to that for filing a petition - that the intervenor's substantial interests may be determined in the proceeding. *See*, § 120.569(1), Fla. Stat. (2020) ("are determined"); Fla. Admin. Code R. 28-106.201(2)(b) ("will be affected"). The petition for intervention must meet the same requirements as for an original petition for hearing and must be filed at least twenty days before a final hearing, except for good cause. R. 28-106.205, Fla. Admin. Code. Section 120.52(13)(c) of the Florida Statutes includes such intervenors in the definition of "party." Not surprisingly, then, but unlike the civil rule on intervention, the rule does not presumptively mandate the subordination of the intervenor to the parties in the case but does allow such subordination by authorizing the ALJ to "impose terms and conditions on the intervenor to limit prejudice to other parties." For example, this could include limitations on the issues that the intervenor could raise or address or the witnesses that the intervenor could call. The discussion of standing under section

[15] Note that in *Suzuki Motor Corp. v. Winckler*, 284 So. 3d 1107 (Fla. 1st DCA 2019), *review granted*, SC19-1998, 2019 WL 6971545 (Fla. Dec. 19, 2019), the Court refused to apply the so-called "apex doctrine" in the context of private, corporate representatives. The Florida Supreme Court granted review of *Winckler* in SC19-1998, but as of the date of this update, no decision had been made.

403.412 of the Florida Statutes, above, addresses the citizen's right of intervention in an ongoing adjudicatory administrative proceeding. Ordinarily in the context of environmental and land use proceedings, intervenors are limited to arguments pertaining to matters placed at issue by the "regular" parties.

G. *Prehearing Conferences, Stipulations, and Amendments*

The standard prehearing order requires the parties or their counsel to confer with each other at least fifteen days before the final hearing to exchange final lists of witnesses and exhibits, discuss the possibility of settlement, and agree on a prehearing stipulation. *See*, R. 28-106.209, Fla. Admin. Code. To streamline the hearing, the stipulation must set forth the factual and legal issues to be resolved, the facts on which the parties agree, the pertinent provisions of law, the position of each party, any agreements on evidentiary issues (such as the lack of objection to the use of photocopies without prior authentication), a list of each party's exhibits, any joint exhibits, and a list of each party's witnesses, including experts. ALJs rely on the prehearing stipulation to provide them with key factual issues and to familiarize themselves with the issues prior to the hearing. The list of exhibits and numbering system used in the prehearing stipulation should also be utilized at trial by all parties in order to reduce confusion and delay at hearing in locating and numbering exhibits which is strongly preferred by the ALJs.

The parties must file their joint prehearing stipulation no later than the date specified in the order of prehearing instructions accompanying the notice of hearing, typically from five to seven days before the final hearing. If they are unable to reach agreement on a joint stipulation, each party may file a unilateral stipulation but must show cause for doing so. ALJs disfavor this practice and practitioners are advised to be mindful of their ethical obligations in their interactions with opposing counsel and the courts in this context. In complex cases, the parties may request a prehearing conference before the ALJ to resolve numerous discovery disputes, resolve motions in limine or other motions, and facilitate agreement on the elimination of certain issues and the proper framing of those that remain.

Sometimes, the discovery process or negotiations during the prehearing stipulation conference may reveal a need for a last-minute amendment to the petition. As stated previously, amending the petition after the ALJ has been designated requires that the petitioner file a motion and obtain leave to amend. *See*, R. 28-106.202, Fla. Admin. Code. As long as opposing parties are not prejudiced, however, it is an error for an ALJ to deny such leave. *See*, *Optiplan, Inc. v. School Bd. of Broward Cty.*, 710 So.2d 569, 571 (Fla. 4th DCA 1998) ("it has been held an abuse of discretion to deny a motion to amend that raises new issues, even if it is filed on the day the hearing is scheduled to commence, absent a showing of prejudice to other parties"*).* The ALJ can order a continuance to allow further discovery if made necessary by such an amendment. *See*, *Key Biscayne Council v. Fla. Dep't of Natural Res.*, 579 So. 2d 293, 295 (Fla. 3d DCA 1991).

H. *Continuances*

Rule 28-106.210 authorizes continuances of any hearing for good cause. The rule purports to require that requests for continuance be made at least five days before the scheduled date of the hearing, except in cases of emergency. In practice, however, ALJs may be more lenient in granting continuances than civil judges are in granting continuances of trial, even when the continuance is not requested until the day before trial to allow more time to prepare, or when the

request is made in the middle of trial (for example), for health reasons. A key factor in determining if a last-minute continuance is granted may depend on overall fairness and prejudice to a party. *See*, *Key Biscayne Council*, 579 So. 2d at 295 (to allow time for discovery required because of amendment to petition made during hearing); *City of W. Palm Beach v. Palm Beach Cty*, 253 So. 3d 623, 627 (Fla. 4th DCA 2018) (reversing denial of continuance).

V. The Administrative Hearing

The conduct of a final evidentiary hearing under sections 120.569 and 120.57 of the Florida Statutes closely resembles that of a bench trial. At a typical hearing, the parties argue preliminary motions, make brief opening statements, present testimony and exhibits, and subject them to cross-examination. Commonly, the petitioner is allowed some time for introducing rebuttal evidence, but often there are no closing arguments. The most important task for counsel is to make the factual case for the client's position. The focus at hearing must be on the factual issues. The framing or resolution of legal issues will already have determined which factual issues are critical or at least relevant. Arguments over the legal issues may well have occurred in motion hearings before the final hearing and usually will occur after the hearing in the proposed recommended orders but should not be the focus of the evidentiary hearing.

Note that although the referring agency technically has the duty of "preserving the testimony at final hearings," the agency may comply with that duty by either tape recording the proceedings or hiring a certified court reporter. *See*, R. 28-106.214, Fla. Admin. Code. Any party desiring to ensure the availability of an accurate transcript for use in post-hearing filings and on appeal should retain a court reporter for the hearing. In practice, this issue is usually discussed in the pretrial conference to avoid surprises at the hearing. Regardless of whether a court reporter attends the hearing, however, there is a further complication when testimony is presented by web conference or telephone. In those circumstances, Rule 28-106.213(5) requires that "a notary public . . . be physically present with the witness to administer the oath" and later "provide a written certification to be filed with the [judge] confirming the identity" and the affirmation or oath of the witness. (For witnesses at the hearing location, the judge administers the oath.)

A. *Burden and Standard of Proof – The J.W.C. Case*

The burden and standard of proof, in an administrative hearing is usually governed by the holdings in *J.W.C.* In general, the applicant or other proponent of the affirmative of an issue bears the ultimate burden of proof, by a preponderance of the evidence. *See*, *Fla. Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat. (2020) (preponderance standard). During the hearing, the burden shifts, as follows. First, the applicant or other proponent has the burden to show by competent substantial evidence that he or she is entitled to the requisite findings. Once the prima facie case is established, the opponent then has the burden of showing (likewise by competent substantial evidence) that the applicant or proponent is not entitled to the finding sought, and if the opponent carries that burden, then the applicant or proponent must shoulder the ultimate burden of proof of entitlement to the finding. Then the ALJ weighs all the pertinent evidence and issues a decision. *See*, *Irvine v. Duval Cnty. Planning Comm'n*, 495 So. 2d 167 (Fla. 1986); *J.W.C.*, 396 So.2d at 788; *see also*, § 120.569(2)(p), Fla. Stat. (burden shifting in third party challenges to environmental regulatory authorizations).

B. *De Novo Proceeding*

Another important standard in how the factual evidence is received is the *de novo* standard. At the administrative hearing, the ALJ will review the agency's action under the *de novo* standard with no presumption that the agency's decision is correct. *J.W.C.,* 396 So. 2d at 785. In fact, many agencies will inform the respondents that the agency may change its decision or rely on new information as it formulates agency action during the proceeding. For a thorough discussion of the de novo standard, see *R.N. Expertise, Inc. v. Miami Dade Cty School Bd.*, 2002 WL 185217 (R.O. Feb. 4, 2002; adopted in toto, F.O. Mar. 14, 2002). A respondent seeking to demonstrate its entitlement to a permit must be careful to prove all aspects of its entitlement at the hearing, including any issues or materials previously submitted to the agency. Unless factual issues are specifically stipulated to in the prehearing stipulation, a practitioner is best served by presenting evidence on all facets of the case.

C. *Preliminary Motions*

The preliminary motions most pertinent to the presentation of the evidence are the motion in limine and, when appropriate, the motion for a determination of which party has the burden of proof. As in civil litigation, the motion in limine is useful in eliminating the need to present evidence on irrelevant or immaterial issues. Because there is no jury in administrative litigation, however, the argument that certain evidence may be too prejudicial for the trier of fact to hear it does not apply. Moreover, the filing and resolution of a motion in limine should come as early as possible in an administrative proceeding to avoid having to prepare any portion of the case addressing irrelevant or immaterial issues, in the first place. Note that the issues of relevance and materiality are related to the standard of proof, requiring that evidence to support factual allegations be competent and substantial. *See*, *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) ("competent substantial evidence" is evidence "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached"); *see also*, *Fla. Power & Light Co. v. Dania*, 761 So. 2d 1089, 1091-92 (Fla. 3d DCA 2000) (contrasting competent substantial evidence as a "standard of proof" with the "standard of review" known by the same name; under the standard of review, a reviewing court must determine whether the factual findings made by the ALJ are supported by competent substantial evidence).

D. *Agency Deference*

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the U.S. Supreme Court established a framework for courts in reviewing an agency's interpretation of a statute that it is charged with administering. 467 U.S. 837 (1984). There, the Court held that if a statute is clear, courts and agencies must give it effect, but if a statute is unclear, the court's determination is limited to whether the agency's interpretation is based on a permissible construction of the statute. Since that decision, courts have long applied the "Chevron deference" doctrine, simply referred to in Florida as "agency deference" under which an agency's reasonable interpretation of laws and rules it is charged with administering was to be accepted, even if other reasonable interpretation might exist.

However, in 2018, the Florida Constitutional Revision Commission proposed a reversal of course regarding agency deference, which was approved by voters and became codified as Article V, Section 21, of the Florida Constitution on January 8, 2019. The provision states that, "[i]n

interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule and must instead interpret such statute or rule de novo." Courts have acknowledged the change. *See*, *e.g.*, *Citizens v. Brown*, 269 So. 3d 498, 504 (Fla. 2019) (reviewing question of statutory interpretation by Florida Public Service Commission de novo, citing Fla. Const. art. V, §21); *Kanter Real Estate, LLC v. Dep't of Envtl. Prot.,* 267 So. 3d 483, 487 (Fla. 1st DCA 2019)*, reh'g denied* (Mar. 19, 2019), *review dismissed sub nom. City of Miramar v. Kanter Real Estate, LLC*, SC19-639, 2019 WL 2428577 (Fla. June 11, 2019) (acknowledging that art. V, §21, declares that "courts may no longer defer to an agency's statutory interpretation, and must instead apply a *de novo* review.").

E. *Opening Statements*

An opening statement in an administrative hearing should be short, focused, and thematic. While an opening statement is not required, practitioners should consider presenting one. In addition, some attorneys prefer to delay their openings until the start of their case. This decision does not allow the ALJ to hear the other side of the case and ultimately, is not preferred. Giving an opening statement at the outset provides an opportunity to present the ALJ with an overview of the factual evidence to be presented, especially in a complex case, or for focusing the judge on the critical issue or theme of the case from the outset.

F. *Presentation of Evidence*

The parties present their witnesses and other evidence as they would at a civil trial. The witnesses are sworn, and the parties have the right to present direct testimony and to cross-examine the opposition's witnesses, as well as "to impeach any witness regardless of which party called the witness to testify." R. 28-106.213, Fla. Admin. Code. Commonly, but not invariably, one or more of the parties will "invoke the rule" sequestering witnesses who have not yet testified, to prevent the potential tainting of their testimony from hearing the testimony of the witnesses who precede them. It is commonly viewed as more appropriate to invoke the rule of sequestration in the context of fact witnesses, rather than experts, as the latter are typically required to have their primary opinions formulated prior to their depositions. While different ALJs take different approaches, generally, each party is allowed one representative to sit with the attorney at the hearing, however, and some parties retain nontestimonial experts to sit through the hearing and offer insights to the attorney and reports of pertinent testimony to the experts who are testifying. The same rules of privilege apply as in civil actions, but the treatment of hearsay evidence is less strict. *See*, § 120.57(1)(c), Fla. Stat., and R. 28-106.213(4), Fla. Admin Code ("Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Sections 90.801-.805, F.S.").

As for the order of presentation, in most substantial interest hearings in environmental and land use law, the applicant goes first, even when the petitioner is a third party challenging the permit or other approval at issue. The rationale for this order of presentation arises from case law, previously discussed, on burdens of proof. The applicant (or permittee) has not only the ultimate burden of proof but also the burden of stating a prima facie case at the outset. If the applicant fails to state a prima facie case, the burden of going forward with evidence to rebut that case never shifts to the agency or third-party opponent of the permit. Once the parties opposing

the permit have presented their witnesses and other evidence, the burden of going forward with any evidence to rebut the opposition's case "shifts" back to the applicant, with whom the ultimate burden of proof rests throughout the proceeding. *See*, § 120.569(2)(p), Fla. Stat., and *J.W.C.*, 396 So. 2d at 787. Thus, applicants commonly present rebuttal evidence at such hearings. Although much of this should target a few critical points made by the opposition during the hearing, a careful practitioner will have planned and prepared some of the rebuttal evidence in advance, having foreseen at least the opposition's strongest points and discovered the evidence for them well before the hearing. Without such planning, it is difficult to prepare effective rebuttal testimony during the hearing itself, because of the lack of time.

1. HEARSAY EVIDENCE

Section 120.569(2)(g) provides that "all . . . evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida," and section 120.57(1)(c) states that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Rule 28-106.213(3) spells out that even if the ALJ admits hearsay evidence over objection, such evidence, alone, cannot "support a finding unless [it] falls within an exception to the hearsay rule" set forth in Chapter 90 of the Florida Statutes (the Florida Evidence Code). Read together, these provisions allow the admission of hearsay but restrict its effect when it, alone, is the factual basis for evidence. *See*, *Fla. Indus. Power Users Grp. v. Graham*, 209 So. 3d 1142, 1145-46 (Fla. 2017) (citing *Houston v. City of Tampa Firefighters & Police Officers' Pension Fund Bd. of Trustees*, 303 So. 3d 233, 244 (Fla. 2d DCA 2020), *review denied sub nom*. *City of Tampa Firefighters v. LaJoyce Houston*, 2020 WL 5908972 (Fla. Oct. 6, 2020) ("[S]ection [120.569(2)(g)] exemplifies the longstanding general rule ... that the rules of evidence do not strictly apply in administrative proceedings."); *Strickland v. Fla. A & M Univ.*, 799 So. 2d 276, 278-80 (Fla. 1st DCA 2001).

Sometimes ALJs refuse to admit hearsay that fits no such exception, does not explain or supplement other evidence, and is not corroborated by competent substantial evidence. *See*, *Wark v. Home Shopping Club, Inc.*, 715 So. 2d 323 (Fla. 2d DCA 1998). On the other hand, if the hearsay evidence is admissible under an exception, it may not only support a finding (as noted above) without the need for corroboration, but even outweigh contrary competent substantial evidence. *See*, *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1012 (Fla. 1st DCA 2001) (after rejecting ALJ's conclusion that grading papers was hearsay requiring corroborative evidence to support a finding, court treated those papers as dispositive of the merits, in effect reweighing the evidence, without addressing contrary findings and conclusions of the recommended order or the evidence on which those findings were based). The lesson for practitioners is that they should prepare for such evidentiary issues at least as carefully as they would for a civil trial. *See*, *Miller v. Div. of Retirement*, 796 So. 2d 644, 646 (Fla. 1st DCA 2001) (affirming denial of motion for reconsideration of decision allegedly based on reliance of Division on hearsay, since there was no objection to the alleged hearsay made at the hearing).

2. EXPERT WITNESSES

Much of the testimony and demonstrative evidence presented in environmental and land use proceedings derives from expert witnesses. Practitioners in this area of law tend to work with

numerous scientists and engineers in various special fields such as wetlands ecology, surface water engineering, civil engineering, ocean engineering, meteorology, transportation engineering, chemistry, landfill design and operation, and environmental modeling. Such experts must teach an ALJ (often a former trial lawyer), just as they must teach a lawyer in an initial preparation of acase. Without such guidance the judge may not fully understand the issues of science and engineering which are often complex and the lawyer may fail to persuade the judge, or may fail to obtain the correct findings of fact that are needed to withstand an appeal. Although a cross-examiner may need to show a subtle righteous indignation at the appropriate time with certain witnesses, outright abrasiveness and histrionics have no place in substantial interest hearings and are discouraged by ALJs. Respect for the experts leads to well-prepared cross-examination targeted at the scientific and engineering principles related to the case, in line with the focus of the judge who is required to resolve those issues.

Because expert opinions are the core of preparing for these trials, attorneys should have all expert opinions finalized by the time of their depositions. Indeed, some ALJs' prehearing orders require as much. Failures to have expert opinions formulated prior to deposition can cause delays and result in continuances, or (worse) exclusion of the newly formulated opinion. Many ALJs will issue discovery orders requiring experts to finalize opinions by a certain date or risk their testimony being excluded. This is an effective tool against opposing counsel who fails to make experts available for depositions.

G. *The "Public" Portion of the Hearing*

In some hearings, the proposed activity to be permitted or approved may be so controversial that members of the general public may wish to be heard on it, although they have neither petitioned for a hearing nor sought to intervene in the proceeding. They may have written letters to the agency involved, or they may simply show up at the hearing and speak to the judge before the hearing begins or, in response to an inquiry by the judge when faced with large numbers of participants, during the hearing. Section 120.57 authorizes the judge to provide such members of the public an opportunity to testify or present written evidence, subject to cross-examination and rebuttal. *See* § 120.57(1)(b), Fla. Stat. (2020). The testimony so given is in the form of a brief statement - a monologue - because there is no direct examiner eliciting the statement, although sometimes the judge will ask questions during the statement, to clarify or pursue particular points. Typically, this "public hearing" portion of the substantial interest hearing comes after the close of the presentation of evidence by the parties, although the statute provides a further opportunity for rebuttal of any evidence presented by the general public. Although rebuttal at this stage is seldom necessary, practitioners should pay attention to such testimony, cross-examine such witnesses when appropriate, and carefully consider the need for rebuttal in light of case law holding that fact-based (rather than opinion) testimony of citizens may be competent, substantial evidence on which a finding and decision may be based. *See, e.g.*, *Marion Cty v. Priest*, 786 So. 2d 623 (Fla. 5th DCA 2001) (discussing previous cases), *review denied*, 807 So. 2d 655 (Fla. 2002).

H. *Closing the Hearing*

At the close of the hearing, it is common for the judge and the parties to determine when the transcript of the proceedings will become available and when the proposed recommended orders must be submitted to the ALJ. The ALJ must submit the recommended order to the referring

agency within thirty days after receipt of the transcript (or after the hearing if there will be no transcript). *See*, R. 28-106.216(1), Fla. Admin. Code. Accordingly, the deadline for filing proposed orders is ten days after the submittal of the transcript to the ALJ. R. 28-106.216(2), Fla. Admin. Code. However, parties are deemed to have waived the thirty-day deadline for filing a recommended order by the ALJ if they agree to a deadline of more than ten days after the judge's receipt of the transcript, for filing proposed orders. In a complex case, a party may wish to waive the deadline for the judge's filing the recommended order in return for a later deadline for filing the proposed orders and (when appropriate) approval of an enlargement of the page limit on proposed orders, which Rule 28-106.215 restricts to forty pages. When the legal issues are especially complex, a party may wish to ask permission to file a separate memorandum of law on those issues. Although the page limit of the rule does not expressly apply to such a memorandum, counsel should clarify whether the judge is imposing any page limit on the memorandum anyway.

VI. Post Hearing Submittals

A. *Proposed Recommended Orders*

Parties may file "proposed findings of fact, conclusions of law, orders, and memoranda on the issues" in the proceeding. *See*, R. 28-106.215, Fla. Admin. Code. Sometimes, parties combine their proposed findings and conclusions in a proposed recommended order filed with the ALJ, but aside from necessary advocacy, providing the ALJ with a proposed recommended order that most closely matches what the ALJ might issue as a recommended order is the soundest practice. Mistakes at any stage of the proceedings can prove costly, but the failure to provide the ALJ with a sound and persuasive proposed recommended order can prove fatal to the client's case. This is the last chance for a party and counsel to make their case, to clarify complex issues, emphasize the strong points of the client's position and the opposition's weaknesses, and explain away or minimize the weak points of the client's position and the opposition's ostensible strengths. Especially in complex cases, a carefully crafted set of proposed findings of fact pointing to the salient portions of testimony and dovetailing with legal argument is an invaluable tool in advocating the client's position. Proposed recommended orders may also remedy the effects of rambling or otherwise weak testimony, by citing to portions of other testimony (or other evidence) clarifying, focusing, or reinforcing the weaker evidence. Furthermore, environmental cases are often criteria-intensive, and if a proposed recommended order is well organized, the ALJ may incorporate many aspects of the well-drafted document into their recommended order. In any substantial interest hearing in which the opposition has presented any evidence, counsel should regard the opportunity to file a proposed recommended order as a requirement of good practice in this area of the law.

As noted in the section above on the closing of the hearing, the parties may seek permission to modify the filing deadlines and length restrictions on proposed orders and to file supplemental memoranda of law.

B. *Recommended Orders*

Within thirty days after receiving the transcript or if otherwise waived, the ALJ submits the recommended order to the referring agency. R. 28-106.216(1), Fla. Admin. Code. As noted above, the parties may waive this requirement in return for receiving more time to file their

proposed orders. R. 28-106.216(2), Fla. Admin. Code. There is no sanction for a judge's failure to submit the recommended order by the deadline.

One can hardly overstate the importance of a recommended order to the disposition of the case. The recommended order includes the ALJ's findings of fact, conclusions of law, and recommendation for the final agency action. In formulating a final order, the referring agency's discretion to reject or modify the findings of fact and some kinds of conclusions of law is narrowly circumscribed, as explained below. In addition, courts generally give great deference to the findings of fact made by ALJs. *But see*, *Barfield*, 805 So. 2d at 1012 (implicitly treating erroneously excluded hearsay documents as dispositive of the merits, without addressing ALJ's contrary findings or the evidence supporting those findings). Thus, a sound and thorough recommended order is often dispositive of the case, even at the appellate level.

C. *Agency's Review of the Recommended Order*

Chapter 120 mandates the standard of review of the recommended order by the referring agency (i.e., DEP, DEO, the Board of Trustees of the Internal Improvement Trust Fund, the Administration Commission, or a water management district, in the present context) as it completes the process of formulating its agency action and issuing a final administrative order that, in turn, may be reviewed by a district court of appeal, under section 120.68, Florida Statutes. Section 120.57(1)(l) imposes restrictive standards on an agency's review of recommended findings of fact and conclusions of law. Under those standards, an agency cannot overturn or modify a finding of fact in a recommended order "unless it determines from a review of the entire record, and states with particularity in the order, that" no competent substantial evidence supports the finding or that the proceedings on which the finding was based did not comply "with the essential requirements of law." *See*, *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002); *see also*, *Save Anna Maria, Inc. v. Fla. Dep't of Transp.*, 700 So. 2d 113 (Fla. 2d DCA 1997) (agency bound by "pure finding of fact" supported by evidence despite labeling of finding as conclusion of law); *accord Viering v. Florida Comm'n on Human Relations ex rel. Watson*, 128 So. 3d 967, 968 (Fla. 1st DCA 2013)*; Gross v. Dep't of Health*, 819 So. 2d 997 (Fla. 5th DCA 2002); *North Port v. Consol. Minerals, Inc.*, 645 So. 2d 485 (Fla. 2d DCA 1994) (fact-finding process on permit is complete on submittal of recommended order except for the restrictive review authorized in former section 120.57(1)(b)10 [now section 120.57(1)(l)]). The agency is not the fact-finder and cannot reweigh the evidence, draw factual inferences from it, or make new findings to support its own conclusions. *See*, *Prysi* at 825; *Heifetz v. Dep't of Bus. Reg*., 475 So. 2d 1277, 1281-83 (Fla. 1st DCA 1985). An agency is not free to evade these requirements by simply making a conclusory statement that no competent substantial evidence supports the ALJ's findings and accepting the findings proposed in the agency's own exceptions on that basis. *See*, *Verleni v. Dep't of Health*, 853 So. 2d 481, 483 (Fla. 1st DCA 2003). Nor may an agency reject findings that are supported by competent substantial evidence, even when the findings have been mislabeled as conclusions of law, whether by the agency or by the ALJ. *See*, *Gross v. Dep't of Health*, 819 So. 2d at 1001; *Pillsbury v. Dep't of Health & Rehab. Servs.*, 744 So. 2d 1040 (Fla. 2d DCA 1999). By the same token, of course, a conclusion of law mislabeled as a finding should be subject to the standard for an agency's review of such conclusions in a recommended order.

Significantly however, the amendments in 1996 and 1999 imposed a further restriction on an agency's power to reject or modify conclusions of law. Formerly, an agency could reject or modify a hearing officer's recommended conclusions of law and interpretation of administrative rules, so long as the substituted conclusions were supported by the findings of fact and explained by the agency. *See*, *Dep't of Prof'l Reg. v. Wagner*, 405 So. 2d 471, 473 (Fla. 1st DCA 1981); *accord 1800 Atlantic Dev. v. Dep't of Envtl. Reg.*, 552 So. 2d 946, 955-56 (Fla. 1st DCA 1989); *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st DCA 1977). Now, however, an agency has the authority to modify or reject conclusions of law or interpretations of rules only if the agency has "substantive jurisdiction" over the law or rules at issue. *See*, *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2d DCA 2001) (DEP had no substantive jurisdiction over ALJ's procedural ruling not to apply collateral estoppel); *L.B. Bryan & Co. v. School Bd.*, 746 So. 2d 1194 (Fla. 1st DCA 1999); *see also Dep't of Children and Fam. Servs. v. Morman*, 715 So. 2d 1076 (Fla. 1st DCA 1998) (concurring and dissenting opinions); § 120.57(1)(l), Fla. Stat. (2020).

Accordingly, the DEO or FLAWAC would have the power to substitute its own conclusions of law in construing provisions of Chapter 380 of the Florida Statutes and interpreting the rules adopted under it, and the water management districts could similarly reject or modify such conclusions in construing Chapter 373 and rules adopted under it.[16] *See, e.g.*, *Save Anna Maria*, 700 So. 2d at 116 (as applied to DEP). But neither the Department of Economic Opportunity nor a water management district would have substantive jurisdiction under its enabling statutes to construe the Evidence Code or the Uniform Rules of Procedure. *See Barfield*, 805 So. 2d at 1009, 1011 (agency had no authority to overturn ALJ's evidentiary conclusion that grading sheets were excludable hearsay requiring corroboration to support a finding). Given that in issuing a final order an agency may not adopt conclusions of law on procedural and evidentiary questions that vary from those in the recommended order, and that the agency cannot appeal its own final order, the ALJ now apparently has final authority over such questions, in effect, subject only to an appeal by a party other than the agency. *See*, Lisa S. Nelson, *Insulated from Review: Barfield v. Department of Health, Board of Dentistry*, XXIII ADMIN. L. SEC. NEWSLETTER (Fla. Bar, Tallahassee), March 2002, at 1. *But see Barfield*, 805 So.2d at 1013 (construing section 120.68(1) as implying a right of appeal by an agency from its own final order that has accepted one or more conclusions of the recommended order with which the agency disagrees but "is powerless to reject" under section 120.57(1)(l)). This enhanced power of ALJs underscores the importance of filing thorough and well-crafted proposed orders, as well as thoroughly preparing for potential rulings on procedural and evidentiary issues at the hearing.

D. *Exceptions*

Within fifteen days after entry of the recommended order, each party may file exceptions to the findings and conclusions in the order. R. 28-106.217(1), Fla. Admin. Code. The filing is with the referring agency because it resumes jurisdiction over the case once it receives the recommended

[16] Under section 373.114(1), FLAWAC no longer has jurisdiction to hear administrative appeals from a final order resulting from an evidentiary hearing under sections 120.569 or 120.57. In appeals of water management district orders and rules not resulting from such a hearing, FLAWAC apparently would not face this constraint on its power to overturn the conclusions of law of an ALJ or other presiding officer on evidentiary and other issues outside the district's substantive jurisdiction -unless FLAWAC determined that material issues of fact existed and referred the matter to DOAH for a hearing before an ALJ.

order from the ALJ. Despite the weight given to the recommended order, counsel ordinarily should file such exceptions when necessary. Given that counsel is in the best position to know whether any evidence supports findings, counsel should file an exception to any finding of fact that damages the client's case and truly is not supported by any competent substantial evidence in the record. An exception is also appropriate whenever a conclusion of law that damages the client's case lies within the substantive jurisdiction of the referring agency and can be controverted by a persuasive argument. It is good practice (though not required by rule) to number the exceptions, focus each exception on a single issue or group of related findings or conclusions (labeled thematically, if possible, as in "Stormwater Impacts"), and to keep the exceptions to findings of fact separate from exceptions to conclusions of law. Any party wishing to respond to such exceptions may do so within ten days after the service of the exceptions. R. 28-106.217(3), Fla. Admin. Code. Note that the deadlines for filing exceptions or responses are not automatically extended for service by mail (as otherwise provided by rule 28-106.103) under Rule 28-106.217(3).

E. *Final Orders*

The agency's final order completes the administrative remedy for resolving the dispute over a permit or other approval. Like the recommended order, the final order includes findings of fact and conclusions of law. The final order also rules on each exception submitted by the parties and states the final administrative disposition of the case (usually, the approval or the denial of the proposed activity). As discussed above, a final order may adopt the recommended order in part or in total and may not reject or modify a finding of fact unless the agency reviews the entire record and states with particularity in the final order that no competent substantial evidence of record supports the finding (or that the proceedings on which the finding was based did not comply with the essential requirements of law). The agency may not reopen the record, receive additional evidence, or make additional findings even through official recognition of facts. *See*, *Prysi*, 823 So. 2d at 825; *Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin.*, 678 So. 2d 421 (Fla. 1st DCA 1996), *review denied*, 690 So. 2d 1299 (Fla. 1997); *Henderson Signs v. Fla. Dep't of Transp.*, 397 So. 2d 769 (Fla. 1st DCA 1981). In addition, the final order may not reject or modify conclusions of law over which the agency lacks substantive jurisdiction. *See, e.g.*, *Barfield*, 805 So. 2d at 1009, 1011. For laws and rules over which an agency does have substantive jurisdiction, the agency may substitute its own conclusions of law for those in the recommended order, but only if the agency states with particularity its reasons for doing so and specifically finds that the substituted conclusion "is as [reasonable as] or more reasonable than that which was rejected or modified." § 120.57(1)(l), Fla. Stat. (2020). If the agency bases any of its decision on policy, it must establish that policy by expert testimony and explain the reasons for the policy. *See*, *Florida Power & Light Co. v. State*, 693 So. 2d 1025 (Fla. 1st DCA 1997); *ManaSota-88, Inc. v. Gardinier, Inc.*, 481 So. 2d 948 (Fla. 1st DCA 1986).

F. *Appeals*

Any party adversely affected by the agency action taken in the final order may appeal the order under section 120.68(1) of the Florida Statutes.[17] In evaluating whether to file such an appeal,

[17] Under section 373.114 of the Florida Statutes, any party to a proceeding before a water management district or the DEP or a local government exercising delegated authority can take an administrative appeal to FLAWAC of any order or rule within twenty days of its adoption at the proceeding below, for review of the appealed decision for

counsel should carefully consider all the limitations on final orders discussed above, especially in relation to the findings and conclusions in the recommended order. In addition, counsel should consider whether all the necessary findings have been made to support the conclusions of law. If not, then a remand to the ALJ may be sought, where additional evidence may be taken (if needed) and additional findings may be made. *See, e.g., Collier Dev. Corp. v. Dep't of Envtl Prot.*, 685 So. 2d 1328 (Fla. 2d DCA 1996), *review denied*, 678 So. 2d 337 (Fla. 1996); *Sabates v. State Dept. of Health*, 104 So. 3d 1227, 1229 (Fla. 4th DCA 2012).

consistency with the provisions and purposes of Chapter 373. Under 373.114(1), FLAWAC does not have jurisdiction over appeals from final orders that result from an evidentiary hearing under section 120.569 or 120.57. This will generally ensure that FLAWAC's decisions in such appeals will be on the record below, although the statute provides some flexibility to expand the initial record by authorizing a remand to the agency below or a referral to DOAH when further findings of fact are required as a basis for deciding the appeal.

