SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

Date: March 11, 1998 Revised: _____ _____ _____ _____

Subject: Rulemaking Authority of the Department of Community Affairs

	Analyst	Staff Director	Reference	Action
1.	Schmith	Yeatman	CA	Favorable
2.				
3.				
4.				
5.				

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.

This bill substantially amends the following sections of the Florida Statutes: 553.37, 553.721, 553.907 and 553.992.

II. 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 provision for periodic review of rules by agencies with rulemaking authority.

In particular, s. 120.536, F.S., 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, F.S., 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 s. 120.56, F.S., 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), F.S., 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 s. 120.536(1), F.S. 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 s. 120.536, F.S.

Subsection (2) of s. 120.536 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 s. 120.54 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 s. 120.536, F.S., 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)

III. Effect of Proposed Changes:

Section 1 amends s. 553.37, F.S., by creating new language authorizing the department to adopt rules setting requirements for construction or modification of manufactured buildings and building modules to address:

- Submittal to and approval by the department of manufacturers' drawings and specifications, including any amendments;
- Submittal to and approval by the department of manufacturers' internal quality-control procedures and manuals, including any amendments;
- Issuance, cancellation, and revocation of any insignia issued by the department and procedures for auditing and accounting for disposition of said insignia; and
- The performance by the department of any other functions required by this part.

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 s. 553.721, F.S., 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 s. 553.907, F.S., 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 s. 553.992, F.S., 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.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

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.

VIII. Amendments:

None.