

STORAGE NAME: s1700a.ca

DATE: April 15, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
COMMUNITY AFFAIRS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: SB 1700

RELATING TO: Rulemaking Authority of the Department of Community Affairs (RAB)

SPONSOR(S): Senator Dyer

COMPANION BILL(S): None

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) COMMUNITY AFFAIRS YEAS 9 NAYS 0
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I. SUMMARY:

Senate Bill 1700 is a Rules Authorizing Bill (RAB) for the Department of Community Affairs which covers rules relating to the Manufactured Buildings Program within the Division of Housing and Community Development. The bill authorizes the department to adopt rules in the following subject areas:

- ▶ Construction and modification requirements for manufactured buildings and building modules;
- ▶ Collection and remittance of surcharges to finance the program;
- ▶ Reporting requirements for local enforcement agencies; and
- ▶ Administration of the statewide uniform building energy-efficiency rating system.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

During the 1996 legislative session, a comprehensive rewrite of the Florida Administrative Procedures Act was adopted as CS/SBs 2290 and 2288. Among many other changes, the revised APA modified the standards which authorize rulemaking and included a provision for periodic review of rules by agencies with rulemaking authority.

In particular, section 120.536, Florida Statutes, a new section of the APA, narrowed legislative authorization for rulemaking:

120.536 Rulemaking authority; listing of rules exceeding authority; repeal; challenge.--

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

In the past, a number of court decisions held that a rule did not exceed the legislative grant of rulemaking authority if it was reasonably related to the stated purpose of the enabling legislation. Additionally, it was accepted that a rule was valid when it implemented general legislative intent or policy. Agencies had wide discretion to adopt rules whether the statutory basis for a rule was clearly conferred or implied from the enabling statute.

By adopting section 120.536, Florida Statutes, the Florida Legislature effectively overturned this line of cases and imposed a much stricter standard for rulemaking authority. Under the new APA, existing rules and proposed rules must **implement, interpret or make specific** the particular powers and duties granted by the enabling statute. It is important to note that the revised APA is not intended to eliminate administrative rules or even to discourage rulemaking, but to ensure that administrative rules are no broader than the enabling statute. A grant of rulemaking authority by the Legislature is necessary but not enough by itself for an agency to adopt a rule. Likewise, agencies need more than a statement of general legislative intent for implementing a rule. Rules must be based on specific grants of powers and not address subjects on which the Legislature was silent.

In creating this new rulemaking standard, the Legislature recognized that there might be existing rules which had been adopted in good faith before the new standard took effect, but which no longer would be valid. Rather than immediately subject all of these rules to challenges under section 120.56, Florida Statutes, for failure to meet the new test, the reform bill created a temporary "shield" for these existing rules. The purpose of this

shield was to allow agencies time to identify these rules and to seek legislative authorization for them.

In order to temporarily shield a rule, or portion thereof, from challenge under the new provisions, agencies were to report rules which they believed did not meet the new criteria by October 1, 1997. This provision is contained in subsection 120.536 (2), Florida Statutes, which reads, in part:

(2) By October 1, 1997, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives.

The Joint Administrative Procedures Committee (JAPC) reports that some 5,850 rules or portions of rules were reported as exceeding the state agencies' rulemaking authority under section 120.536(1), Florida Statutes. Of these, 3,610 rules were identified by various local school boards, whose rules are not contained in the FAC. However, 2,240 rules contained in the FAC were reported by various agencies as exceeding statutory authority for rulemaking under section 120.536, Florida Statutes.

Subsection (2) of section 120.536, Florida Statutes, also lays out the second step in the process, that of legislative review. The subsection goes on to state:

The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to section 120.54, Florida Statutes, to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist.

Thus, during the 1998 legislative session, each agency has the responsibility to bring forward legislative proposals, as appropriate, which will provide statutory authorization for existing rules or portions thereof which the agency deems necessary but which currently exceed the agencies' rulemaking authority. The Legislature is directed to consider whether such legislation authorizing the identified rules should be enacted.

Subsection (3) of section 120.536, Florida Statutes, details when rules, both those identified by agencies as exceeding their new authority and those not so identified, may be challenged as exceeding rulemaking authority under the new act:

(3) All proposed rules or amendments to existing rules filed with the Department of State on or after October 1, 1996, shall be based on rulemaking authority no broader than permitted by this section. A rule adopted before October 1, 1996, and not included on a list submitted by an agency in accordance with subsection (2) may not be challenged before November 1, 1997, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before October 1, 1996, and included on a list submitted by an agency in accordance with subsection (2) may not be

challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

Rules not included on the list submitted by the agency, along with rules adopted after October 1, 1996, could be challenged on grounds of exceeding the agencies' rulemaking authority after November 1, 1997. Rules included on the submitted list may not be challenged on such grounds until July 1, 1999. Thus, while the statutes direct the 1998 Legislature to consider whether legislation authorizing identified rules should be enacted and while agencies must begin the rule repeal process for identified rules before January 1, 1999, rules identified as exceeding the new rulemaking authority are not subject to challenge on such grounds until July 1, 1999, after the 1999 legislative session.

According to the JAPC, there are 3500-3600 grants of rulemaking authority contained in the Florida Statutes falling roughly into two categories: specific grants and general grants. Most of them are specific grants of authority, that is, the grant of authority is found coupled in a sentence with a specific power or duty of the agency. General grants of rulemaking authority authorize rulemaking in the context of the agency's mission or as it pertains to the stated purpose of the enabling legislation. Most agencies have a general grant of rulemaking authority and numerous specific grants of rulemaking authority. In most cases, it appears that existing rules exceed statutory authority because a "specific law to be implemented" is missing from the statute, not a legislative grant of rulemaking authority.

Identified Rules for the Manufactured Buildings Program

Chapter 553, part IV, Florida Statutes, is known as the "Florida Manufactured Building Act of 1979," and creates the Manufactured Buildings Program to be administered by the Department of Community Affairs. The Manufactured Buildings Program is housed within the Division of Housing and Community Development at the Department of Community Affairs. This program ensures that manufactured and modular buildings (not mobile homes) built or marketed in Florida are constructed to certain minimum standards. The program certifies third-party inspection agencies to verify compliance with plans and to inspect plants. The program is funded primarily through certification insignia fees and building permit surcharges that are calculated based upon the square footage of buildings.

On September 30, 1997, the department transmitted to JAPC its list of rules for which the existing statutory authority may be considered insufficient under the new APA standard. That transmittal included the following chart identifying rules for the department's Manufactured Buildings Program:

Rule	Rule Title	Statute Authorized	Statute Implemented
9B-1.007	Manufacturer Requirements	§553.37(1) §553.38(1) §553.381	§553.37(8)
9B-1.009	Design Plan and Systems Approval	§553.37(1)	§553.38(1)

Rule	Rule Title	Statute Authorized	Statute Implemented
9B-1.010	Quality Control Procedures	§553.37(1)	§553.37(1) §553.37(8)
9B-1.011	Changes in Status, Alterations	§553.37(1)	§553.37(1) §553.37(4)
9B-1.015	Multiple Site Manufacturing	§553.37(1)	§553.37
9B-13.0051	Enforcement Authority	§553.901	§553.901 §553.904 §553.905 §553.906 §553.907 §553.908
9B-60.002	Definitions	§553.992	§553.992
9B-60.003	Department Activities	§553.992 §553.994	§553.990
9B-62.002	Definitions	§553.76(1)	§553.721
9B-62.003	Building Permit Surcharge Collection and Remittance	§553.76(1)	§553.721
9B-67.003	Department Activities	§553.98(2)	§553.98(3)

B. EFFECT OF PROPOSED CHANGES:

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C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes

The bill requires the Department of Community Affairs to adopt rules, in accordance with chapter 120, Florida Statutes, setting requirements for construction or modification of manufactured buildings and building modules; and governing the collection and remittance of surcharges.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

- d. Does the bill reduce total fees, both rates and revenues?

N/A

- e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

N/A

E. SECTION-BY-SECTION RESEARCH:

Section 1: Amends section 553.37, Florida Statutes, by creating new language authorizing the department to adopt rules setting requirements for construction or modification of manufactured buildings and building modules. This section provides legislative authority for the following rules: 9B-1.007, 1.009, 1.010, 1.011 and 1.015, F.A.C.

Section 2: Amends section 553.721, Florida Statutes, by authorizing the department to adopt rules for the collection and remittance of building permit surcharges and deleting obsolete dates and language referring to the Department of Health and Rehabilitative Services. This section provides legislative authority for Rules 9B-60.002 and 9B-60.003, F.A.C.

Section 3: Amends section 553.907, Florida Statutes, to authorize the department to designate by rule reporting intervals for local enforcement agencies to report to the department any information concerning compliance certifications and amendments. This section provides statutory authority for Rule 9B-13.0051, F.A.C., which requires enforcement agencies to file forms with the department on a quarterly basis in accordance with the schedule identified in the Florida Energy Efficiency Code for Building Construction, which Code is incorporated into the rules by reference.

Section 4: Amends section 553.992, Florida Statutes, by authorizing the department to issue non-binding interpretations, clarifications and opinions concerning the application and use of the building energy rating system when requested to do so by any builder, designer, rater or owner of a building. This section provides statutory authority for Rule 9B-60.003, F.A.C., authorizing the department to interpret and clarify various aspects of the energy rating system.

Section 5: Provides an effective date upon becoming a law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The does not reduce the authority of local governments to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the percentage of state tax shared with local governments.

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V. COMMENTS:

The department initially identified Rule 9B-67.003, F.A.C., as one for which the agency lacks specific authority. As this bill does not provide that authority, the rule must either be repealed by the agency, or it may be subject to a rule challenge under the new APA standard.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON COMMUNITY AFFAIRS:

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