

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 975 Administrative procedures

**SPONSOR(S):** Goodson

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 600

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee	9 Y, 3 N, As CS	Rubottom	Rubottom
2) Appropriations Committee			
3) State Affairs Committee			

### SUMMARY ANALYSIS

Florida's Administrative Procedure Act provides for administrative hearings of many matters, authorizing an award of attorney fees when a losing party participates for an improper purpose. Current law creates a rebuttable presumption that a party participates for an improper purpose when the party unsuccessfully participates in more than 2 successive, related proceedings in certain circumstances.

The bill changes the number of prior proceedings from 2 or more to 1 or more prior proceedings, increasing the deterrence of baseless challenges.

An amendment adopted by the Rulemaking Oversight & Repeal Subcommittee adds a provision that allows an award of attorney fees and costs incurred in litigating attorney fees awardable in underlying administrative proceedings. The additional fees would not be subject to caps applicable to the fees in the underlying proceeding. State agencies would not be able to recover the additional fees.

The bill has an effective date of July 1, 2014.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Present Situation:**

The Administrative Procedure Act<sup>1</sup> provides for administrative hearings of facts and issues for parties substantially affected by agency action.<sup>2</sup> Some substantive statutes allow other interested parties opportunity to participate in proceedings.<sup>3</sup>

Beginning in 1996, the APA authorized awarding attorney fees to parties when the non-prevailing party challenged an agency action for an "improper purpose",<sup>4</sup> establishing a rebuttable presumption of improper purposes in certain circumstances of 3 or more, unfounded, administrative challenges.<sup>5</sup>

Under the fees provision, a matter does not have to proceed to hearing in order for fees to be awarded.<sup>6</sup>

Some affected challenges to agency action may arise in a permitting case where an agency awarded a permit but a third party challenged the agency action in an administrative proceeding. The presumption of improper purpose applies when the party had failed to establish either factual or legal merits twice previously, and either the factual or legal position in the latest challenge would have been cognizable in the previous proceedings. In effect, the risk of an attorney fees award provides motivation for parties to raise all of their concerns in one proceeding and not file successive proceedings to test different factual or legal claims in a way designed to delay the final resolution of the matter.

Other provisions of s. 120.595 award reasonable attorney fees and costs to prevailing parties challenging agency actions or rules,<sup>7</sup> and fees and costs are awardable under other statutes for some administrative proceedings.<sup>8</sup> Some of these fees are capped.<sup>9</sup> When a fee is claimed that approaches or exceeds such cap, an agency can offer a settlement below the fee cap knowing that parties cannot recover for the cost of litigating their fee claim.

##### **Proposed changes:**

The bill changes the number of prior proceedings giving rise to the presumption from 2 or more to 1 or more prior proceedings, increasing the deterrent effect to reduce delays arising from the baseless challenges. The bill also revises some grammar in the statute without further substantive change.

One amendment adopted by the RORS Subcommittee reworded paragraph (c) of s. 120.595(1), F.S., the paragraph with the substantive change in the bill, in order to clarify the meaning of the provision.

Two other amendments adopted by the RORS Subcommittee, added a new subsection (7) to s. 120.595, F.S., authorizes an award of reasonable costs and attorney fees incurred in litigating entitlement to, and the determination or quantification of, fees and costs otherwise awardable. These

---

<sup>1</sup> Chapter 120, F.S.

<sup>2</sup> See, ss. 120.56, 120.569, 120.57, F.S.

<sup>3</sup> See, e.g., s. 120.569(2)(p), F.S. (citing chapters 373 (water resources), 378 (land reclamation), and 403 (environmental control), F.S.), s. 373.116, F.S. (Procedure for water use and impoundment construction permit applications), s. 373.229, F.S. (application for permit relating to water use, well, diversion).

<sup>4</sup> Section 120.595(1), F.S.

<sup>5</sup> Section 120.595(1)(c), F.S.

<sup>6</sup> See, G.E.L. Corp. v. Department of Environmental Protection, App. 5 Dist., 875 So.2d 1257 (2004).

<sup>7</sup> See, s. 120.595(2)-(5), F.S.

<sup>8</sup> See, s. 57.105(5) F.S. (unsupported claims and unreasonable delays); s. 57.111, F.S. (reasonable fees awarded to prevailing small business unless agency action substantially justified).

<sup>9</sup> Section 120.595(2)-(4) (capping fees and costs awards at \$50,000).

additional fees and costs are exempted from any caps applicable to the underlying fee claim. The amendment excludes state agencies from recovery of such "fees on fees".

**B. SECTION DIRECTORY:**

SECTION 1. Amends s. 120.595(1) and creates a new subsection (7) to that section.

SECTION 2. Provides an effective date of July 1, 2014.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

The bill does not appear to have any impact on revenues.

**2. Expenditures:**

The bill may save expenditures if the goal of reducing baseless administrative proceedings is attained. The addition of fees on fees may increase fee awards payable by agencies. Those costs would likely be offset to some degree by deterring the use of agency resources to aggressively litigate against fee awards that are clearly deserved.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The bill does not appear to affect local government revenues.

**2. Expenditures:**

The bill does not appear to impact local government expenditures.

**C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill might have a slight positive economic impact on the private sector if permits are awarded sooner because of reductions in administrative procedural delays.

**D. FISCAL COMMENTS:**

N/A

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

**1. Applicability of Municipality/County Mandates Provision:**

The bill does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

**2. Other:**

None.

**B. RULE-MAKING AUTHORITY:**

The bill requires no additional rulemaking by any agency.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

An apparent grammatical change on line 38 strikes the word "either" in a manner that may create an ambiguity, possibly changing the meaning of the provision. Another grammatical change, breaking an extended sentence at lines 32-42 into two sentences, may create in context an ambiguity in the following sentence, which begins "In such event".

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

The RORS Subcommittee adopted two main amendments to the bill. The amendments are described in the foregoing analysis.