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PART TWO

Administrative Law: Access to Review of Official Action—Standing Under the Florida Administrative Procedure Act

MURRAY H. DUBBIN* AND SAMUEL J. DUBBIN**

The Florida Administrative Procedure Act provides the vehicle through which Florida citizens can seek judicial or administrative review of the actions of administrative agencies. Before a litigant will be entitled to the benefits of these procedures, however, he must satisfy certain threshold standing requirements. This article critically examines Florida's standing doctrine in the context of the structure and purpose of the Act and the major federal decisions that have developed many of the doctrine's central principles.

I. INTRODUCTION	816
II. PREENFORCEMENT ADMINISTRATIVE REVIEW OF AGENCY ACTION	818
III. UNIFORM PRINCIPLES OF STANDING AND <i>Jerry</i>	822
IV. INJURIES RECOGNIZED AS SUFFICIENT FOR STANDING UNDER THE APA	828
A. <i>Publicly Conferred Benefits Accruing to Individuals or Groups</i>	828
B. <i>Interests Created by Statute or Agency Rule</i>	834
1. AGENCY RULES CONFERRING STANDING	834
2. EXPRESS STATUTORY GRANTS OF STANDING	835

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3. IMPLIED STATUTORY GRANTS OF STANDING	838
C. <i>Interference with Traditional Property or Contract Rights</i>	843
V. THE PROBLEM OF ASSOCIATIONAL STANDING	845
VI. JUDICIAL REVIEW OF FINAL AGENCY ACTION	850
VII. CONCLUSION	853

I. INTRODUCTION

The widespread use of regulatory agencies to execute legislative policy is a current fact of political and economic life.¹ Private persons frequently encounter the constraints of agency regulations as they conduct their business affairs and seek to acquire publicly created benefits. There has been a greater propensity to use non-legislative means to resolve social issues and political conflicts, which has followed the growth of administrative regulation. In Florida, the mechanism that regularizes the relationship between the state and persons who wish to challenge official action, and persons who need or want to act in concert with the state, is the Florida Administrative Procedure Act (APA).²

A major aspect of the Florida APA is its comprehensive procedural framework through which persons who are aggrieved or affected by agency action can challenge the acts of state and local administrative agencies. A central concept underlying this framework is that persons must be sufficiently affected by official action before they will be allowed to disrupt the governmental process by pursuing the remedies of the APA. This standing requirement, which is an express part of the legislative scheme, is necessary to protect both the integrity and efficiency of the process, and the interests of persons who in fact are affected and who would suffer from either a delay in the process or an improvident decision litigated by a nonaffected party. This article identifies the principles that underlie the standing requirement by analyzing federal and state administrative law decisions.

The APA details the procedures for challenging both agency rulemaking and enforcement.³ The administrative rulemaking provisions contain a procedure, section 120.54(4)(a) of the Florida Statutes,⁴ under which "[a]ny *substantially affected* person may seek an administrative determination of the invalidity of any pro-

1. See generally Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

2. FLA. STAT. §§ 120.50-.73 (1981).

3. *Id.* § 120.54. If an agency does not adopt specific rules of procedure to govern its action, FLA. STAT. § 120.54(10) (1981) prescribes model rules.

4. FLA. STAT. § 120.54(4)(a) (1981).

posed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.”⁵ Section 120.56(1),⁶ which governs challenges to existing rules, provides in almost identical language that “[a]ny person *substantially affected* by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.”⁷

In addition to rulemaking, administrative agencies also carry out the executive functions of government and implement legislative enactments. These exercises of delegated authority include licensing, permitting, enforcement, and numerous adjudicatory matters that, by definition, determine a person’s rights, privileges, or interests under state law.⁸ The Florida APA attempts to ensure the fairness of these administrative determinations through a system of formal and informal hearings under section 120.57 of the Florida Statutes.⁹ The procedures “shall apply in all proceedings in which the *substantial interests* of a party are determined by an agency.”¹⁰

Thus, the standard of “substantiality” governs the entitlement to hearings under sections 120.54(4)(a), 120.56(1), and 120.57.¹¹ The Florida cases appear to define “substantiality” under these sections in a similar manner.¹² This article suggests an analytical framework for determining when a party has satisfied the APA’s “substantiality” requirement and therefore has standing to challenge agency action.

Part II of this article evaluates the Florida APA’s provisions for preenforcement review of administrative action, analyzing Flor-

5. *Id.* (emphasis added). Similarly, FLA. STAT. § 120.54(5) (1981) provides that “[a]ny person regulated by an agency or having a substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule. . . .” Although this article does not focus on this provision, it argues that the same factors will trigger standing under either subsection (4) or (5). Nothing in the APA or case law indicates that the analysis of “substantiality” should be any different.

6. FLA. STAT. § 120.56(1) (1981).

7. *Id.* (emphasis added). According to FLA. STAT. §§ 120.54(4)(d), .56(5) (1981), the hearings in which such challenges are decided are subject to FLA. STAT. § 120.57 (1981). Proceedings involving a disputed issue of material fact may require a formal hearing, according to § 120.57(1). Informal proceedings are available under § 120.52(2) for cases not involving disputed issues of material fact.

8. *See, e.g.*, FLA. STAT. §§ 120.57, .60 (1981).

9. *Id.* § 120.57.

10. *Id.* (emphasis added).

11. Furthermore, one must be a “party” in the agency action that determines the substantial interest. FLA. STAT. § 120.52(10) (1981) defines “party.”

12. *See* notes 26-27 and accompanying text *infra*.

ida administrative law in the context of federal standing principles. These principles form a coherent basis for resolving the standing issue under the Florida APA. Part III examines the federal standing concepts in relationship to *Florida Department of Offender Rehabilitation v. Jerry*,¹³ the leading Florida case on standing. Part IV considers other Florida APA cases in which parties had standing to challenge agency determinations that injured or threatened injury to public entitlement program benefits, statutorily created substantive interests, and traditional contract or property rights. Part V examines recent developments in associational standing, and Part VI considers the standing necessary for judicial review of final agency rulings.

II. PREENFORCEMENT ADMINISTRATIVE REVIEW OF AGENCY ACTION

The major innovation of the Florida APA is its expanded system of preenforcement review of agency action.¹⁴ Although the APA does not expressly state that its purpose is to establish preenforcement review, the statutory scheme allows persons to challenge rules that potentially affect their substantial interests. Expanded preenforcement review in Florida corresponds with other state administrative law reform efforts. According to one prominent commentator:

The Revised Model State Administrative Procedure Act and a number of state statutes make general provision for judicial review of agency positions through declaratory judgments, with or without prior administrative proceedings to remove uncertainties in scope or meaning. The [federal] APA does not, and the draftsmen of the new state provisions have apparently assumed that they were going beyond at least the explicit federal statutory guarantees in embracing the "principle [of] advance determination of the validity of administrative rules, and [of] 'declaratory rulings,' affording advance determination of the applicability of administrative rules to particular cases."¹⁵

13. 353 So. 2d 1230 (Fla. 1st DCA), *cert. denied*, 359 So. 2d 1215 (Fla. 1978).

14. Although the legislative history of the APA is sparse, the Law Revision Council's Reporter published Comments that support this conclusion. See 3 A. ENGLAND & L. LEVINSON, *FLORIDA ADMINISTRATIVE LAW MANUAL Reporters' Comments* (1979); England & Levinson, *1976 Developments in Florida Law: Administrative Law*, 31 U. MIAMI L. REV. 749, 761 (1977).

15. Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443, 1452 (1971). See also 1 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 1.11, at 7-38 (2d ed. 1978): "The Uniform Law Commissioners speak of 'certain basic principles of common sense, justice, and fairness that can and should prevail universally,'

The former Florida APA provided that "affected part[ies]" could seek judicial review of an administrative rule's validity in the circuit courts.¹⁶ The current APA requires every agency to issue declaratory statements to petitioners setting forth "the agency's opinion as to the applicability of a specified statutory provision or of any rule or order of the agency as it applies to the petitioner in his particular set of circumstances only."¹⁷ The current APA also creates a Division of Administrative Hearings (DOAH) with the power to conduct independent preenforcement hearings on the validity of rules.¹⁸ The administrative review process remedies the deficiencies of the former statutes by "expanding the opportunities for flexibility and informality in Florida administrative processes."¹⁹

The District Court of Appeal, First District, recently discussed the underlying legislative intent of the rule challenge provisions of the Florida APA. In *Professional Firefighters, Inc. v. Department of Health & Rehabilitative Services*,²⁰ the First District held that "[t]he APA permits prospective challenges to agency rulemaking and does not require that an affected party comply with the rule at his peril in order to obtain standing to challenge the rule."²¹ In *Firefighters*, a union and three individual members challenged department rules that required state licensing of paramedics. The administrative hearing officer had held that the individual petitioners did not have standing to challenge the rules because they had not applied for certification and had not alleged that the rules would disqualify them from obtaining the required licenses.²²

The First District reversed because the administrative hearing officer's reasoning

would preclude a challenge by anyone who had not first complied with a rule and suffered injury, no matter how clear the rule's applicability to, or substantial its effect on, the challenger.

. . . .

. . . [including] [p]rovision for advance determination of the validity of administrative rules"

16. FLA. STAT. § 120.30 (1973) (repealed 1974).

17. *Id.* § 120.565 (1981).

18. *See id.* § 120.65(1). The Division of Administrative Hearings is a division of the State Department of Administration.

19. 3 A. ENGLAND & L. LEVINSON, *supra* note 14, Reporters' Comments, at 3. *See also* THE FLORIDA BAR, FLORIDA ADMINISTRATIVE PRACTICE § 2.2, at 43 (1976).

20. 396 So. 2d 1194 (Fla. 1st DCA 1981).

21. *Id.* at 1195.

22. *Id.*

. . . When an agency sets up a new licensing or certification requirement for an occupation or profession not previously subject to state-wide regulation or licensing, persons engaged in that occupation or profession have standing to challenge the proposed regulation.²³

Thus, although preenforcement review is an integral part of the Florida APA, it is clear that the legislative scheme also contemplates that the APA's benefits will be available only to the proper parties under the proper circumstances. The concepts of substantial effect and substantial interest govern access to the procedures of the APA.

III. UNIFORM PRINCIPLES OF STANDING AND *Jerry*

The Florida APA does not define the "substantially affected" language of sections 120.54(4)(a) and 120.56(1). The legislature left the task to the courts and administrative agencies.²⁴ Unlike the broader standard of "affected person" that appears in other sections of the APA,²⁵ the "substantially affected" standard requires a relatively higher threshold of injury or threatened injury before a person can challenge either proposed or adopted agency rules.²⁶ This section of the article examines the meaning of "substantially affected" under both section 120.54(4) and section 120.56(1).²⁷

23. *Id.* at 1195-96.

24. FLA. STAT. § 120.57 (1981) provides that one whose "substantial interests . . . are determined by an agency" has a right to an administrative hearing for a review of that determination. Regarding the term "substantial interests," two leading commentators have noted that "[t]he use of an undefined term in such a crucial provision of the Act is an obvious invitation to agencies and courts to develop the meaning of the term." 2 A. ENGLAND & L. LEVINSON, *supra* note 14, § 11.02, at 3. The term "substantially affected" in §§ 120.54(a) and 120.56(1) is equally open to interpretation. *See* note 27 *infra*.

25. Under FLA. STAT. § 120.54(3) (1981), "any affected person" may "present evidence and argument on all issues under consideration" if he has made a request within 14 days after the publication of the notice.

26. Florida Dep't of Offender Rehabilitation v. *Jerry*, 353 So. 2d 1230, 1232 (Fla. 1st DCA), *cert. denied*, 359 So. 2d 1215 (Fla. 1978). The court noted:

Section 120.30, Florida Statutes (1973), [the former APA] repealed by Ch. 74-310, Section 4, Laws of Florida, effective January 1, 1975, permitted any "affected party" to obtain a judicial declaration of the validity of any rule of an administrative agency by bringing a declaratory judgment action in the circuit court of the county in which such party resides.

The legislature in enacting Sections 120.54(4)(a) and 120.56, employed more restrictive language, "substantially affected", than it did in enacting Section 120.30. The legislature must be presumed to have intended a different result by employing language describing a more limited scope of persons affected in a given situation and less restrictive language in other situations.

27. Courts have applied the general considerations governing standing under FLA. STAT.

*Florida Department of Offender Rehabilitation v. Jerry*²⁸ was the first decision to recognize the need for a standard to measure the injury required for standing under the Florida APA. In *Jerry* the District Court of Appeal, First District, reviewed the case of a prison inmate who had been found guilty of unarmed assault, in violation of a department rule.²⁹ The rule also outlined the procedures for subjecting offenders to disciplinary confinement and the forfeiture of previously earned gain-time. After his release, the inmate, Leroy Jerry, challenged the validity of the rule's disciplinary procedure, contending that the department had violated the procedural guidelines of section 120.57 when it adopted the rule.³⁰ The First District declined to reach the merits because Jerry failed to prove his injury and thus did not have standing³¹ to challenge the rule under section 120.56(1).³²

The *Jerry* court could find few Florida cases that addressed

§§ 120.54(4), .56 (1981) ("substantially affected") to the determination of "substantial interests" under § 120.57. Two commentators disagree, however, with the proposition that standing under §§ 120.54(4) and 120.56(1) is coextensive with standing under § 120.57:

Section 120.54(4)(a) makes review of a proposed rule available to "any substantially affected person", and Section 120.56 makes review of an existing rule available to "any person substantially affected." These two triggering phrases, virtually indistinguishable from one another, are quite different from the triggering phrase of Section 120.57, "in which the substantial interests of a party are determined by an agency."

2 A. ENGLAND & L. LEVINSON, *supra* note 14, § 11.02(c)(1), at 10 (emphasis added).

In some respects, the three sections operate similarly. For example, the hearing procedures under § 120.57 are also generally used for § 120.54(4) and § 120.56 challenges. There are, however, some significant operational differences. First, both § 120.54(4) and § 120.56(1) provide that determinations must be made by a hearing officer assigned by the Division of Administrative Hearings (DOAH), without the other options available in some situations under § 120.57. Second, the determination by the DOAH hearing officer under §§ 120.54(4) and 120.56 "is final agency action," subject only to judicial review in the district court of appeal. FLA. STAT. §§ 120.54(4), .56(5) (1981). Section 120.57 hearing officers may render a recommended order, subject to final action by the agency head and the courts. *Id.* § 120.57. Nonetheless, neither the legislative history of the APA nor the case law indicates that any difference for determining standing should exist, except in some cases not involving pre-enforcement relief.

Section 120.57 additionally applies only in proceedings in which an agency determines the substantial interests of a party. Therefore, one threshold difference is the necessity that one be a party and have substantial interests determined. The point here, however, is that the same concepts apparently govern both the "substantiality of interests" test and the "substantially affected" test.

28. 353 So. 2d 1230 (Fla. 1st DCA), cert. denied, 359 So. 2d 1215 (Fla. 1978).

29. FLA. ADMIN. CODE Rule 33-3.08 (1981).

30. 353 So. 2d at 1231.

31. *Id.* at 1235.

32. FLA. STAT. § 120.56(1) (1981) states, "Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."

standing³³ and none that defined a "substantially affected" person. It therefore turned to the federal APA and to major decisions of the Supreme Court of the United States delineating the degree of injury required for standing to sue in the federal courts.³⁴ The First District noted that under the federal APA, a person must be "'adversely affected or aggrieved by agency action'" to seek redress in the courts.³⁵ Nevertheless, "[d]espite the dissimilarities of the terms under the federal and Florida Acts,"³⁶ the court observed that "decisions involving standing in the federal courts often turn upon issues pertaining to whether a person seeking relief has shown that his interests are *substantial* and not illusory."³⁷

The First District relied on *Sierra Club v. Morton*,³⁸ *Roe v. Wade*,³⁹ and especially *O'Shea v. Littleton*,⁴⁰ to hold that Jerry's

33. The only Florida cases the court cited were *A.S.I., Inc. v. Florida Pub. Serv. Comm'n*, 334 So. 2d 594 (Fla. 1976) and *Gadsden State Bank v. Lewis*, 348 So. 2d 343 (Fla. 1st DCA 1977).

34. 353 So. 2d at 1233.

35. *Id.* at 1233 & n.7 (quoting 5 U.S.C. § 702 (1976)).

36. 353 So. 2d at 1233.

37. *Id.* (emphasis added). Although the language of the Florida APA, unlike that of the federal APA, includes the word "substantial," the First District applied federal standing principles. One explanation may be that article III of the United States Constitution limits federal court jurisdiction to "cases" or "controversies." The courts have construed this requirement to mean that a plaintiff must have an "injury in fact" and that the injury must fall within the statutorily protected "zone of interests." See *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970). *But see* *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 79 (1978) ("[A] litigant must demonstrate . . . [nothing] more than injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III.').

In addition to the article III requirement, federal courts have imposed an additional standing barrier as a rule of self-restraint, under which they have denied standing for prudential reasons, even when a plaintiff has met the minimum article III injury requirement. See *Data Processing*, 397 U.S. at 154. See also *Warth v. Seldin*, 422 U.S. 490 (1975). By statute, however, Congress may abrogate prudential limits on standing, as it did in the Administrative Procedure Act, § 10(a), 5 U.S.C. § 702 (1976). Thus, courts may not deny access to persons "adversely affected or aggrieved within the meaning of a relevant statute" solely because of prudential considerations. *Id.*

The prudential considerations of federal courts probably would not apply under the Florida APA, because the principles that apply to the federal courts do not constrain Florida administrative hearing officers. Nevertheless, by applying the federal test, the *Jerry* court interpreted "substantially affected" to be coextensive with the federal standing requirement.

38. 405 U.S. 727 (1972). In *Sierra Club* an environmental group challenged the United States Forest Service's proposal to develop Segovia National Forest's Mineral King Valley into an extensive resort area. The group claimed a special interest in the continued maintenance and conservation of the national park system. The Court denied the group standing because it failed to show injury in fact or an interest beyond that shared by the general public.

39. 410 U.S. 113 (1973). In *Roe* a woman challenged an anti-abortion statute, alleging a

alleged injury was an insufficient basis for standing. Because Jerry did not allege that he had lost gain-time, he effectively challenged only the procedural rules that he might be subjected to if he committed a future infraction. Like the plaintiffs in *O'Shea*, Jerry was unable to demonstrate an immediate injury. In *O'Shea* seventeen blacks and two whites complained that law enforcement officers were engaging in discriminatory bail-setting, sentencing, and juryfee practices. The plaintiffs in *O'Shea* could only allege potential injury because at the time the lawsuit was filed, none of them were on trial, awaiting trial, or serving an allegedly illegal sentence, and thus were not subject to the alleged discriminatory practices.⁴¹ The Supreme Court of the United States decided that the case was nonjusticiable because the probability was too remote that any of the plaintiffs would ever be exposed to the allegedly discriminatory criminal justice system.⁴² The Court "assume[d] that [the plaintiffs would] conduct their activities within the law and so avoid prosecution and conviction as well as exposure to the challenged course of conduct."⁴³

The First District compared the inmate's claim in *Jerry* to that of the plaintiffs in *O'Shea*:

As in *O'Shea*, Jerry's prospects of future injury rest on the likelihood that he will again be subjected to disciplinary confinement because of possible future infractions of [the challenged rule]. Whether this will occur, however, is a matter of speculation and conjecture and we will not presume that Jerry, having once committed an assault while in custody, will do so again. To so presume would result only in illusory speculation which is hardly supportive of issues of "sufficient immediacy and reality" necessary to confer standing.⁴⁴

possible future injury should she become pregnant and desire an abortion. The Court found no present injury, and concluded that the potential for future injury was so attenuated that it failed to meet the article III "case or controversy" requirement.

40. 414 U.S. 488 (1974).

41. *Id.* at 496.

42. See note 48 and accompanying text *infra*.

43. 414 U.S. at 497.

44. 353 So. 2d at 1236. The *Jerry* case, which turned on the issue of standing, closely resembles federal decisions on a related problem of justiciability: ripeness. Although the three United States Supreme Court cases cited by the *Jerry* court involved the federal standing doctrine, the *Jerry* decision is most comparable to *O'Shea v. Littleton*, 414 U.S. 488 (1974), in which the Court held the case nonjusticiable because the plaintiffs failed to show an immediate injury on grounds that more closely resembled ripeness.

To some extent, "standing" and "ripeness" represent artificial labels applied to conditions underlying a purported dispute. The article III "case or controversy" requirement, however, underlies both concepts. That requirement means, in part, that federal courts may

Jerry has been recognized as the leading Florida decision defining "substantially affected."⁴⁵ Subsequent cases indicate, however, that *Jerry's* rationale, considered together with the underlying purpose of the Florida APA,⁴⁶ requires additional clarification to ensure its consistent application. Analyzing *Jerry* and adducing its operative principles will promote the development of a standing doctrine that recognizes the substantial injury requirement, yet conforms with the purpose of the Florida APA.

The court's analysis in *Jerry* consists of two related factors. First, *Jerry* did not challenge the substantive rule against assault. Rather, he challenged only the procedures that would be applied should he again be accused of violating the valid substantive rule.⁴⁷ Second, the court refused to speculate on the probability that a particular prisoner would be subsequently charged with violating a substantive rule and thus become subject to the challenged procedures.⁴⁸ Post-*Jerry* decisions on standing examine the immediacy

not issue advisory opinions. Because any decision will have a precedential effect on persons situated similarly to the party in court, the judiciary closely scrutinizes the litigant's standing, and examines the issue's timeliness.

The standing doctrine seeks to ensure that a plaintiff has a sufficient injury and personal stake in the outcome of the litigation to present the issues fully and concretely. A decision resulting from an improper party's "inadequate" presentation would prejudice "proper" parties directly injured by the challenged rule. "Ripeness" means that the courts will entertain only fully developed issues fit for judicial resolution. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 52-58, 60-62 (1978).

Although the *O'Shea* opinion did not expressly mention ripeness, the substance of the decision implies that timeliness was the concern, and textbooks and treatises treat *O'Shea* as a ripeness case. See, e.g., P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 48 (2d ed. Supp. 1981); G. GUNTHER, *CONSTITUTIONAL LAW* 1590 (1978).

45. At least one commentator has suggested abandoning *Jerry* as the "test" case for administrative standing. See Kavanaugh, *Administrative Standing Under Chapter 403: What Does the Jerry Case Mean?* 53 FLA. B.J. 729 (1979). Despite Kavanaugh's concerns, *Jerry* does provide insight into the reasoning of the district court that had decided the most cases under the APA.

46. See notes 14-23 and accompanying text *supra*.

47. *Jerry* was not asserting the right to engage in proscribed conduct.

48. To avoid speculating about the likelihood that a particular person will again be subject to the rule, one could look to the class of persons affected by the rule. A substantial number of prisoners will undoubtedly commit breaches of prison discipline in the future. By focusing on the common sense dynamics of the group, the courts could avoid the difficulty of imputing a propensity for lawlessness to any one individual. Professor Alan C. Swan, Professor of Law at the University of Miami School of Law has suggested this perspective as a possible alternative to the court's present approach.

Professor Swan recognizes however that the group should not be defined too broadly. For example, the class of female Medicaid recipients of childbearing age is too broad to have APA standing to challenge rules governing the availability of abortions, because there is no reason to believe that any one, much less a substantial number, of the group will want an

and reality of the alleged injury to evaluate its "substantial effect." To analyze this aspect of standing properly, one must consider a major purpose of the Florida APA: the regularization of the relationship between administrative agencies and regulated groups through preenforcement review of proposed or final agency actions.⁴⁹ The lessons of federal administrative law are extremely helpful in providing a meaningful interpretation of *Jerry* for future application.

The federal APA does not expressly provide for preenforcement review.⁵⁰ Nevertheless, the Supreme Court of the United States has ruled that an aggrieved party may seek such review. In *Abbott Laboratories v. Gardner*,⁵¹ the Court upheld the availability of preenforcement review of a regulation promulgated by the Commissioner of the Food and Drug Administration (FDA) since the federal Food, Drug, and Cosmetic Act⁵² did not expressly preclude review.⁵³ The Court also ruled that a challenge to the Commissioner's interpretation of the statute under which he issued the regulation was a justiciable controversy "ripe" for judicial resolution.⁵⁴ Two factors that contributed to the holding were the fitness of the issues for judicial decision and the hardship to the parties that would result if the Court withheld court consideration. As described below,⁵⁵ both aspects of the *Abbott Laboratories* decision, particularly the hardship aspect, provide a basis for understanding the nature and degree of injury necessary to permit standing under the APA.

The first factor supporting judicial review in *Abbott Laboratories* was the fitness of the issue for review: the challenge raised a question of pure statutory interpretation turning on congressional intent.⁵⁶ Similarly, most issues raised by challenges to Florida administrative regulations, which arise under sections 120.54(4) and 120.56(1) of the Florida APA, present a purely legal question: whether a proposed or enacted rule is an invalid exercise of the

abortion in the future. See *Department of Health & Rehabilitative Servs. v. Alice P.*, 367 So. 2d 1045 (Fla. 1st DCA 1979). On the other hand, of the subgroup of that class who cannot, for medical reasons, take contraceptives, a substantial number may indeed want an abortion in the future.

49. See text accompanying notes 14-17 *supra*.

50. See note 35 and accompanying text *supra*.

51. 387 U.S. 136 (1967).

52. 21 U.S.C. § 301 (1976).

53. 387 U.S. at 141.

54. *Id.* at 151.

55. See notes 56-61 and accompanying text *infra*.

56. 387 U.S. at 149.

authority delegated by the legislature. Challenges to state administrative regulations, therefore, usually satisfy the first part of the *Abbott Laboratories* justiciable controversy test.⁵⁷

The second factor supporting judicial review in *Abbott Laboratories* concerned the hardship to the parties that would result if a court withheld review. The Court examined the finality and formality of the administrative action, and the extent of its direct and immediate impact on the challenger. In Florida, even if challenges under sections 120.54(4) and 120.56(1) do not have to conform to *Abbott Laboratories*'s finality and formality standard, they still must demonstrate sufficient injury to be reviewable under the Act. A sufficient injury exists when the challenger is faced with an immediate adverse impact, which is the heart of the Florida APA "standing" doctrine.

In *Abbott Laboratories*, Justice Harlan emphasized that the challenged regulation had a direct impact upon the day-to-day business of the drug companies: "[T]he regulation is directed at them in particular; it requires them to make significant changes in their everyday business practices; if they fail to observe the Commissioner's rule they are quite clearly exposed to the imposition of strong sanctions."⁵⁸ The substantive nature of the regulation and

57. The Court's reluctance to become entangled in agency matters at an inappropriate stage underlies *Abbott Laboratories*. As Justice Harlan said:

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

387 U.S. at 148-49 (citing 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE 116 (1948) and L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 395 (1965)).

Although administrative, not judicial, review is immediately at issue in §§ 120.54(4) and 120.56, a hearing officer's determination that a rule or proposed rule is invalid constitutes final agency action under §§ 120.56(5) and 120.54(4)(d). Final agency action is directly appealable to the district courts of appeal. FLA. STAT. § 120.68(1) (1981). Furthermore, as discussed at note 37 *supra*, although the precise separation of powers principles that govern relationships between the branches of the federal government may not be fully binding on such interbranch relationships at the state level, the general concept of undesirable interference with the administrative process, rather than the means of that interference, still controls.

58. 387 U.S. at 154. As Professor Vining stated:

Whenever an agency administering a comprehensive regulatory scheme adopts an authoritative position on a question, the plans of persons and groups active in the regulatory field are affected. Indeed, they are affected whenever the agency acts to crystallize a question for authoritative resolution out of the flux of problems being handled by those in the field. Plans must change, and this does not mean change merely in expectations and paper calculations, in hopes and

its immediate impact on the regulated companies' primary conduct, therefore, supported review.

In contrast, in a companion case to *Abbott Laboratories, Toilet Goods Ass'n v. Gardner*,⁵⁹ the Court refused to allow preenforcement review of a regulation that governed the inspection of manufacturing facilities because a particular inspection case was not at issue. According to Justice Harlan, "This is not a situation in which primary conduct is affected—when contracts must be negotiated, ingredients tested or substituted, or special records compiled. This regulation merely states that the Commissioner may authorize inspectors to examine certain processes or formulae"⁶⁰ The regulation challenged was a procedural rule that governed how an agency could enforce a presumably valid substantive rule. The challenged regulation did not have the impact on primary behavior necessary to warrant review prior to enforcement.

The ripeness analysis used in *Toilet Goods* provides an informative comparison to the standing rationale of *Jerry*. Like the petitioners in *Toilet Goods*, the prisoner in *Jerry* challenged the procedures used to enforce an otherwise valid substantive rule. In both cases, as in *O'Shea v. Littleton*, there was an insufficient impact on the challenger's everyday conduct to justify intrusion into the administrative process.

To mount a challenge under the Florida APA after *Jerry*, therefore, a litigant must show that he faces a concrete and immediate injury that is caused by the challenged agency rule. Analogizing to federal administrative law principles, if the petitioner proves he is within the class regulated by a particular substantive rule that regulates primary conduct, and thus is substantially affected by the rule, he should have standing under the APA. If, however, the petitioner challenges a procedural rule, the requisite immediate injury will probably not exist, although it is conceivable that some onerous procedural rules could cause immediate injury.⁶¹

fears. Purchasing and personnel training programs, research and product design, financial arrangements, even organizational structures must be redirected to a greater or lesser degree to accommodate or avoid the new fixed point.

Vining, *supra* note 15, at 1446.

59. 387 U.S. 158 (1967).

60. *Id.* at 164.

61. A possible example is procedures that fail to afford adequate due process. In fact, the court in *Jerry* implied that an allegation labeling a rule unconstitutional might satisfy the APA's standing requirements. 353 So. 2d at 1235. In Florida, however, administrative agencies are not considered appropriate bodies to decide constitutional questions. The proper procedure for instituting review of an allegedly unconstitutional rule is an action for declaratory judgment in a circuit court under FLA. STAT. § 86 (1981). *See, e.g., Metropolitan*

Under either the procedural-substantive analysis or the "injury" test, official action that forces regulated persons to conform immediately to substantive behavioral guidelines may be challenged under sections 120.54(4), 120.56(1), or 120.57 of the Florida Statutes.⁶² Later cases indicate three general substantive areas into which this official conduct falls: (1) entitlements to obtain or compete for benefits publicly conferred upon certain beneficiaries; (2) interests arising from substantive grants under statutes or agency regulations; and (3) rights under contract or property principles.

IV. INJURIES RECOGNIZED AS SUFFICIENT FOR STANDING UNDER THE APA.

A. *Publicly Conferred Benefits Accruing to Individuals or Groups*

Agency administration of publicly created opportunities has generated many challenges under the Florida APA. In *Department of Administration v. Harvey*,⁶³ for example, an applicant was informed that she was ineligible for Division of Personnel employment because she failed to meet the department's minimum train-

Dade County v. Department of Commerce, 365 So. 2d 432 (Fla. 3d DCA 1978). See also Swan, *Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law*, 33 U. MIAMI L. REV. 527 (1979).

Professor Swan, of the University of Miami School of Law, suggested an alternative to the general standing analysis in a class lecture:

Any facial "preenforcement" attack on an existing or proposed substantive or procedural rule may have a broad *stare decisis* effect on a group of people similarly situated to the petitioner. If the petitioner will adequately represent that group, the focus of analysis for standing purposes should properly be the interests of the group. Arguably, the legislature, in providing for preenforcement review of rules, thought of protecting the general group of persons possibly affected by the rules.

Thus, the standing test might (1) start with those interests relied on by the individual petitioner to establish the probability of his future encounter with the challenged rule, and then (2) determine the probability of that future encounter by reference to the characteristics and propensities of the group that shares the petitioner's asserted interests (*i.e.*, those characteristics indistinguishable from the individual petitioner). In other words, the test would define a group and then determine the probability of the petitioner's future encounter with the rule by reference to the nature of the group's business, or its personal characteristics, or the dynamics of the institution that make it a group.

For example, of all the firms engaged in bidding on public works, a substantial number will probably bid on future projects and encounter a minimum wage determination. See notes 67-71 and accompanying text *infra*. Also, a substantial number of the applicants who have been denied civil service jobs because they did not meet minimum qualifications might apply again for similar civil service positions. See notes 63-66 and accompanying text *infra*.

62. FLA. STAT. §§ 120.54(4), .56(1)-.57 (1981).

63. 356 So. 2d 323 (Fla. 1st DCA 1977).

ing and experience requirements.⁶⁴ The applicant challenged the validity of the requirements under section 120.56 of the Florida Statutes,⁶⁵ alleging that the agency's regulation deprived her of the substantive right to compete for state employment. She also alleged that although the agency requirement had the effect of a rule, the agency had not adopted the requirement in rulemaking proceedings. In finding that the applicant had standing to challenge the rule, the District Court of Appeal, First District, ruled that "the denial of avenues of employment substantially affected" the petitioner.⁶⁶

In *Department of Commerce v. Matthews Corp.*,⁶⁷ an unsuccessful bidder on a public construction project contested the validity of department wage rate guidelines under section 120.56 of the Florida Statutes.⁶⁸ The bidder alleged that the wage rate guidelines were rules, but were not adopted in accordance with the requirements of section 120.54.⁶⁹ Although the petitioner had not been the low bidder, and had not received the contract, the First District upheld the hearing examiner's ruling that the petitioner had standing. "[I]f it were not for the wage rate determinations," the court stated, "Matthews would be in better competitive position to bid on public works projects."⁷⁰ The court contrasted the bidder's situation to that of the petitioner in *Jerry*, who "had not shown either injury in fact or issues of sufficient immediacy and reality necessary to confer standing."⁷¹

64. See FLA. ADMIN. CODE Rule 22A-7.02(9) (1981).

65. FLA. STAT. § 120.56 (1981).

66. 356 So. 2d at 325.

67. 358 So. 2d 256 (Fla. 1st DCA 1978).

68. FLA. STAT. § 120.56 (1981).

69. *Id.* § 120.54.

70. 358 So. 2d at 257 n.1. The wage rate guidelines substantially affected Matthews Corp., although perhaps not for the reason the court cited. Because the guidelines applied to specific projects at particular locations, *id.* at 258, all bidders on a particular project would be subject to the same guidelines. Thus, it is difficult to discern how the wage rate determinations placed Matthews Corp. in a worse "competitive position to bid on public works projects" vis-a-vis other bidders for the same project. Nevertheless, the application of the guidelines would raise the cost of any bid, and thereby affect contractors' interests.

71. 358 So. 2d at 257 n.1. The court held that the guidelines were not rules subject to a § 120.54 challenge, because they were limited both temporally and geographically, and were not generally applicable. *Id.* at 258. Nevertheless, because the wage determinations for a particular project were mandatory and thus affected the substantial interests of contractors and contracting authorities, the court subjected the guidelines to the hearing requirements of § 120.57. *Id.* at 259.

The court's holding strongly suggests that the injury requirements for standing under §§ 120.57 and 120.56 (and therefore § 120.54(4)) are coextensive. Significant differences may exist in the procedures following the hearing, but this apparently is irrelevant in triggering

The First District's opinion in *Department of Health & Rehabilitative Services v. Alice P.*⁷² applied the standing principles articulated in *Jerry* to a class action rule challenge. In *Alice P.*, the Department of Health and Rehabilitative Services, which administers the Medicaid program in Florida, had issued a notice of proposed amendments to its permanent rules, and had promulgated emergency rules, to conform to a federal amendment that terminated federal Medicaid funds for elective, nontherapeutic abortions.⁷³ Several Medicaid recipients, two women's health organizations, and the physician in charge of a women's health clinic petitioned for a section 120.54(4) determination that the proposed amendments improperly impounded funds appropriated by the Florida Legislature, and that the notice summarizing the estimate of economic impact was erroneous. After holding that "a proposed rule challenge is not, under Florida law, a proper proceeding for the maintenance of a class action," the First District considered the standing of the individual petitioners.⁷⁴ The court found that the only Medicaid recipients who were "substantially affected" by the proposed rules, and thus met the threshold standing test of *Jerry*, were those women pregnant at the time of the challenge.⁷⁵ The director of the abortion clinic, also had standing because thirteen percent of the abortions performed at the clinic during his four and one-half years tenure as director had been funded by Medicaid. After the funding cutoff, the number of Medicaid patients patronizing the clinic significantly decreased.⁷⁶ Although the court ultimately held that the petitioners who satisfied the threshold requirements still could not sue because they did not file their petitions within the statutory period,⁷⁷ the court's opinion recognized that persons threatened by a reduction of public benefits are "substantially affected."

A central factor in the court's standing analysis in *Alice P.* was its application of *Jerry* to determine which petitioners were sufficiently affected to challenge the rule. The court rejected as "clearly

the initial procedural relief. See discussion at note 27 *supra*.

72. 367 So. 2d 1045 (Fla. 1st DCA 1979).

73. *Id.* at 1048.

74. *Id.* at 1050.

75. *Id.* at 1052 & nn.1 & 2 (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

76. *Id.* at 1052. The court found nothing in the record to support a finding of standing for the two women's health organizations.

77. *Id.* at 1052-53. FLA. STAT. § 120.54(4)(b) (1981) requires petitioners challenging proposed rules to file their petitions within fourteen days after notice of the proposal is published.

erroneous" the hearing officer's finding "that all women of childbearing age who are Medicaid recipients are substantially affected."⁷⁸ Just as Jerry lacked standing "to challenge a rule even though he had previously been directly affected by its operation,"⁷⁹ it would be inconsistent to grant standing to all Medicaid recipients of childbearing age, whether or not they are presently "directly affected" by the rule—*i.e.*, pregnant.⁸⁰

In *Panama City v. Public Employee Relations Commission*,⁸¹ the DOAH found that Panama City had standing to bring a section 120.56(1)⁸² challenge to a state Public Employee Relations Commission (PERC) order. The order threatened to revoke state approval of the city's "local option" ordinance⁸³ unless the city amended its ordinance within ninety days. The "immediate and real" order had "continuing present adverse effects upon [the city] as a result of the state's threat to revoke approval of the local option ordinance should [the city] fail to comply with the order."⁸⁴

Panama City is an example of a dispute involving public benefits to a specified beneficiary, in which the alleged injury had the

78. 367 So. 2d at 1051. The court noted that "the hearing officer stated that he was not concerned with the technicalities of standing but was 'interested in reaching the merits in this case.'" *Id.* at 1049.

79. *Id.* at 1051.

80. *Alice P.* clarified the principles governing access to Florida APA procedures. The rule challenged in *Alice P.* was not "procedural" in the same sense as the rule challenged in *Jerry*. Indeed, it was substantive to the extent it determined what class of persons would be eligible for a particular public benefit. But it is difficult to classify the abortion entitlement as bearing significantly on the primary conduct of all women. Although many women would adopt a different mode of behavior if federally funded abortions were available, such a choice does not pose the same inevitability of changed conduct as in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). See text accompanying note 58 *supra*. As a practical matter, the proposed rule change in *Alice P.* might cause nonpregnant Medicaid recipients to use an alternative method of birth control. On the other hand, the pregnant Medicaid recipients who would be excluded from benefits under the proposal would be compelled to carry an "unwanted" child to term, obtain a professional abortion at significantly greater expense, or abort in some less costly manner, clearly a choice of a different magnitude.

81. 1980 FLA. ADMIN. L. REP. 1193-A (Case No. 79-1369R) (Sept. 22, 1980).

82. FLA. STAT. § 120.56(1) (1981).

83. Pursuant to FLA. STAT. § 447.603 (1981), local governments may create a local commission to govern labor disputes between public employers and employees in lieu of the state PERC.

84. 1980 FLA. ADMIN. L. REP. at 1194-A. The opinion restated the *Jerry* test:

[T]he concept of standing in an administrative proceeding includes the notion that Petitioner has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged rule, that Petitioner must show an injury which is accompanied by continuing present adverse effects, and by the notion that the substantial effect must be of sufficient immediacy and reality and not illusory speculation.

Id. at 1193-A.

immediacy that was lacking in *Jerry*. In *Panama City*, PERC's action threatened to force the city to change its local law—its “primary behavior”—or face a sanction for failure to comply. The city suffered the kind of “immediate impact” contemplated by the standing doctrine articulated in *Jerry*.

Similarly, in *Groves v. Department of Transportation*,⁸⁵ the DOAH ruled that the petitioning state employees, who were subject to department layoffs, had standing to challenge the agency's designation of a “competitive area.” A competitive area represents the divisions in which an employee who holds an eliminated position can elect to replace an employee with fewer retention points at the same or a lower job classification. The DOAH found that the employees were “clearly substantailly [*sic*] affected by the designation of the competitive area”⁸⁶ because the number of available divisions directly affected their ability to retain or transfer to a job. Furthermore, it required little speculation to assume that discharged employees holding eliminated positions would exercise their seniority rights and thereby be affected by the rule.

The employees had also challenged the date selected by the department as a deadline for updating the retention point list. The DOAH hearing officer found, however, that the employees lacked standing to challenge this determination because “[i]t is just as possible that choosing the . . . date was advantageous to the [employees] as is the contrary.”⁸⁷ Under the *Jerry* standard, the employees lacked the requisite immediate injury. The DOAH hearing officer concluded, therefore, that sections 120.56(1) and 120.54(4) implicitly require that petitioners be “adversely” affected by the challenged agency action. The concept of “injury” engrafted onto these sections by *Jerry* implies an “adverse effect.”⁸⁸

85. 1980 FLA. ADMIN. L. REP. 1513-A (Case No. 80-1690R) (Dec. 1, 1980).

86. *Id.* at 1514-A. After finding that the petitioners had standing to challenge the Department's designation of the competitive area, the hearing officer held that the designation did not constitute a “rule,” and that the petition should be dismissed. *Id.* at 1515-A.

87. *Id.* at 1514-A.

88. For example, in *Florida State Univ. v. Dann*, 400 So. 2d 1304 (Fla. 1st DCA 1981), seven members of the university faculty brought an action challenging the issuance of a document that set forth the university procedures for awarding merit salaries and other pay increases. The complaint alleged that the document was not issued in a § 120.54 rulemaking process, and thus constituted an invalid rule. The District Court of Appeal, First District, held that the faculty members had standing to bring the challenge because the procedures “were likely to have a continuing impact on determination of their annual salaries.” *Id.* at 1305.

The DOAH recently denied standing in another case after finding that no continuing impact existed. In *Serrano v. Valencia Community College*, 1981 FLA. ADMIN. L. REP. 2334-A

A recent DOAH decision indicates that to be "substantially affected" by agency action, a litigant must show that the remedy sought will adequately redress the "effect" that gives rise to the challenge. In *Kiley v. Leon County School Board*,⁸⁹ a public school student challenged a county-wide compulsory school attendance rule,⁹⁰ which required the school board to fail students with too many unexcused absences. The student had failed the fall semester of her freshman year because of her unexcused absences and poor academic performance. She did not challenge the rule, however, until two years later, after she had satisfactorily progressed in another school. The hearing officer concluded that "a determination of the challenged rule's invalidity necessarily could not return her to the position she occupied" two years earlier; thus the rule no longer "substantially affected" her.⁹¹

In *Couch Construction Co. v. Department of Transportation*,⁹² a case involving private beneficiaries of public grants that arose under section 120.57 of the Florida Statutes,⁹³ the court held that bidders on public contracts have standing to invoke a hearing to challenge the qualifications of other bidders. The court approved the hearing officer's ruling that the "right of a bidder for a public contract to a fair consideration of his bid and his right to an award of the contract if his is the lowest responsible bid are matters of substantial interest to him, thus entitling him to a hearing pursuant to § 120.57."⁹⁴

(Case No. 81-2055R) (Nov. 5, 1981), an applicant who was denied either of two vacant teaching positions challenged, under § 120.56, the college's procedural rules governing grievance proceedings. Although the applicant had unsuccessfully pursued grievance proceedings after the university denied his application, the applicant had no grievance pending when he filed his APA petition. Citing *Jerry*, the hearing officer ruled that the petitioner "failed to establish that he is suffering any continuing injury as a result of the procedural rules," and dismissed the petition for lack of standing. *Id.* at 2335-A.

89. 1981 FLA. ADMIN. L. REP. 2245-A (Case No. 80-1611R) (June 8, 1981).

90. Leon County School Board, Rule 66X37-3.03 (1981).

91. 1981 FLA. ADMIN. L. REP. at 2447-A.

92. 361 So. 2d 184 (Fla. 1st DCA 1978).

93. FLA. STAT. § 120.57 (1981).

94. 361 So. 2d at 186. There is a reasonable inference that the court in *Couch* based its grant of standing on an implied statutory right. See generally notes 123-64 and accompanying text *infra*. The petitioner's complaint alleged that the low bidder was disqualified under FLA. STAT. § 337.16(1) (1981), which provides: "(1) No contractor shall be qualified to bid when an investigation by the highway engineer discloses that such contractor is delinquent on a previously awarded contract, and in such case his certificate of qualification shall be suspended or revoked." *Id.*, quoted in 361 So. 2d at 186 n.2. But the court did not suggest that standing springs from the substantive command of the statute. The court's holding thus coincides with the general principle of this section: official actions affecting access to "public goods" creates standing.

B. Interests Created by Statute or Agency Rule

Substantive statutes and departmental rules may also entitle persons to the benefits of the Florida APA's procedures for challenging agency action. Some statutes and rules expressly create "substantial" interests,⁹⁵ while others create interests that courts have inferred will be "substantially affected" by agency action.⁹⁶

1. AGENCY RULES CONFERRING STANDING

*Gadsden State Bank v. Lewis*⁹⁷ illustrates the extent to which agency rules can establish a person's right to participate in or demand a section 120.57 hearing. In *Gadsden*, the Department of Banking and Finance denied the Gadsden State Bank's (Gadsden) petition for a section 120.57(1) hearing to protest another bank's application for authority to establish a branch near Gadsden's existing facility. The department ruled that Gadsden was neither a party to the competitor's branch application nor a person whose substantial interests would be determined by the department's action.⁹⁸

The District Court of Appeal, First District, reversed, ruling that Gadsden was a "party" because a department rule defined "parties to proceedings before the department" to include "complainants" and "protestants."⁹⁹ The court then found that because of the potential competitive injury to Gadsden, the agency proceedings on the competitor bank's branch application would determine Gadsden's "substantial interests." Although potential competitive injury was not a matter of explicit statutory concern,¹⁰⁰ another department rule conditioned branch approval on a finding

95. *E.g.*, FLA. STAT. § 381.494(7)(b)-(e) (1981). *See also* The Florida Environmental Protection Act of 1971, FLA. STAT. § 403.412(5) (1981).

96. *See* notes 123-64 and accompanying text *infra*.

97. 348 So. 2d 343 (Fla. 1st DCA 1977).

98. *Id.* at 346.

99. FLA. ADMIN. CODE Rule 3-2.20 (1981) provides: "Parties to proceedings before the department are designated as applicants, petitioners, complainants, defendants, respondents, protestants, or intervenors, according to the nature of the proceeding and the relationship of the respective parties."

The court noted that another rule designates opponents of an application as "protestants," FLA. ADMIN. CODE Rule 3-2.26 (1981), and still another authorizes protestants to make appearances and present evidence and argument at formal hearings, FLA. ADMIN. CODE Rule 3-3.73(2)(a)(4) (1981). 348 So. 2d at 346.

100. FLA. STAT. § 659.06(1)(a)(1) (Supp. 1976) (current version at FLA. STAT. § 658.26(2)(a) (1981)) authorized the Department of Banking and Finance to approve the establishment of branches "upon such conditions as the department shall prescribe, including a satisfactory showing . . . that public convenience and necessity will be served thereby."

“that local conditions assure reasonable promise of successful operation for the proposed branch ‘and for the existing banks or branches already established in such area.’”¹⁰¹ The department’s rule thus made the potential competitive injury a matter of statutory concern, creating a substantial interest for purposes of section 120.57.¹⁰²

A recent decision by the District Court of Appeal, Second District, demonstrates that the scope and purpose of a statute may also limit the extent to which the enforcing agency’s rules can confer party status. In *Agrico Chemicals Co. v. Department of Environmental Regulation*,¹⁰³ a phosphate producer (Agrico) applied to the Department of Environmental Regulation (DER) for a construction permit to build a terminal facility to handle solid sulphur. Agrico needed a permit under section 403.807 of the Florida Statutes¹⁰⁴ because the proposed facility posed a potential air and water pollution hazard. Two molten sulphur suppliers, who would be threatened economically by competition from Agrico, subsequently petitioned for a section 120.57 hearing to challenge Agrico’s application. The suppliers argued that the DER’s “Latest Reasonably Available Control Technology” (LRACT) rule,¹⁰⁵ which required the DER to give “*due consideration to . . . the social and economic impact of the application of [proposed pollution*

101. FLA. ADMIN. CODE Rule 3C-13.07(1)(e) (1977) (current version at FLA. ADMIN. CODE Rule 3C-13.041 (1981)), quoted in 348 So. 2d at 346. In *Carrollwood State Bank v. Lewis*, 362 So. 2d 110 (Fla. 1st DCA 1978), a bank located across the street from the site of a proposed branch had standing to request a § 120.57 hearing to argue that local conditions did not ensure the successful operation of existing banks in the area, much less the proposed branch bank. The position taken by the Department of Banking and Finance, that the bank “had no standing and was not a proper party or a person whose substantial interests were determined by the agency, was untenable.” *Id.* at 113.

102. A second, apparently independent basis that entitled Gadsden to demand a § 120.57(1) hearing was the statutory language: “[A] protesting party’s right of participation in an APA hearing does not depend on showing its own substantial interests are to be determined. Section 120.57 provides a hearing under one of its subsections ‘in all proceedings in which the substantial interest of a party are determined.’” 348 So. 2d at 346 (quoting FLA. STAT. § 120.57 (Supp. 1976) (subsequent amendments do not affect cited section) (emphasis added by the court)). The court noted that Gadsden’s competitor “assuredly was such a party.” 348 So. 2d at 346. Thus, a person that can acquire party status under an agency rule arguably has a right to a § 120.57 hearing if the challenged agency action will determine the substantial interest of any other “party.” See also *Bio-Medical Applications v. Department of Health & Rehabilitative Servs.*, 374 So. 2d 88 (Fla. 1st DCA 1979); text accompanying notes 113-15 *infra*. This rationale arguably undercuts the meaningfulness of the “substantial interest” requirement.

103. 406 So. 2d 478 (Fla. 2d DCA 1981).

104. FLA. STAT. § 403.087 (1977) (amended 1978).

105. FLA. ADMIN. CODE Rule 17-2.03 (1981).

control] *technology*," made potential economic injury a proper matter of DER concern, and thus conferred "party" status¹⁰⁶ on business competitors under section 120.52(10)(b) of the Florida APA.¹⁰⁷ The DER agreed that the LRACT rule gave the suppliers standing and denied Agrico's application for a permit.¹⁰⁸

On appeal, the Second District rejected the argument that the LRACT Rule gave the suppliers standing to challenge Agrico's permit applications solely on the basis of competitive economic injury. The court concluded that "[t]he LRACT Rule, read in the context of DER's statutory framework," is concerned with the cost to businesses of conforming their technology to new environmental technology, not with possible economic losses to a business competitor.¹⁰⁹ The court thus limited an agency's discretion to confer party status by requiring that the allegedly injured interest have a direct relationship to the interest protected by the underlying statutory framework.¹¹⁰

2. EXPRESS STATUTORY GRANTS OF STANDING

Some statutes expressly grant a substantive right to the APA's procedures. Section 381.494(7)(e) of the Florida Statutes,¹¹¹ for example, allows "[a]n applicant, a substantially affected person, or a health systems agency aggrieved by the issuance, revocation, or denial of a certificate of need [for a health care facility] . . . to seek relief according to the provisions of the Administrative Procedure Act."¹¹² In *Bio-Medical Applications v. Department of Health & Rehabilitative Services*,¹¹³ an unsuccessful applicant for a certificate of need authorizing a dialysis facility petitioned for a section 120.57 hearing to challenge the simultaneous grant of such a certif-

106. *Id.* Rule 17-2.03(1)(d), quoted in 406 So. 2d at 480 n.1 (emphasis supplied by court). The DER granted the challengers' standing on this basis. The DER took the position that "while competitive economic injury is not sufficient to confer standing to seek a section 120.57 hearing in a chapter 403 permitting procedure, the LRACT Rule makes competitive economic injury a matter of agency concern and confers standing on Freeport and Sulphur Terminals pursuant to section 120.52(10)(b), Florida Statutes." 406 So. 2d at 481. The DER claimed it could grant standing within its discretion "even though its final decision to issue or deny a permit may not be based on the economic effect on an applicant's competitor."

107. FLA. STAT. § 120.52(10)(b) (1981).

108. 406 So. 2d at 482-83.

109. *Id.* at 482.

110. *Id.* at 483; see FLA. STAT. § 120.52(10)(b) (1981). See also notes 140-44, 158-64 and accompanying text *infra*.

111. FLA. STAT. § 381.494(7)(e) (1981).

112. *Id.*

113. 374 So. 2d 88 (Fla. 1st DCA 1979).

icate to a nearby hospital. The department denied the petition on the ground that Bio-Medical lacked standing to contest its competitor's application. Without discussing the broad "any applicant" language of the statute, the District Court of Appeal, First District, reversed and held that "when simultaneous applications are mutually exclusive and are so regarded by the Department, as here . . . , each competitor is potentially a party to the proceedings on the other's application. Each is one 'whose substantial interests will be affected by proposed agency action' on the other's application."¹¹⁴ Because Bio-Medical had standing as a potential party to the proceedings on its competitor's application, "Bio-Medical was entitled to request a hearing in those proceedings by which [the competitor's] substantial interests were to be determined."¹¹⁵

The Florida Environmental Protection Act (EPA)¹¹⁶ goes even further than the statute at issue in *Bio-Medical*,¹¹⁷ and permits Florida citizens to file suit to enjoin violations of the environmental protection laws, rules, and regulations.¹¹⁸ In *Florida Wildlife Federation v. Department of Environmental Regulation*,¹¹⁹ the Supreme Court of Florida held that the EPA "created a new cause of action, giving the citizens of Florida new substantive rights not previously possessed."¹²⁰ Because the EPA expressly allowed private suits, the Wildlife Federation had standing to sue without alleging a special injury, different in kind and degree from that suffered by the public at large.¹²¹ A person alleging an injury by an agency to a substantive right created by the EPA would also

114. *Id.* at 89 (quoting FLA. STAT. § 120.52(10)(b) (1981)). The court also ruled that Bio-Medical's petition was timely: "[A]bsent Department rules giving Bio-Medical an earlier clear point of entry as intervenor, Bio-Medical timely requested a hearing after the Department acted on [one competitor's] application in free-form proceedings." 374 So. 2d at 88.

115. 374 So. 2d at 89 (citing FLA. STAT. § 120.57 (Supp. 1978) (amended 1979, 1980 & 1981) (amendments do not affect cited section) and *Gadsden State Bank v. Lewis*, 348 So. 2d 343, 346 (Fla. 1st DCA 1977)); see note 102 *supra*.

116. FLA. STAT. § 403.412 (1981).

117. *Id.* § 381.494(7)(e).

118. *Id.* § 403.412(2)(a). Plaintiffs must file a complaint with the appropriate agency before they can bring a court action for injunctive relief. *Id.* § 403.412(2)(c).

119. 390 So. 2d 64 (Fla. 1980).

120. *Id.* at 66.

121. *Id.* at 67. The court noted:

We presume legislative awareness of the law of public nuisance with its special injury requirement. That the legislature chose to allow citizens to bring an action where an action already existed for those who had special injury persuades us that the legislature did not intend that the special injury rule carry over to suits brought under the EPA.

Id. FLA. STAT. § 192.091 (1981) arguably creates an interest in property appraisers and state taxing authorities that would support standing for APA challenges. See note 142 *infra*.

clearly have standing to challenge the agency action under the Florida APA.¹²²

3. IMPLIED STATUTORY GRANTS OF STANDING

Some substantive statutes create "substantial" interests by implication rather than express provision; that is, courts sometimes infer that the beneficiaries of a statute's protection will be "substantially affected" by action undertaken by an agency pursuant to the statute. For example, chapter 380 of the Florida Statutes, the state Environmental Land and Water Management Act,¹²³ is a substantive statute that establishes planning objectives and procedures for the regulation of land use, and creates governmental and quasi-governmental bodies to implement its provisions. Various private parties and public bodies have attempted to assert substantive interests supposedly created by chapter 380.

Private parties may challenge a developer's failure to comply with the requirements of chapter 380, but only if they allege injuries different in kind from those of the public generally.¹²⁴ In *Pinnellas County v. Lake Padgett Pines*¹²⁵ a partnership alleged the requisite special injury when it claimed that a county-approved well field project on neighboring land would jeopardize its water supply.¹²⁶ The partnership thus had standing to maintain an action to enjoin the project on the ground that the developer failed to comply with the requirements of chapter 380.

A large part of the recent adjudication under chapter 380 has involved third-party attempts to participate in proceedings to determine whether a proposed development is a "development of regional impact" (DRI). Section 380.06(1) defines a DRI as a development that "would have a substantial effect on the health, safety, or welfare of citizens of more than one county."¹²⁷ Before a devel-

122. Obviously, the legislature may also restrict access to APA procedures. See, e.g., FLA. STAT. § 120.52(10) (1981). But cf. *Hunter v. Department of Corrections*, 390 So. 2d 1227, 1228 (Fla. 1st DCA 1980).

123. FLA. STAT. ch. 380 (1980).

124. The rule that a private party must allege special injury to challenge another person's violation of the law originated in the law of public nuisance. See, e.g., *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974); *Chabau v. Dade County*, 385 So. 2d 129 (Fla. 3d DCA 1980); *Askew v. Hold the Bulkhead—Save Our Bay, Inc.*, 269 So. 2d 696 (Fla. 2d DCA 1972); *Sarasota Anglers Club, Inc. v. Burns*, 193 So. 2d 691 (Fla. 1st DCA 1967).

125. 333 So. 2d 472 (Fla. 2d DCA 1976). *Lake Padgett Pines* discussed standing to sue for an injunction, not standing under the APA.

126. *Id.* at 475.

127. FLA. STAT. § 380.06(1) (1981).

oper may undertake a DRI, he must first obtain the approval of the appropriate agency or local government.¹²⁸ Although section 380.06 provides general guidelines for classifying property as a DRI, a developer in doubt may request the state land planning agency to issue a binding letter of interpretation concerning the status of the proposed development.¹²⁹ To ensure certainty, “[b]inding letters of interpretation issued by the state land planning agency shall bind all state, regional, and local agencies, as well as the developer.”¹³⁰

The Florida district courts of appeal have firmly established that regional planning councils do not have standing to participate as formal parties in binding letter proceedings. In *South Florida Regional Planning Commission v. Division of State Planning*,¹³¹ the District Court of Appeal, First District, denied the regional planning council’s petition for a formal hearing under section 120.57(1) to challenge the state planning agency’s finding that a proposed development was not a DRI. The court held that section 380.06(4)(a) of the Florida Statutes¹³² “in no way provides for the involvement of the regional planning council in the binding letter process; and there is no other provision of the statute that in any way provides a basis for the Council’s contention that it is entitled to participate in binding letter determinations.”¹³³

Similarly, a regional planning council is not a “party” to binding letter proceedings under section 120.52(10) of the Florida Statutes.¹³⁴ Reading chapter 380 together with section 120.52(10), the District Court of Appeal, Third District, has opined that any “substantial interest” of a regional planning council is fully represented by the state agency. Because a regional council “lacks a substantial interest which is not otherwise represented” by the state agency, it is not a “party” under chapter 120.¹³⁵

The district courts of appeal have also held that “third persons have no enforceable right of their own volition to participate

128. *Id.* § 380.06(5).

129. *Id.* § 380.06(4)(a).

130. *Id.*; see *South Florida Regional Planning Council v. Division of State Planning*, 370 So. 2d 447 (Fla. 1st DCA 1979). See also *South Florida Regional Planning Council v. Land & Water Adjudicatory Comm’n*, 372 So. 2d 159 (Fla. 3d DCA 1979).

131. 370 So. 2d at 447.

132. FLA. STAT. § 380.06(4)(a) (1981).

133. 370 So. 2d at 449.

134. FLA. STAT. § 120.52(10) (1981).

135. *South Florida Regional Planning Council v. Land & Water Adjudicatory Comm’n*, 372 So. 2d 159, 167 (Fla. 3d DCA 1979) (alternative holding).

as formal parties in binding letter proceedings."¹³⁶ In *Suwannee River Area Boy Scouts of America v. Department of Community Affairs*,¹³⁷ the District Court of Appeal, First District, noted that the regional impact concept of chapter 380 concerns "matters affecting the public in general, not special interests of adjoining landowners."¹³⁸ Thus, the interests of particular groups should be brought before the "local governing body having jurisdiction to control land use and development under zoning and building regulations."¹³⁹

The court in *Suwannee* addressed, but specifically declined to decide, whether the Department of Community Affairs could enact a rule permitting third parties to request a formal section 120.57(1) hearing.¹⁴⁰ *Gadsden State Bank v. Lewis*¹⁴¹ would seem to suggest that the Department had the authority to do so, because the court in *Gadsden* granted standing on the basis of an agency rule. But in *Gadsden* the interests recognized by the rule were consistent with the underlying statutory scheme. In *Suwannee*, on the other hand, the court specifically noted that chapter 380 addresses the public's interest in DRIs, not the interests of particular neighbors.¹⁴² Furthermore, "the proceeding in *Gadsden* was required by law as the final step in the licensing or permitting process."¹⁴³ In contrast, additional proceedings that would delay the binding letter process could defeat the purpose of the statutory scheme, because developers "would be more reluctant to voluntarily subject themselves to the additional delay and expense entailed in securing a binding letter."¹⁴⁴

In *Peterson v. Department of Community Affairs*,¹⁴⁵ the First District again held that third parties do not have a substantial interest in the issuance of a binding letter, and thus have no right to

136. See, e.g., *Suwannee River Area Boy Scouts of Am. v. Department of Community Affairs*, 384 So. 2d 1369, 1373 (Fla. 1st DCA 1980).

137. 384 So. 2d 1369 (1st DCA 1980).

138. *Id.* at 1374.

139. *Id.* (emphasis added). The court noted that chapter 380 encourages local control of land use and development. *Id.* at 1374 n.3.

140. *Id.* at 1373. Under the Department's rules, only developers may request a formal section 120.57(1) hearing. FLA. ADMIN. CODE Rule 22F-1.16(12) (1981).

141. 348 So. 2d at 343 (Fla. 1st DCA 1977); see text accompanying notes 96-101 *supra*.

142. 384 So. 2d at 1374. *Agrico Chemical Co. v. Department of Env'tl Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), concurs on this point. See discussion at text accompanying notes 103-09 *supra*.

143. 384 So. 2d at 1374.

144. *Id.*

145. 386 So. 2d 879 (Fla. 1st DCA 1980).

request a section 120.57(1) hearing. The court first stated that section 380.06(4)(a) did not grant the petitioners, who were neighboring landowners, party status. Specifically, the petitioners failed to show that classifying the project as a DRI would affect their property differently than a finding that the project was not a DRI. The petitioners thus raised only the possibility that some speculative injury might result from construction of the proposed project.¹⁴⁶ Because a binding letter is neither a permit nor a license to begin construction, and only determines whether or not a proposed development is a DRI, it does not sufficiently affect a neighboring landowner's interests to confer standing for an APA challenge.¹⁴⁷

Standing issues also frequently arise in APA challenges to school board boundary determinations. In *School Board v. Blackford*,¹⁴⁸ the District Court of Appeal, First District, held that a boundary change that required children to attend a school farther from their homes did not "substantially affect" the children under the rule of *Florida Department of Offender Rehabilitation v. Jerry*.¹⁴⁹ In deciding that the children and their parents did not have standing to bring a section 120.56 rule challenge, the court noted that the petitioners did not show any disparity in the educational opportunities offered at the two schools.¹⁵⁰

In *McGill v. School Board*,¹⁵¹ the petitioners did make the necessary showing. In that case the Division of Administrative Hearings held that parents and their school-age children, who would be transferred to educationally inferior schools under proposed school board rules, had standing to challenge the proposed rules under section 120.54(4). After limiting *Blackford* to its facts,¹⁵² the hearing officer in *McGill* used the substantive statute governing the school board's authority to give content to the definition of "party" in section 120.52(10)(b) of the Florida Statutes.¹⁵³ Section 120.52(10)(b) defines a "party" as any person "who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in

146. *Id.* at 881.

147. *Id.* at 880.

148. 369 So. 2d 689 (Fla. 1st DCA 1979).

149. *Id.* at 691 (citing *Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978)).

150. 369 So. 2d at 690.

151. 1980 FLA. ADMIN. L. REP. 995-A (Case No. 80-775R) (Aug. 11, 1980).

152. For example, the school board decision challenged in *Blackford* was not discretionary; it was mandated by a federal court order. In *McGill*, the school board rezoned to reduce overcrowding and eliminate underutilization of elementary schools. *Id.* at 998-A.

153. FLA. STAT. § 120.52(10)(b) (1981).

the proceeding, or whose substantial interest will be affected'¹⁵⁴ Section 230.232(2) of the Florida Statutes¹⁵⁵ created a duty on the part of school boards to consider parents' interests. The hearing officer found that the statute

requires that in the course of setting school attendance zones ". . . there shall be taken into consideration the request or consent of the parent or guardian or the person standing in loco parentis to the pupil. . . ." Thus, the interests of parents, and through them, their school-age children, must be considered by [the school board] in the context of any proposed changes of school attendance zones.¹⁵⁶

McGill thus found that the statute created a substantive interest that could be substantially affected by agency action.

To obtain standing by implication from a statutorily created right, a petitioner must demonstrate a direct relationship between the interest allegedly injured and the substantive purpose of the statute.¹⁵⁷ *Yamaha Motor Corp. v. Department of Highway Safety & Motor Vehicles*,¹⁵⁸ describes the nexus that is necessary to infer a substantive interest from a statutory scheme. In *Yamaha*, the national Yamaha importer and distributor challenged the validity of a Department rule permitting existing, licensed automobile dealers to protest in licensing proceedings initiated by prospective dealers.¹⁵⁹ Specifically, the rule requires the agency to notify licensed dealers of "the same make or makes of vehicles in the territory or community in which the new dealership proposed to locate," and give "them and all real parties in interest an opportunity to be heard."¹⁶⁰ The Department promulgated the rule pursuant to chapter 320 of the Florida Statutes,¹⁶¹ which establishes certain business qualifications that applicants must satisfy to obtain an automobile dealership license.¹⁶²

The challenged rule's express grant of standing to existing dealers to protest a prospective competitor's licensing application

154. 1980 FLA. ADMIN. L. REP. at 997-A (quoting FLA. STAT. § 120.52(10)(b)) (emphasis supplied by hearing officer).

155. FLA. STAT. § 230.232(2) (1979) (repealed 1980).

156. 1980 FLA. ADMIN. L. REP. at 997-A (quoting FLA. STAT. § 230.232(2) (1979) (repealed 1980)).

157. See notes 109-10, 140-44 and accompanying text *supra*.

158. 1981 FLA. ADMIN. L. REP. 1724-A (Case No. 81-1619R) (Aug. 13, 1981).

159. FLA. ADMIN. CODE Rule 15C-1.08.

160. *Id.*

161. FLA. STAT. ch. 320 (1981).

162. *Id.* §§ 320.27-.70.

is consistent with the purpose of chapter 320. Section 320.642, for example, requires the Department to deny a license application when existing dealerships "have complied with [their] agreements and are providing adequate representation in the community or territory."¹⁶³ The statutory and regulatory schemes do not, however, directly address the interests of a national distributor-franchisor, even though the statute indirectly affects a franchisor's ability to sell franchises. Therefore, the hearing officer held that Yamaha lacked standing to challenge the rule under section 120.56 because it "failed to demonstrate that [it] has sustained injury or is in immediate danger of sustaining some direct injury" because of the rule.¹⁶⁴

C. *Interference with Traditional Property or Contract Rights*

Under section 120.57 of the Florida Statutes, an aggrieved party will have standing to seek a formal hearing if a factual dispute in an administrative proceeding requires resolution of the party's "substantial" property or contract rights.¹⁶⁵

The Department of Education has concluded that a party may not demand a section 120.57 hearing unless the Department's ac-

163. *Id.* § 320.642.

164. 1981 FLA. ADMIN. L. REP. at 1726-A (citing *Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978)). A franchisee whose license application was being protested by existing dealers had originally joined Yamaha's rule challenge. Those dealers settled their dispute, however, and thus foreclosed a full hearing on the validity of the rule.

165. A party's "special injuries" also fall within the penumbra of substantial rights or interests. Parties possessing the requisite special injuries include persons allegedly victimized by a public nuisance. *See* cases cited at note 124 *supra*. The special injury requirement also applies in suits by taxpayers challenging tax statutes. "It has long been the rule in Florida that, in the absence of a constitutional challenge, a taxpayer may bring suit only upon a showing of special injury which is distinct." *Department of Revenue v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981).

In *Markham* the Florida Supreme Court held that the Broward County property appraiser did not have standing to bring a declaratory action to determine the inclusiveness or wisdom of part of the former personal property tax law. The court applied the rule that "a public official may only seek a declaratory judgment when he is 'willing to perform his duties, but . . . prevented from doing so by others.'" *Id.* (quoting *Reid v. Kirk*, 257 So. 2d 3, 4 (Fla. 1972)). The court held that a public official may not challenge a statute he is obligated to apply, without alleging a constitutional infirmity or qualifying as a specially injured taxpayer.

A new statute may broaden the standing of taxing authorities and property appraisers involving tax rolls and tax levies applicable to 1980 and subsequent years: "The property appraiser or any taxing authority shall have the authority to bring and maintain such actions as may be necessary to contest the validity of any rule, regulation, order, directive, or determination of any agency of the state . . ." 1980 Fla. Laws ch. 80-274, § 6 (adding FLA. STAT. § 195.092(2) (1981)). The court in *Markham* expressly withheld comment on the applicability of the new statute to suits such as the one before it. 396 So. 2d at 1121 n.1.

tions affect the party's property interests. In *Equels v. Florida State University*,¹⁶⁶ a student challenged the propriety and legality of the University's grants of certain institutional fellowships, because one-fourth of the grants went to minority applicants, some of whom were "less qualified" or had "less need" than the petitioner.

The Department dismissed the student's claim because he failed to demonstrate that the University was contractually obligated to grant him a fellowship; a contract would have vested in the student a legally protectable property interest.¹⁶⁷ The Department reasoned that the petitioner could not challenge the allotment of grants unless he would have received an award but for the University's distribution scheme. Thus, because the student failed to allege or prove a substantial contract or property interest, he did not meet the threshold standing requirement of the APA.¹⁶⁸

In contrast, in *Graham Contracting, Inc. v. Department of General Services*,¹⁶⁹ the petitioner demonstrated a substantial contract right, even though the terms of the contract ostensibly removed its claim from the ambit of APA control. The underlying contract in *Graham* required the petitioner to construct a state office building, and directed the architect and the Department of General Services to resolve all contractual disputes without satisfying the procedural requirements of section 120.57.¹⁷⁰ After an unsuccessful attempt to win time and cost concessions from the Department, the petitioner appealed to the District Court of Appeal, First District. The court accepted jurisdiction under section 120.68 and reversed,¹⁷¹ holding that the grievance procedures in the contract required the Department to conduct more than a perfunctory

166. 1980 FLA. ADMIN. L. REP. 1205-A (Case No. 79-1621) (Sept. 22, 1980).

167. The Department rejected the student's claim also because administrative agencies are not empowered to resolve constitutional disputes. *Id.* at 1207-A.

168. See *Florida Dept. of Offender Rehabilitation v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978). The Department noted that all 211 other applicants, including the thirty awarded fellowships, would be necessary and indispensable parties to any hearing. It concluded that "the legislature intentionally omitted compulsory joinder of parties in administrative proceedings. Therefore, claims such as these which require compulsory joinder of parties to fully examine all issues and adjudicate all interests have also been intentionally excluded from being determined by an administrative proceeding." *Id.* at 1208-A. Although many persons have pressed for standing by implication of substantive statutes, *Equels* shows that standing may be denied by negative implication of the APA.

169. 363 So. 2d 810 (Fla. 1st DCA 1978).

170. *Graham* and the Department exchanged claims and orders, respectively, in a series of informal letters. *Id.* at 813.

171. The court determined that the Department's orders constituted a final judgment, thereby permitting judicial review. *Id.*

review of the petitioner's claims.¹⁷² The court left little doubt that a contractual right triggers agency review procedures: "[T]he Department's contract . . . calls for agency action which potentially affects Graham's substantial interests and thereby subjects the Department's actions to Chapter 120 discipline and remedies."¹⁷³

V. THE PROBLEM OF ASSOCIATIONAL STANDING

In a series of Florida administrative law cases, representative associations have brought actions under chapter 120 of the Florida Statutes to pursue the substantial interests of their members. Contrary to the doctrine of associational standing that prevails in federal courts,¹⁷⁴ Florida tribunals, until recently, have denied standing to associations whose members are not also parties to the action.¹⁷⁵

172. *Id.* at 814.

173. *Id.* at 812. Of course, the formality of the hearing required would depend on the existence of a material factual dispute. *Id.* at 815; see FLA. STAT. § 120.57(1)-(2) (1981). The district court also held that the APA represents a legislative waiver of state immunity in qualified suits brought against a state agency for violations of contract rights.

174. See notes 182-96 and accompanying text *infra*.

175. There are two apparent exceptions to this general proposition. Florida courts have granted organizations standing to bring suit without the participation of the individual members: 1) when a substantive statute grants that organization the right to sue, or 2) when a zoning ordinance is challenged as illegal and, therefore, void. The following two illustrative cases are non-APA cases.

FLA. STAT. § 403.412(2) (1979) permitted associational standing in *Florida Wildlife Fed'n v. Department of Env'tl Regulation*, 390 So. 2d 64 (Fla. 1980). The statute provided that state citizens could sue either to compel or to enjoin the activities of governmental agencies regulated by the Environmental Protection Act. Following the dictates of FLA. STAT. § 617.021 (1979), the court found that the Federation, like a natural citizen, has the power to seek judicial enforcement of the Act's policy. 390 So. 2d at 68. The court found the Federation a "citizen" because a different statute, FLA. STAT. § 617.021 (1979), "states that nonprofit corporations have the power to sue and be sued to the same extent as natural persons," and because it would be consistent with the Act's enforcement policy. 390 So. 2d at 68.

Upper Keys Citizens Ass'n v. Wedel, 341 So. 2d 1062 (Fla. 3d DCA 1977), illustrates the judicial willingness to allow an organization to challenge a zoning ordinance although its members suffer no special injury. In *Upper Keys*, a nonprofit citizens group challenged a county development order on the ground that the decision, made after discussions in a closed meeting between the zoning board and a county commissioner, violated Florida's "Sunshine Law." The court held that "any affected resident, citizen or property owner of the governmental unit in question has standing to challenge an improperly enacted, and thus void, ordinance without the necessity of showing special damages." *Id.* at 1064 (citing *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972)). See also *Upper Keys Citizens Ass'n v. Schloesser*, 407 So. 2d 1051 (Fla. 3d DCA 1981); *Save Brickell Ave., Inc. v. City of Miami*, 395 So. 2d 246 (Fla. 3d DCA 1981). The broad standing granted in *Wedel* reflects a judicially created exception to the special injury rule. See *Renard v. Dade County*, 261 So. 2d 832 (Fla. 1972). The special injury rule was judicially created for the purpose of "forestalling

In *Florida Department of Education v. Florida Education Association/United (FEA/United)*,¹⁷⁶ a confederation of bargaining units representing approximately 30,000 of the state's 90,000 teachers challenged Department of Education procedures governing the revocation or suspension of teaching certificates. In a section 120.56 proceeding, the DOAH invalidated a number of these rules. The District Court of Appeal, First District, reversed on the ground that the confederation lacked standing. Significantly, no teacher was a party to the action.¹⁷⁷ Without a teacher as a party, the association could not claim that it had suffered or was in immediate danger of sustaining direct injury as a result of the challenged rule. The court thus held that the confederation was not a "substantially affected" person under *Jerry*.¹⁷⁸

The First District followed the rule implied in its *FEA/United* opinion—that an association does not have standing to challenge the validity of a rule even though the rule affects its members—in *Department of Labor & Employment Security v. Florida Home Builders*.¹⁷⁹ The Department of Labor had appealed a DOAH finding that a Department rule constituted an invalid exercise of delegated authority. The disputed rule in *Home Builders*, like the procedures examined in *FEA/United*, affected members of the builders association by placing the builders at a competitive disadvantage. Nonetheless, the district court reversed because the association lacked standing under section 120.56: no builder was a party to the action and, therefore, the builders' association was not a substantially affected party.¹⁸⁰

The Supreme Court of Florida recently quashed the district court's decision in *Home Builders*, however, finally incorporating associational standing into Florida's standing doctrine. The court held that

a trade or professional association should be able to institute a

a multiplicity of suits." *Florida Wildlife Fed'n. v. Department of Env'tl Regulation*, 390 So. 2d at 67:

176. 378 So. 2d 893 (Fla. 1st DCA 1979).

177. *Id.*

178. *Id.* at 894.

179. 392 So. 2d 21 (Fla. 1st DCA 1980), *quashed*, 412 So. 2d 351 (Fla. 1982).

180. 392 So. 2d at 22. In *Florida Optometric Ass'n v. Department of Business Regulation*, 399 So. 2d 6 (Fla. 1st DCA 1981), the court also denied an optometrist association the right to file for a declaratory statement under § 120.56(5) as to the applicability of an agency rule based upon a hypothetical set of facts allegedly existing as to some members. The court held that the association lacked standing because those members "who may be affected by the rule were not parties to the petition." *Id.*

rule challenge under section 120.56 even though it is acting solely as the representative of its members. To meet the requirements of section 120.56(1), an association must demonstrate that a substantial number of its members, although not necessarily a majority, are "substantially affected" by the challenged rule. Further, the subject matter of the rule must be within the association's general scope of interest and activity, and the relief requested must be of the type appropriate for a trade association to receive on behalf of its members.¹⁸¹

The Supreme court's decision in *Home Builders* aligns Florida law with the federal decisions that conferred standing on traditional voluntary membership organizations to assert their members' rights.¹⁸² For example, in *Warth v. Seldin*,¹⁸³ several individuals and organizations, including the Rochester Home Builders Association,¹⁸⁴ challenged the constitutionality of the city's zoning practices. The association claimed that the zoning restrictions thwarted its members' business activities by preventing the construction of low- and moderate-cost housing.¹⁸⁵ The Supreme Court of the United States affirmed the district court's dismissal of the suit, holding that the petitioners in general,¹⁸⁶ and the association in particular, lacked standing to sue. The Court reasoned that the association could not demonstrate that its members suffered

181. Florida Home Builders Ass'n v. Department of Labor & Employment Security, 412 So. 2d 351, 353-54 (Fla. 1982).

Between the First District's decision in *Home Builders* and the Supreme Court's reversal, the First District, may have been reconsidering its position in *Professional Firefighters, Inc. v. Department of Health & Rehabilitative Servs.*, 396 So. 2d 1194 (Fla. 1st DCA 1981), in which a firefighters' union and two of its members petitioned under § 120.56 to challenge the agency's paramedic licensing requirements. The court found it unnecessary to determine whether the union had satisfied the jurisdictional requirement established in *FEA/United* because it ruled that the firefighters had standing under chapter 120; the union members proved that the licensing regulations substantially affected their ability to earn a livelihood. The authority of *Professional Firefighters* was somewhat tenuous because the firefighters, unlike the teachers in *FEA/United*, were parties in the suit and were able to demonstrate a quantifiable and deleterious effect of the disputed requirements. *Id.* at 1196; see notes 20-23 and accompanying text *supra*.

182. See 412 So. 2d at 353 & n.3.

183. 422 U.S. 490 (1975).

184. *Id.* at 497-98. The Rochester Home Builders Association represented firms engaged in residential construction in the Rochester metropolitan area.

185. *Id.* at 497.

186. The residents of Rochester failed to demonstrate a palpable economic injury. *Id.* at 508. The city's taxpayers were also unsuccessful because they failed to establish a nexus between their claims and the alleged injury sustained by low income families. *Id.* at 510, 513-14. Petitioner Housing Council, a nonprofit corporation interested in housing problems, lacked standing because it failed to allege a "live" controversy. *Id.* at 517.

any injury.¹⁸⁷ The nature of the relief sought by the builders' association also troubled the Court. Justice Powell explained that when an association seeks declaratory, injunctive, "or some other form of prospective relief, it can reasonably be supposed that the remedy . . . will inure to the benefit of those members . . . actually injured."¹⁸⁸ In *Warth*, however, the association sought damages for injuries to its members, who were not parties to the suit, when it could not even meet its threshold burden of establishing their injury.

The United States Supreme Court articulated an analytical framework for resolving problems of associational standing in *Hunt v. Washington State Apple Advertising Commission*.¹⁸⁹ In *Hunt* a North Carolina statute prevented out-of-state apple growers from displaying their state apple grades on the containers used to ship their products into North Carolina. The Washington Apple Commission,¹⁹⁰ an agency consisting of thirteen elected apple growers and dealers, challenged the constitutionality of the statute. The organization claimed that the North Carolina law limited its access to local markets in a manner inconsistent with the principles underlying the commerce clause.¹⁹¹ Ignoring the obvious economic injury sustained by the apple dealers,¹⁹² North Carolina officials contended that the Washington Commission lacked the necessary "personal stake" to assert the claims of its growers. The Supreme Court refused, however, to separate the claims of the apple growers from those of the Commission, and affirmed the district court's finding that the statute unconstitutionally discriminated against commerce.¹⁹³ The Court found that the North Carolina statute affected the Commission's growers and dealers to the same extent as the class of growers and dealers that it represented. Chief Justice Burger noted that an association may bring suit on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to

187. Like the petitioner in *Equels*, the association could not prove that the restrictive zoning ordinance was the proximate cause of its members' injuries. *Id.* at 516.

188. *Id.* at 515.

189. 432 U.S. 333 (1977).

190. Although the Washington Commission was not a traditional voluntary membership organization, the Court classified it as a de facto traditional trade association representing the state's apple industry. *Id.* at 344.

191. Justice Cardozo explained in *Baldwin v. Sellig*, 294 U.S. 511, 522-23 (1935), that the commerce clause is to be interpreted in a manner that prevents parochial interests from inciting economic rivalries and reprisals among states.

192. 432 U.S. at 344.

193. *Id.* at 345.

protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."¹⁹⁴

The associational standing doctrine established in *Hunt* allows groups to sue for injunctive, declaratory, or some other form of prospective relief, without joining individual members' damage claims. The Florida Supreme Court's recent acceptance of this doctrine in *Home Builders* represents a well-reasoned application of the federal doctrine to the Florida APA. After all, petitions for a hearing under section 120.56(1) or 120.54(4) of the Florida Statutes, which permit challenges to the validity of proposed or enacted regulations, seek the same type of prospective relief that the petitioners sought in *Warth*.¹⁹⁵ Furthermore, the petitions, like their federal counterparts, present legal questions of statutory interpretation to be resolved by administrative hearing officers.¹⁹⁶

Although *Warth* and *Hunt* involved constitutional questions, their analysis is still relevant to petitions filed under the Florida APA.¹⁹⁷ In *Jerry*, for example, the court gave content to the words "substantially affected" by looking to the injury required to meet the "case or controversy" requirement of article III.¹⁹⁸ Of course, grants of administrative relief under the Florida APA are not necessarily construed as liberally as under federal doctrines.¹⁹⁹ Nonetheless, the doctrine of associational standing is consistent with both the legislative history and the purpose of the Florida APA.²⁰⁰

194. *Id.* at 343.

195. See notes 176-78, 180 and accompanying text *supra*.

196. Whether the associational standing doctrine should also apply to FLA. STAT. § 120.57 hearings presents a more difficult question. Section 120.57 provides for adjudicatory hearings, which require the resolution of factual disputes rather than purely legal questions of statutory interpretation. Thus, the "prospective-relief-only" and the "nonindividual-fact" elements underlying the federal associational standing doctrine are absent.

197. *National Motor Freight Traffic Ass'n v. United States*, 372 U.S. 246 (1963), served as the doctrinal basis for *Warth* and *Hunt*. *National Motor* involved an interpretation of § 1009(a) of the federal APA. This provision is similar to § 10(a) of the current APA, 5 U.S.C. § 702 (1976). Neither § 1009(a) nor § 702 expressly grants to groups the right to pursue APA remedies. Yet the Court permitted associational standing because the association was the carriers' proper representative and the alliance's members suffered injury. 372 U.S. at 247.

Justice Harlan concurred in the decision, but expressed concern because "the question of 'standing' should not be decided without plenary consideration." 372 U.S. at 247.

198. See notes 33-44 and accompanying text *supra*.

199. For example, the delegation doctrine applies more strictly in state administrative law than federal law. See W. GELLHORN, C. BYSE & P. STRAUSS, *ADMINISTRATIVE LAW* 81 (7th ed. 1979). The Florida courts invoke that doctrine to ensure that the legislature does not delegate authority without proper standards as it did in *Askew v. Cross Key Waterways*, 372 So. 2d 913 (Fla. 1979).

200. *Florida Home Builders Ass'n v. Department of Labor & Employment Security*, 412

The decision of the Supreme Court of Florida in *Home Builders* faces the reality that people with common interests unite to pursue common goals, and promotes the legislative purpose of expanding public access to government agencies.

VI. JUDICIAL REVIEW OF FINAL AGENCY ACTION

Section 120.68(1) of the Florida Statutes, provides that "[a] party who is adversely affected by final agency action is entitled to judicial review."²⁰¹ Section 120.52(10) defines "party" as follows:

So. 2d 351, 352-53 (1982). The concept discussed in this section should not be confused with the question of neighborhood groups challenging zoning decisions, or of ideologically based organizations maintaining lawsuits. In those cases, the standing problem exists because neither the general membership nor the organization itself has suffered or is threatened with the special injury necessary to gain standing. In zoning cases, for example, a number of factors must be considered to determine whether a given complainant has a sufficient injury to maintain the suit. See *Renard v. Dade County*, 261 So. 2d 832, 837 (Fla. 1972).

Two cases help illustrate the distinction between the concepts. In *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So. 2d 9 (Fla. 1974), the Supreme Court of Florida held that a nonprofit citizens' group did not have standing to sue a developer for declaratory and injunctive relief to prevent interference with "certain alleged rights of the public generally" to use a portion of a beach that allegedly had been acquired by prescription. *Id.* at 10. The court denied standing because neither the plaintiff nor any of its members alleged any injury different from that suffered by the public generally.

In *Hemisphere Equity Realty Co. v. Key Biscayne Property Taxpayers Ass'n*, 369 So. 2d 996 (Fla. 3d DCA 1979), the court denied a neighborhood organization standing to contest the rezoning of certain property on Key Biscayne. The court granted standing to three individual petitioners who lived within the rezoning area "because of the proximity of their property to the subject property, the character of the neighborhood, and the type of zoning proposed, stood to suffer special damages from the effects of the zoning of the subject property." *Id.* at 1001; see, e.g., *Upper Keys Citizens Ass'n v. Schloesser*, 407 So. 2d 1051 (Fla. 3d DCA 1981) (court granted standing to a group of seventeen condominium owners whose political clout to challenge a proposed zoning change had been diluted by trial court's insistence that their individual votes be counted as one).

The opinion in *Hemisphere Equity* does not reveal whether or not the three individuals belonged to the taxpayers' association, but it does not matter for purposes of this analysis. The very nature of a neighborhood or taxpayers' association is such that, for purposes of suffering the type of injury necessary to challenge a zoning enactment, not all members may have the requisite injury. Injury from a zoning ordinance necessarily depends on facts that will vary from member to member, particularly each one's proximity to the affected site. But the injuries to members of an employees' union or an industrial trade association resulting from administrative action are more uniform, even though the application of a rule to various members may vary slightly in effect. Organizations such as the Florida Education Association/United and the Florida Home Builders Association now qualify for standing in a Florida court as long as they seek prospective relief that did not require the participation of individual members. Although the Florida Supreme Court's decision in *Home Builders* is a welcome alignment of Florida law with prevailing federal principles, the standing of associations must be evaluated critically to ascertain the substantiality and commonality of the injury alleged.

201. FLA. STAT. § 120.68(1) (1981).

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.²⁰²

In *City of Key West v. Askew*,²⁰³ a special cabinet-level administrative commission classified most of Monroe County as an area of "critical state concern." Following this action, the City of Key West and private interests in the county initiated a suit to challenge the propriety of the commission's rule. The state moved to dismiss the action because the commission's action was not final and because the petitioners, as nonparties, lacked standing to sue. The district court disagreed, finding that the commission's promulgation of the land planning rule was the statutory equivalent of an administrative order under section 120.52(2), and therefore constituted final agency action.²⁰⁴ The court dispensed with the standing issue with similar ease. It found that a city within an area described by a state agency as an area of critical state concern has standing to appeal the agency's decision. The definition of party in section 120.52 includes "[s]pecifically named persons whose substantial interests are being determined in the proceeding."²⁰⁵ Because the commission's boundary designation included Key West, and because the challenged rule expressly affected "local government capabilities for managing land use and development,"²⁰⁶ the court considered the city a specifically named person with a substantial interest.

The *Key West* court also held that a group of citizens who had participated in the public hearings were parties under subsection (c) of section 120.52(9). The court granted these citizen-petitioners standing because their previous participation in the rulemaking

202. *Id.* § 120.52(10).

203. 324 So. 2d 655 (Fla. 1st DCA 1975).

204. *Id.* at 657.

205. *Id.* at 658 (citing FLA. STAT. § 120.52(9)(a) (Supp. 1974) (current version at § 120.52(10)(a) (1981))).

206. *Id.* at 657 (citing FLA. ADMIN. CODE Rule 22F-8.03(A)(1) (1981)).

proceedings made them "interested persons" eligible to seek judicial review of the commission's actions.²⁰⁷

In *Times Publishing Co. v. Department of Corrections*,²⁰⁸ the court granted standing to two newspaper companies to appeal a Department of Corrections emergency rule that limited interviews of death row inmates. The rule limited media access to death row inmates whose executions were imminent. Although the logistical and security conditions in the prison warranted emergency restrictions on interviews with death row prisoners generally,²⁰⁹ the court held that the rule regulating interviews with inmates soon to be executed was not sufficiently justified under section 120.54(9)(a).²¹⁰ The court granted the publishers standing to sue under section 120.68(1). The court implied that the state cannot unilaterally impose restrictions on a newspaper's ability to collect and report the news.²¹¹ In the absence of a justifiable policy for the rule, the publishers have every right to claim that they were "adversely affected" by its application.²¹²

A party is deemed "adversely affected" by a rule if, in pursuing a legitimate objective, the party cannot voluntarily avoid the rule's consequences. Thus, in *Times Publishing* the court determined that the newspapers were "adversely affected" by the prison's media restrictions because reporters had no other way to interview soon-to-be-executed inmates. Similarly, parents and children who challenge school district rezoning under section 120.68 are "adversely affected" by the changes because the rules do not provide an alternative means for a child to receive a public education.²¹³

207. *Id.* at 659. The court noted that previously, legislative functions such as the delegation of power to the cabinet and the subsequent execution of its assigned duties, were only reviewable if a constitutional infirmity existed and the citizen could demonstrate a "special injury separate in kind" from the general public. Acting Chief Judge Rawls stated with some disdain that these traditional concepts of standing have been "supplanted" by the APA. *Id.* at 658.

208. 375 So. 2d 307 (Fla. 1st DCA 1979).

209. *Id.* at 310.

210. *Id.* at 309 & n.3 (citing FLA. STAT. § 120.54(9)(a) (Supp. 1978)).

211. 375 So. 2d at 309.

212. *Id.* In *Times Publishing* the court permitted the newspapers to appeal, although they had not appeared at an emergency rulemaking proceeding and therefore were not "parties." Since the rule had not been adopted in a formal hearing, there had been no opportunity for an appearance. Nevertheless, because the appellants did not challenge the emergency rulemaking procedures and the department did not contest standing because of the appellants' failure to appear, the court found it "unnecessary to decide what opportunity for party appearances must be given in emergency rulemaking." *Id.* at 309 n.3.

213. See *School Bd. v. Constant*, 363 So. 2d 859, 861 (Fla. 4th DCA 1978) (school child

In contrast, if department rules allow one to avoid application of a particular rule by choice, then one may not be deemed "adversely affected" for purposes of challenging or appealing the operative provisions of the rule. In *Florida Home Builders Ass'n v. Division of Labor*,²¹⁴ the court denied a group of contractor associations standing to obtain judicial review of an emergency rule that established standards to govern the approval of apprenticeship programs sponsored by the state pursuant to section 120.54(9) of the Florida Statutes. The rule in question allowed a program applicant to request that his application not be considered during the duration of the emergency.²¹⁵ In refusing to grant the contractors standing, the court reasoned that an applicant who declines to subject himself to the emergency rule cannot simultaneously claim to be "adversely affected" by the rule in order to obtain judicial review under section 120.68(1).²¹⁶

VII. CONCLUSION

Since its enactment, the Florida APA has become an effective and widely used tool for challenging administrative rules and other official agency actions. The Act represents a profound political judgment, embodying the principle that Floridians should have a more regularized relationship with their government's administrative agencies. This relationship includes the right to a hearing for review of agency action, and the right to preenforcement review of both proposed and enacted administrative rules. These rights are limited by the standing requirement of the APA. The legislature has stated clearly that only parties "substantially affected" or whose "substantial interests" are determined by agency action are entitled to the benefits of the elaborate review procedures.

The standing requirement, a legitimate and necessary feature of the APA, seeks to resolve the tension between providing expanded review opportunities and protecting other important, often countervailing, interests such as the allocation of the public resources of the agencies and the courts. In rulemaking challenges, the standing requirement protects against the adjudication of issues presented by parties who lack a sufficient personal stake in

had a "substantial interest" affected by the proposed agency action); *Polk v. School Bd.*, 373 So. 2d 960, 961 (Fla. 2d DCA 1969).

214. 355 So. 2d 1245 (Fla. 1st DCA 1978).

215. *Id.* at 1247.

216. 355 So. 2d at 1247. But the court did not foreclose the possibility of entertaining the petitioners' claim in a § 120.57 or § 120.60 proceeding.

the outcome. This guards the rights of the proper parties against prejudice by inappropriate or unnecessary decisions. When courts require that certain problems await fuller development before being subject to legal challenge, then the standing doctrine of Florida's APA incorporates the ripeness doctrine of the federal courts. The standing requirement for administrative review implicitly protects a government-regulated party from interference by others whose interests are too attenuated to justify the intrusion. Therefore, one who opposes on philosophic or economic grounds, some private activity requiring official approval will generally lack standing to challenge the approval in an administrative hearing unless a statute or the common law recognizes his interests. Otherwise, to permit standing would unjustifiably disrupt a citizen's relationship with the government.

Standing under the Florida APA is a critical issue of the 1980's because it defines the citizens' rights and relationships with their government. This article has attempted to expose and develop the legislative purpose and considerations supporting the courts' decisions under the Florida APA, and to illuminate the factors governing litigants' access to administrative review.