

# LOOSENING THE CHAINS THAT BIND: THE NEW VARIANCE AND WAIVER PROVISION IN FLORIDA'S ADMINISTRATIVE PROCEDURE ACT

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I. INTRODUCTION.....	353
II. HISTORY OF THE VARIANCE AND WAIVER PROVISION.....	354
A. The Governor's APA Review Commission.....	357
B. Approaches to Flexibility.....	359
C. Constitutional Considerations Unique to Florida.....	362
D. The Commission's Recommendation to the Legislature.....	366
III. SECTION 120.542, FLORIDA STATUTES.....	368
IV. PROCEDURAL REQUIREMENTS.....	372
V. CONCLUSION.....	375

## I. INTRODUCTION

This legislation loosens the chains that had been placed on our agencies for too long. It gives them the flexibility to use a more common sense approach—encouraging state employees to solve problems rather than create roadblocks.<sup>1</sup>

The premise behind this law is simple: No one has ever elected a rule. You can't fire a procedure. And policies aren't accountable to taxpayers. Unfortunately, too many of our citizens have been forced to deal with a government of the books, by the books, and for the books! That's why we have shifted the focus away from paper and back to people. People can use good judgment; people can be held accountable when they don't. We want our managers to look diligently for how we can—before they respond with why we can't!<sup>2</sup>

When Governor Lawton Chiles and Lieutenant Governor Buddy MacKay spoke about Florida's revised Administrative Procedure Act (APA)<sup>3</sup> at the bill signing ceremony last May, they emphasized the Act's "flexibility," its provisions for "good judgment," and its opportunities for a "common sense approach" to rule application. The section of the Act prompting these comments is the variance and waiver

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1. Gov. Lawton Chiles, Remarks at the Bill Signing Ceremony for Fla. CS for SB 2290 & 2288 (1996) (the revised Administrative Procedure Act) (May 1, 1996).

2. Lt. Gov. Buddy MacKay, Remarks at the Bill Signing Ceremony for Fla. CS for SB 2290 & 2288 (1996) (the revised Administrative Procedure Act) (May 1, 1996).

3. FLA. STAT. ch. 120 (Supp. 1996).

provision,<sup>4</sup> which directs state agencies to apply their own rules flexibly as long as the statutory criteria for granting variances and waivers are satisfied.

The variance and waiver provision may be the most significant aspect of the revised APA.<sup>5</sup> It is unique in that no other state has a "mandated flexibility" provision within its administrative procedure act.<sup>6</sup> The prospect of giving agencies such flexibility has raised a number of concerns and questions,<sup>7</sup> as well as high hopes, such as those expressed by Governor Chiles and Lieutenant Governor MacKay.

Part II of this Article discusses the genesis of the variance and waiver provision in the Governor's Administrative Procedure Act Review Commission<sup>8</sup> and the development of the section's specific provisions. Additionally, parts III and IV of the Article address the requirements of section 120.542, Florida Statutes, both for agencies and for regulated citizens, and discuss issues that may arise as agencies begin to receive and act on petitions under this new section. Finally, part V concludes that the variance and waiver provision may be the means through which common sense is brought into government decisionmaking.

## II. HISTORY OF THE VARIANCE AND WAIVER PROVISION

Before the fall of 1995, Governor Chiles and others bemoaned the consequences of rigid adherence to rules and expressed a desire for increased flexibility in the APA.<sup>9</sup> In the 1995 bill revising the APA, which the Governor ultimately vetoed, the Legislature included the following provisions concerning flexibility:

Before July 1, 1996, each agency must review its rules and file a written report with the President of the Senate, the Speaker of the

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4. *Id.* § 120.542.

5. See Mary Smallwood, Update on the Governor's APA Committee, *ADMIN. L. SEC. NEWSL.*, March 1996, at 7.

6. See *GOV.'S ADMIN. PROC. ACT REV. COMM'N, FINAL REPORT 9 & app. H* (1996) [hereinafter *FINAL REPORT*]; see also Jim Rossi, *The 1996 Revised Florida Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 *FLA. ST. U. L. REV.* 283, 290 (1997).

7. See Smallwood, *supra* note 5; Rossi, *supra* note 6, at 290-94.

8. The 15-member Commission was appointed by Governor Chiles in the fall of 1995 to evaluate all aspects of the APA. The Commission released its Final Report on Feb. 20, 1996. See generally *FINAL REPORT*, *supra* note 6. The vast majority of the Commission's recommendations were adopted by the Legislature during the 1996 legislative session. See Act effective Oct. 1, 1996, ch. 96-159, 1996 Fla. Laws 147; see also Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, *FLA. B.J.*, July/Aug. 1996, at 30.

9. See Veto of Fla. CS for CS for SB 536 (1995) (letter from Gov. Chiles to Sec'y of State Sandra B. Mortham, July 12, 1995) (on file with Sec'y of State, The Capitol, Tallahassee, Fla.) [hereinafter 1995 Veto Message].

House of Representatives, and the Governor. The report must identify ways to simplify and clarify rules and regulatory schemes by combining redundant and overlapping rules and by deleting obsolete rules. The report must identify rules that are appropriate for variances, waivers, or special circumstances consistent with the directives of the Legislature. . . .<sup>10</sup>

. . . .

Each agency is encouraged to accomplish its statutory duties and objectives using sound judgment and flexibility so that agency action in implementing legislative enactments and in adopting agency rules is accomplished in a manner that meets individual needs and circumstances while at the same time carrying out the legislative requirements.<sup>11</sup>

Agencies are encouraged to adopt rules that can be flexibly applied.<sup>12</sup>

These attempts at flexibility were not enough for Governor Chiles, who disliked other provisions of the legislation. In his message vetoing the 1995 Act, he stated:

For all the good thought that goes into the promulgation of a rule, and for whatever laudable purpose it seeks to achieve, a rule cannot think. The universe invariably presents agency decision makers with factual situations unanticipated by the drafters of the rule. Application of the rule to the facts in such a case, oftentimes leads to dysfunctional results lacking in common sense.<sup>13</sup>

Florida, like many other states,<sup>14</sup> has several statutory provisions authorizing variances to particular statutes or rules.<sup>15</sup> Section 403.201, Florida Statutes, for example, authorizes the Department of Environmental Protection (DEP) to grant variances to the provisions of the Florida Air and Water Pollution Control Act and to the

10. Fla. CS for CS for SB 536, § 8(2) (1995) (vetoed by the Governor) (emphasis added).

11. *Id.* § 10(1) (proposed FLA. STAT. § 120.547(1)).

12. *Id.* § 10(2) (proposed FLA. STAT. § 120.547(2)).

13. 1995 Veto Message, *supra* note 9, at 2. The Governor is a supporter of "common sense" in government and once distributed copies of PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE: HOW LAW IS SUFFOCATING AMERICA* (1994) to all 160 legislators. See Bill Moss, *The Monster That Nonsense Created*, STATE LEGISLATURES, June 1995, at 16.

14. State statutes frequently include procedures that provide petitioners with an opportunity to request a hearing either upon petitioning for a variance or upon the agency's denial of a variance request. See, e.g., CAL. HEALTH & SAFETY CODE § 25233 (West 1996) (hazardous waste control); DEL. CODE ANN. tit. 7, § 6011 (1995) (environmental control). Statutes also frequently include requirements that the variance pose no adverse effects to the health, well being, or safety of the public. See, e.g., MO. REV. STAT. § 260.405 (1994) (environmental control); WYO. STAT. ANN. § 27-11-111 (Michie, LEXIS through 1996 Sess.) (OSHA). Sometimes variances may be issued only when the petitioner can demonstrate a particular hardship in complying with the regulation. See, e.g., KY. REV. STAT. ANN. § 224.30.130 (Baldwin 1996) (public health); MICH. COMP. LAWS § 125.1515 (1996) (zoning).

15. See, e.g., FLA. STAT. § 403.201 (1995) (pollution control); *id.* § 403.854 (drinking water); *id.* § 381.0086 (migrant housing); *id.* § 378.212 (phosphate land reclamation).

rules and regulations that implement it. The statute allows variances to be granted for any one of the following reasons:

(a) There is no practicable means known or available for the adequate control of the pollution involved.

(b) Compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.

(c) To relieve or prevent hardship of a kind other than those provided for in paragraphs (a) and (b).<sup>16</sup>

Section 403.201 also provides for notice of the variance request and the opportunity for a hearing.<sup>17</sup> Additionally, DEP is authorized to adopt rules imposing other conditions for the granting of variances.<sup>18</sup> Some Florida statutes permit the granting of variances only when alternative means fail to protect public health and safety.<sup>19</sup> In other cases, an agency may grant a variance if a particular project provides a significant regional benefit for wildlife and the environment.<sup>20</sup> The requirements in Florida's specific statutory variance provisions appear to be similar to those in many states.<sup>21</sup> Thus, before the enactment of the 1996 APA revisions, Florida had several individual statutory provisions directing agencies to be flexible in certain circumstances, but no general statute that allowed agencies to use judgment in the application of their rules.

This lack of general statutory flexibility is a relatively recent development in Florida law. The APA once afforded more flexibility to agencies through a provision that was interpreted by Florida courts as authorizing agencies to grant exceptions to their rules as long as they explained those deviations.<sup>22</sup> Section 120.68(12), Florida Statutes, provided that a court should remand a case to an agency if it found the agency's exercise of discretion to be inconsistent "with an agency rule, an officially stated agency policy or a prior agency

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16. *Id.* § 403.201(1).

17. *See id.*

18. *See id.* § 403.201(3)-(4); see also FLA. ADMIN. CODE R. 62-103.100 (1995) (repealed Dec. 31, 1995). Rule 62-103.100 required the petitioner or applicant to address six factors when requesting a variance. *See id.* The factors included the steps or measures the petitioner was taking to meet the requirement from which the variance was sought. *See id.* Further, the petitioner had to address the social, economic, and environmental impacts on the applicant, residents of the area, and the state if the variance were granted or denied. *See id.*

19. *See, e.g.,* FLA. STAT. § 381.0086(3) (1995) (relating to migrant housing).

20. *See id.* § 378.212(1)(f) (phosphate land reclamation).

21. *See* sources cited *supra* note 14.

22. *See* FLA. STAT. § 120.68(12) (1983).

practice, if deviation therefrom is not explained by the agency . . . .”<sup>23</sup> Florida courts began to develop an “explication” doctrine allowing an agency to deviate from its own rule as long as it explained the deviation.<sup>24</sup> However, the cases discussing section 120.68(12) did not elaborate on the kind of explanation an agency must provide or the standard under which the courts would review the agency’s explanation.

In 1984, the Florida Legislature amended section 120.68(12) to direct the remand of all cases in which a court finds that an agency’s exercise of discretion is inconsistent with an agency rule.<sup>25</sup> Thus, the opportunity to deviate from an existing rule and explain that deviation was eliminated, and the only kind of agency flexibility that appeared likely to meet with approval from Florida courts was that specifically granted by statute.<sup>26</sup>

#### A. The Governor’s APA Review Commission

Following Governor Chiles’ veto of the 1995 APA legislation, he appointed a fifteen-member commission to evaluate virtually all aspects of the APA.<sup>27</sup> The Commission met for nearly five months in late 1995 and early 1996, gradually building consensus on the major points of contention that led to the 1995 veto.<sup>28</sup> At the first meeting

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23. *Id.* (emphasis added).

24. See e.g., *General Tel. Co. v. Florida Pub. Serv. Comm’n*, 446 So. 2d 1063 (Fla. 1984); *Best Western Tivoli Inn v. Department of Transp.*, 435 So. 2d 321 (Fla. 1st DCA 1983). These cases and the development of this doctrine are discussed in detail in F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 ST. THOMAS L. REV. 287 (1995).

25. See Act effective June 11, 1984, ch. 84-173, § 4, 1984 Fla. Laws 519, 523-24 (amending FLA. STAT. § 120.68(12) (1983)).

26. See *Booker Creek Preservation, Inc. v. Southwest Florida Water Mgmt. Dist.*, 534 So. 2d 419, 423 (Fla. 5th DCA 1988).

27. The commissioners and their positions at the time of the Commission’s creation were: Robert M. Rhodes, chair, partner, Steel Hector & Davis, LLP; Representative David I. Bitner, Repub., Port Charlotte; Representative Irló “Bud” Bronson, Dem., Kissimmee; Senator Locke Burt, Dem., Ormond Beach; Senator Rick Dantzler, Dem., Winter Haven; Martha Edenfield, of counsel, Akerman, Senterfitt & Eidson; Clay Henderson, president, Fla. Audubon Soc’y; Wade Hopping, partner, Hopping, Green, Sams & Smith; Eleanor Hunter, hearing officer, Div. of Admin. Hearings; Jon Mills, director, Ctr. for Govtl. Resp., University of Florida; Jon Moyle, Jr., partner, Moyle, Flanigan, Katz, Fitzgerald & Sheehan; Representative Ken Pruitt, Repub., Port St. Lucie; Representative Dean Saunders, Dem., Lakeland; Linda Loomis Shelley, chief of staff, Exec. Office of the Gov.; and Alan Starling, president, Starling Chevrolet, Inc., Kissimmee. The Commission’s executive director was Donna E. Blanton, an associate at the law firm of Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon.

28. See generally FINAL REPORT, *supra* note 6. The recommendations of the Commission served as a starting point for the 1996 legislation. As these authors have expressed elsewhere, the success of the Commission in presenting an acceptable package of compromises to the Legislature was due in large measure to the Governor’s foresight in appointing a balanced Commission consisting of six legislators, representatives of interest groups who had been deeply involved in debate about the APA in recent years, and his own chief

of the Commission, Commissioners Rick Dantzler and Wade Hopping suggested that providing more flexibility in the APA should be a primary goal of the Commission.<sup>29</sup> Commissioner Linda Shelley, the Governor's chief of staff, also was an enthusiastic supporter of increased efforts at flexibility.<sup>30</sup> Early in its deliberations, the Commission agreed that its focus in APA reform would encompass three broad areas: simplifying the APA, increasing flexibility in the application of administrative rules and procedures, and increasing agency accountability to the Legislature and the general public.<sup>31</sup> The focus of the "flexibility" aspect of the Commission's reform efforts was almost immediately directed to a general variance and waiver provision within the Florida APA.<sup>32</sup>

At the second meeting of the Commission, the following premise was proposed for consideration:

More flexibility is needed in the administrative process, particularly in the ways agencies apply their rules to the public. Agencies must write rules "specific enough to be meaningful, yet general enough to fit a variety of situations. The broader the regulatory task, the greater the likelihood that unforeseen situations will arise," thus creating the need for "adjustments" to rules of general applicability. Consequently, to achieve an appropriate result for the public and private citizens, agencies often need flexibility to vary from literal requirements of rules. Procedural mechanisms are needed to consider individual requests for variances and exceptions to administrative rules of general applicability.<sup>33</sup>

The premise was intended to respond to concerns expressed at the first Commission meeting regarding problems that arise from an agency's strict adherence to its rules.<sup>34</sup> Despite widespread interest in a more flexible APA, the Commission recognized that the view that more flexibility is needed in the administrative process is not universally held.<sup>35</sup> Thus, Commissioners were aware of the need to

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of staff. See Blanton & Rhodes, *supra* note 8, at 30. In addition to the Commission's recommendations, many elements of the vetoed 1995 legislation were included in the 1996 proposal.

29. See FINAL REPORT, *supra* note 6, app. A, at 3.

30. See *id.* app. D, at 2.

31. See *id.* at 1 (executive summary).

32. See *id.* apps. A-B.

33. *Id.* app. H, at 1 (quoting Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions to Administrative Rules*, 1982 DUKE L.J. 277, 289).

34. See *id.* app. A, at 3. Senator Dantzler, for example, expressed the view that applying rules literally can lead to "nonsensical results." *Id.* Commissioner Hopping mentioned a provision in Minnesota law that allows agencies to grant variances to rules. See *id.* Other Commissioners expressed interest in exploring the Minnesota model. See *id.*

35. Mary Smallwood, a veteran practitioner of administrative law who is based in Tallahassee, told Commissioners at the first meeting that she believes "flexibility should be removed from government decisionmaking as much as possible." *Id.* app. A, at 2. Former Senator Curt Kiser, Repub., Palm Harbor, 1984-1994, who was deeply involved in

strike a balance between rigid adherence to rules and their unpredictable application to the public.

### B. Approaches to Flexibility

Flexibility can be built into the administrative process in a number of ways. The Commission was particularly interested in the approach taken in Minnesota.<sup>36</sup> The Minnesota APA includes a general provision authorizing agencies to grant rule variances. The statute provides:

Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance, it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency receiving a request for a variance shall set forth in writing its reasons for granting or denying the variance. This subdivision shall not constitute authority for an agency to grant variances to statutory standards.<sup>37</sup>

The Commission's research indicated that Minnesota was the only state granting variance authority to its agencies in this manner.<sup>38</sup> The research further showed that while some states allow agencies to develop standards and guidelines for variances through rulemaking, the statutory directives usually prohibit variances unless such rules are adopted.<sup>39</sup> The Commission did not discover any case law interpreting the twenty-year-old Minnesota provision, nor

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drafting an earlier revision of Florida's APA, "also reminded Commissioners that the Florida [APA] was adopted in 1974 in large measure because of concerns about 'phantom government' and to rein in unbridled agency flexibility." *Id.* app. H, at 1.

36. See *supra* note 34.

37. MINN. STAT. § 14.05 (1996).

38. See FINAL REPORT, *supra* note 6, app. H, at 2.

39. See *id.* In 1994, New Hampshire adopted a provision that prohibits agencies from granting variances unless they provide by rule for a waiver or variance procedure. See Act of June 10, 1994, ch. 412, 1994 N.H. Laws (WESTLAW). Thus, New Hampshire's new statute could be broadly interpreted as allowing agencies authority to grant variances as long as they adopt a procedure for variances by rule. This provision states: "No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides." N.H. REV. STAT. ANN. § 541-A:22 (Supp. 1995) (emphasis added).

Similarly, North Carolina has a statute that prohibits agencies from waiving or modifying "a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement." N.C. GEN. STAT. § 150B-19 (1995). Vermont also has a statute stating that agencies may not grant routine waivers of or variances from any provision of their rules "without either amending the rules, or providing by rule for a waiver or variance procedure." VT. STAT. ANN. tit. 3, § 845 (LEXIS through 1995 Sess.).

All of these statutes are cast in terms of prohibiting variances, yet all appear to allow them as long as agencies establish guidelines or procedures by rule. There are no reported cases interpreting these provisions.

could Minnesota governmental officials recall the provision ever being used.<sup>40</sup>

A recent study of the Minnesota APA recommended that agencies make better use of the statutory variance provision.<sup>41</sup> According to interviews with Minnesota officials, a few years ago Minnesota legislators attempted to develop some general variance standards for agencies to follow, but dropped the proposal because of strong agency objections.<sup>42</sup>

A proposed bill revising the Iowa APA includes a provision that would authorize a person to petition an agency for an exemption from a rule.<sup>43</sup> If adopted, it would require agencies to adopt rules "governing the form, contents, and filing of" waiver petitions, "specifying the procedural rights of persons in relation to such petitions," and "providing for the disposition of those petitions."<sup>44</sup> The proposed waiver provision states that an agency must grant a petition for exemption from a rule "if application of the rule to the petitioner on the basis of the particular facts specified in the petition would not serve any of the purposes of the rule."<sup>45</sup> Additionally, the proposed statute would allow an agency to waive application of one or more of its rules on its own motion if it found that the statutory criteria for waiver existed.<sup>46</sup>

Variations and other "exceptions" provisions are common in federal regulatory schemes.<sup>47</sup> Although the authority to grant exemptions or waivers usually is found in an agency's enabling act or in its own regulations, the U.S. Court of Appeals for the District of Columbia has suggested that the authority to grant exceptions may be implied by Congress's directive to agencies to regulate in the public interest.<sup>48</sup>

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40. See FINAL REPORT, *supra* note 6, app. H, at 2.

41. See MINNESOTA COMM'N ON REFORM AND EFFICIENCY, REFORMING MINNESOTA'S ADMINISTRATIVE RULEMAKING SYSTEM, SUMMARY REPORT 15 (1993). This report states:

Agencies should make better use of rule variances or waivers to facilitate the use of outcome measures.

Rule waivers encourage regulated parties to design alternative approaches, enhancing compliance with state policies. Agencies should develop processes that specify when a rule can be waived, such as when the legislature has set a broad standard. Authority to do so already exists in the APA. Frequent use of waivers can indicate a need for reviewing and perhaps updating a particular rule.

*Id.*

42. See FINAL REPORT, *supra* note 6, app. H, at 3.

43. See Iowa SF 2404, § 39 (proposed IOWA CODE § 17A.4106).

44. *Id.* § 39(2).

45. *Id.* § 39(5).

46. See *id.* § 39(7).

47. See discussion *infra* note 48.

48. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). For a general discussion of waiver of federal regulations, see Jim Rossi, Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission, 47 ADMIN. L. REV. 255

Exceptions to administrative rules are so common, particularly in the federal regulatory context, that a number of scholarly articles have been written about them.<sup>49</sup> The various types<sup>50</sup> of exceptions to administrative rules are categorized in the literature as follows:

1. Hardship exceptions. These are based on the premise that exceptions may be granted because compliance with the rule in question would create a substantial hardship. There are several subcategories of hardship exceptions, including economic hardship and technological hardship. The idea behind these exceptions is that a regulated entity or person should not be penalized or prejudiced when complying with a rule is too expensive or too technologically difficult unless the social benefits of compliance with the rule outweigh the costs to the particular entity or person.

2. Fairness exceptions. These are used when application of a rule would cost one entity or person substantially more than those similarly situated, when application of a rule would unintentionally penalize an entity's or person's recent good-faith activities, or when regulatory costs to an entity or person are simply not worth the minimal social benefits that compliance with the rule would produce.

3. Policy exceptions. These are geared to the overall goals of a regulatory program. For example, an exception to a rule may be granted if its desired results can be achieved by another means. Policy exceptions can allow an agency to implement a new or refined policy on an experimental basis.<sup>51</sup>

The Commission used the premises of these general categories of exceptions as bases for the criteria that agencies must consider when reviewing petitions for variances and waivers.<sup>52</sup>

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(1995). One example of an elaborate exceptions program is the federal Department of Transportation's (DOT) program for relieving a person from hazardous materials regulations. DOT recently proposed a rule amendment to streamline the exemption process, which would establish procedures for granting routine, priority, and emergency exceptions. See Exemption, Approval, Registration and Reporting Procedures, 60 Fed. Reg. 47,723-47,725 (1995) (to be codified at 49 C.F.R. §§ 107, 171-73, 178) (proposed Sept. 14, 1995). The proposed rule allows for priority or emergency processing when routine processing would result in significant economic loss to the applicant. See *id.* at 47,725. In a report to Congress, DOT explained the need for flexibility in the hazardous materials area as follows:

The need for exemptions from the regulations arises from the changing nature of HM and the methods by which they are transported. Since the regulations are relatively static in nature, exemptions are vital to industry, allowing it to implement new technology and to evaluate new operational techniques which often increase productivity and enhance safety.

RESEARCH AND SPECIAL PROGRAMS ADMIN., U.S. DEPT OF TRANSP., 1992-1993 BIENNIAL REPORT TO CONGRESS ON TRANSPORTATION OF HAZARDOUS MATERIALS 5 (1993).

49. See, e.g., Peter H. Schuck, *When the Exception Becomes the Rule: Regulatory Equity and the Formulation of Energy Policy Through an Exceptions Process*, 1984 DUKE L.J. 163; Aman, *supra* note 33; Rossi, *supra* note 48.

50. See Aman, *supra* note 33, at 293-322.

51. FINAL REPORT, *supra* note 6, app. H, at 6-7.

52. See *id.* app. J.

### C. Constitutional Considerations Unique to Florida

During the discussion of flexibility issues at the second Commission meeting, several Commissioners questioned whether a general waiver or variance provision could be constitutionally included in Florida's APA.<sup>53</sup> The concerns related to the separation of powers requirement in article II, section 3 of the Florida Constitution, and the "nondelegation doctrine" that state courts have developed when construing that provision.<sup>54</sup>

After researching the cases interpreting article II, section 3, the Commission concluded that it was possible to draft a general exceptions provision in the Florida APA that would satisfy constitutional requirements.<sup>55</sup>

Article II, section 3, states:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.<sup>56</sup>

Florida courts have explained that this section encompasses two fundamental prohibitions.<sup>57</sup> First, "no branch [of government] may encroach upon the powers of another."<sup>58</sup> Second, "no branch may delegate to another branch its constitutionally assigned powers."<sup>59</sup> This second prohibition frequently is referred to as the "nondelegation doctrine." It can be implicated when the Legislature allows another branch of government (such as an executive branch agency) to establish policy without sufficient guidelines from the Legislature.<sup>60</sup>

Florida courts have taken a much stricter view of the nondelegation doctrine than have federal courts.<sup>61</sup> In *Askew v. Cross Key Waterways*,<sup>62</sup> the Florida Supreme Court invigorated Florida's long-standing nondelegation doctrine and applied it in the context of the new APA. The court stated that "the legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient."<sup>63</sup> The court made clear, however, that the doc-

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53. See *id.* app. B, at 3.

54. For a detailed discussion of the nondelegation doctrine as it relates to a potential variance and waiver provision in the Florida APA, see *id.* app. I.

55. See *id.* app. I, at 1.

56. FLA. CONST. art. II, § 3.

57. See, e.g., *Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 264 (Fla. 1991).

58. *Id.*

59. *Id.*

60. See *B.H. v. State*, 645 So. 2d 987, 992 (Fla. 1994).

61. See *id.* ("In sum, Florida has expressly and repeatedly rejected whatever federal doctrine can be said to exist regarding nondelegation.")

62. 372 So. 2d 913 (Fla. 1978).

63. *Id.* at 924.

trine does not prohibit administrative agencies from “fleshing out” legislative policy, and even noted that “[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society.”<sup>64</sup> What the Legislature may not do is repose in an administrative body “the power to establish fundamental policy.”<sup>65</sup>

Despite the stated strict adherence to the nondelegation doctrine following *Cross Key*, a close reading of the cases indicates that courts allow agencies considerable flexibility in interpreting the general policies stated by the Legislature.<sup>66</sup> As the First District Court of Appeal recently explained:

The legislature may perform its function by laying down policies and establishing standards while leaving to agencies the making of subordinate rules within prescribed limits and the determination of facts to which the policy, as declared by the legislature, is to apply. The fact that some authority, discretion or judgment is necessarily required to be exercised in carrying out a purely administrative or ministerial duty imposed by a statute, does not invalidate the statute. Although the legislature is obliged by the nondelegation doctrine to establish adequate standards and guidelines, the drafting of detailed or specific legislation may not always be practical or desirable.<sup>67</sup>

Courts have adopted a pragmatic approach, liberally interpreting the nondelegation doctrine<sup>68</sup> in cases involving licensing and determinations of fitness of license applications;<sup>69</sup> the regulation of a business operated as a privilege rather than a right when the business is potentially dangerous to the public;<sup>70</sup> and in cases where the subject matter is highly complex, and expertise and flexibility are needed to deal with its complexity and fluid conditions.<sup>71</sup>

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64. *Id.*

65. *Id.*

66. For discussions of the courts' treatment of the doctrine, see John E. Fennelly, *Non-Delegation Doctrine and the Florida Supreme Court: What You See Is Not What You Get*, 7 ST. THOMAS L. REV. 247 (1995); Johnny C. Burris, *The 1988 Survey of Florida Law*, *Administrative Law*, 13 NOVA L. REV. 727 (1989).

67. *Ameraquatic, Inc. v. Department of Nat. Resources*, 651 So. 2d 114, 117 (Fla. 1st DCA 1995) (citations omitted) (emphasis added).

68. These exceptions are discussed by Judge Ervin in *A.A. v. State*, 605 So. 2d 106, 107 n.2 (Fla. 1st DCA 1992) (Ervin, J., specially concurring).

69. See *Astral Liquors, Inc. v. Department of Bus. Reg.*, 463 So. 2d 1130, 1131 (Fla. 1985).

70. See *Department of Bus. Reg., Div. of Alcoholic Beverages & Tobacco v. Jones*, 474 So. 2d 359, 361-62 (Fla. 1st DCA 1985).

71. See *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 820 (Fla. 1983), appeal dismissed sub nom., *Southeast Volusia Hosp. Dist. v. Florida Patient's Compensation Fund*, 466 U.S. 901 (1984); *State v. Bender*, 382 So. 2d 697, 700 (Fla. 1980); *Jones v. Department of Revenue*, 523 So. 2d 1211, 1214 (Fla. 1st DCA 1988); see also *Brown v. Apalachee Reg'l Planning Council*, 560 So. 2d 782, 785 (Fla. 1990) (upholding

Nonetheless, the Florida Supreme Court reiterated the importance of the doctrine in *Chiles v. Children A, B, C, D, E, and F*,<sup>72</sup> striking down a statute that assigned to the executive branch the broad discretionary authority to reapportion the state budget.<sup>73</sup> The court stated that any attempt by the Legislature to delegate to another branch of government the power to enact laws or to declare what the law shall be is void.<sup>74</sup> However, the court acknowledged that if the Legislature establishes fundamental policy, other branches of government may constitutionally carry out that policy.<sup>75</sup> The court reasoned that “[t]he legislature can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established.”<sup>76</sup>

The Florida Supreme Court stated in another case that it is “impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine.”<sup>77</sup> The court acknowledged that in some instances, the delegation of discretion is warranted and that flexibility is important to the effective operation of administrative agencies.<sup>78</sup>

The Commission concluded that the clearest principle that can be drawn from the nondelegation doctrine, as it applies to a general variance and waiver provision in the APA, is that administrative agencies cannot be granted general authority to waive statutory provisions.<sup>79</sup> The courts likely would construe such a measure as delegating to an agency the authority to make law and policy.<sup>80</sup> Nonetheless, the Commission also expressed the view that a general provision granting administrative agencies authority to waive or vary their own rules could be drafted in a constitutional fashion.<sup>81</sup> As noted in the cases previously discussed, a certain amount of discretion is granted to agencies along with the authority to make rules. The Commission concluded that the Legislature also could grant agencies the discretion to make exceptions to those rules.<sup>82</sup>

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against a nondelegation challenge a regional planning council rule assessing fees for review of Development of Regional Impact applications).

72. 589 So. 2d 260 (Fla. 1991).

73. See *id.* at 267-68.

74. See *id.* at 264.

75. See *id.* at 268.

76. *Id.*

77. *B.H. v. State*, 645 So. 2d 987, 993 (Fla. 1994).

78. See *id.*

79. See FINAL REPORT, *supra* note 6, app. I, at 3.

80. For additional discussion of this point, see Boyd, *supra* note 24. Although granting agencies general authority to waive or vary statutory provisions is problematic, the Legislature can adopt statutes granting agencies specific authority to waive specific statutory provisions, as long as standards and guidelines are provided. See *supra* notes 15-20 and accompanying text.

81. See FINAL REPORT, *supra* note 6, at 9-15; *id.* app. I, at 3.

82. See *id.*

Further, the Commissioners decided that the nondelegation doctrine does not prohibit the enactment of a general exception provision in the APA, as long as the Legislature provides adequate standards for the agencies to follow in exercising this discretion and does not grant the agencies the power to create fundamental policy.<sup>83</sup> Another aspect of the variance and waiver statute that should insulate it from a nondelegation challenge relates to the detailed due process considerations included in the statute. Section 120.542, Florida Statutes, includes extensive provisions relating to notice and the opportunity to be heard.<sup>84</sup>

Consequently, the Commission staff recommended that several elements be included within any general waiver and variance provision in the APA to increase the likelihood that the statute will pass constitutional scrutiny.<sup>85</sup> The recommendations were that the provision include:

- Language making clear that it is the policy of the Legislature (not the agency) that exceptions to rules are appropriate in certain circumstances;
- Reasonably detailed guidelines and standards stating when the Legislature believes it is appropriate to grant exceptions (i.e., when hardship can be demonstrated; when fairness requires an exception; or when policy reasons justify an exception);
- A statement that agencies under no circumstances have authority to grant exceptions to statutory requirements;
- A requirement that the decision to grant or deny an exception be explained in writing and that the specific statutory standards concerning exceptions be addressed;
- The standard under which the agency's explanation would be reviewed (i.e., competent substantial evidence);
- A statement that the procedural requirements of chapter 120 (such as for notice and hearing) will apply to requests for exceptions.<sup>86</sup>

All of these elements were included in the statute that ultimately was passed by the Legislature.<sup>87</sup> The statutory elements enacted in 1996 demonstrate that the Legislature is establishing the fundamental policies concerning decisions on variances and waivers from agency rules. Without question and of necessity, the statute has granted agencies some needed discretion to decide whether a variance or waiver is appropriate in specific circumstances. Nonetheless, that discretion is limited by a statutory policy framework that

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83. See *id.*

84. See FLA. STAT. § 120.542(4)-(7) (Supp. 1996); see also *infra* Parts III-IV.

85. See FINAL REPORT, *supra* note 6, at 9-15; *id.* app. I, at 4.

86. *Id.* app. I, at 4.

87. See generally FLA. STAT. § 120.542 (Supp. 1996).

guides agency decisionmaking and was drafted with Florida court precedent concerning the nondelegation doctrine in mind.

#### D. The Commission's Recommendation to the Legislature

Most of the Commission's recommendations to the Legislature were framed as general policy directives rather than specific proposals incorporating recommended statutory language.<sup>88</sup> The variance and waiver proposal, however, was drafted by the Commission and its staff over the course of several meetings.<sup>89</sup> The final draft of the Commission's proposal is nearly identical to the proposal that ultimately was adopted by the Legislature.<sup>90</sup> The Commission's draft required agencies to advise persons of the remedies available through the variance and waiver process and to provide copies of the variance and waiver section and the uniform rules on variances and waiver to citizens who asked about relief from rule requirements.<sup>91</sup> During the 1996 legislative session, a representative of small business owners noted that a copy of the underlying statute also should be provided because it is the central consideration in any decision to grant a variance or waiver.<sup>92</sup>

The decision to recommend a general variance and waiver provision in the APA was one of the few Commission votes that was not unanimous.<sup>93</sup> Although a few Commissioners had concerns with potential constitutional problems, the majority of Commissioners expressed the view that adequate consideration had been given to nondelegation doctrine concerns as the proposal was drafted.<sup>94</sup> In particular, Commissioners noted that the central consideration in an agency's decision regarding whether to grant a variance or waiver is whether "the purpose of the underlying statute" can be or has been achieved by other means.<sup>95</sup> This core consideration draws in and

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88. See generally FINAL REPORT, *supra* note 6.

89. *Id.* apps. C-F.

90. Compare *id.* app. J with FLA. STAT. § 120.542 (Supp. 1996). Changes added during the legislative process include provisions for temporary and emergency variances and waivers, see FLA. STAT. § 120.542(3) (Supp. 1996), and a statement that the agency must provide persons with a copy of the underlying statute that forms the basis for a rule if a person seeking relief from the rule requests it, see *id.* § 120.542(4).

91. See FINAL REPORT, *supra* note 6, at app. J.

92. Bill Herrle, a lobbyist for the National Federation of Independent Businesses, requested that the Commission add this language.

93. Commissioners Eleanor Hunter, an administrative law judge with the Division of Administrative Hearings (DOAH), and Clay Henderson, the president of the Florida Audubon Society, voted against the proposal. See FINAL REPORT, *supra* note 6, app. F, at 2. Commissioner Jon Mills, a University of Florida College of Law professor and former speaker of the Florida House of Representatives, voted in favor of the proposal but expressed concerns about Florida's nondelegation doctrine and noted that he expects the proposal to be challenged on those grounds. See *id.*

94. See *id.*

95. *Id.*

applies legislatively established statutory standards and fundamental policy to each agency decision on a variance or waiver. It reflects widespread agreement among the Commission, as well as legislators, that the Legislature should set the policies and direction for an agency; the agency, through its rules, should carry out those policies and directives.<sup>96</sup>

Before making their final recommendations, Commissioners considered the possibility of returning to the approach of former section 120.68(12), Florida Statutes, which allowed agencies to grant exceptions to their rules if they explained the deviation.<sup>97</sup> The Commission decided, however, "that a more detailed variance and waiver provision, including procedural safeguards for both the applicant and other parties, was preferable."<sup>98</sup>

Professor Jim Rossi, writing about the new waiver and variance provision,<sup>99</sup> notes that the concept of waiver appears at first blush to be in conflict with other sections of the APA that strongly encourage rulemaking rather than adjudication by agencies.<sup>100</sup> He concludes, however, that because no agency can foresee all future contingencies, the introduction of a waiver and variance provision in the APA should actually encourage the adoption of more precise rules.<sup>101</sup> He reasons that without a waiver or variance provision, the temptation is great for agencies to either avoid rulemaking or to adopt vague and ambiguous rules to preserve some flexibility.<sup>102</sup>

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96. See *id.* at 9-15. The Executive Council of the Administrative Law Section of The Florida Bar opposed the creation of a general waiver and variance statute within the APA. See Smallwood, *supra* note 5, at 8. The Council recommended instead that any variance provisions be incorporated into individual substantive statutes, a proposal that the Commission decided would be time-consuming and impractical. See FINAL REPORT, *supra* note 6, at 12. The Council's view is best expressed by Mary Smallwood, who wrote:

[T]here is no reason to believe that a one-size-fits-all variance process will work. Is it really appropriate to use the same criteria in evaluating a request for a variance from a chemical manufacturing facility from hazardous waste financial responsibility requirements as it is to determine whether a cosmetologist should be granted a variance from a licensing requirement?

Smallwood, *supra* note 5, at 9. Although Commissioners recognized the Council's concerns, there was general agreement that a general policy concerning variances and waivers could be incorporated into the APA with an assurance that granting a waiver or variance would achieve the purpose of the underlying statute. See FINAL REPORT, *supra* note 6, at 12. Thus, in addition to the criteria included within the variance and waiver statute, Commissioners believed agencies would receive adequate guidance as to whether a variance or waiver was appropriate from the language of the underlying substantive statute. See *id.*

97. See FLA. STAT. § 120.68(12) (1983); see also *supra* text accompanying notes 22-24.

98. FINAL REPORT, *supra* note 6, at 13-14.

99. See Rossi, *supra* note 6.

100. See *id.* at 292; see also FLA. STAT. § 120.54(1)(a) (Supp. 1996) (stating that rulemaking is not a matter of agency discretion and that agency statements defined as rules must be adopted as soon as feasible and practicable).

101. See Rossi, *supra* note 6, at 293.

102. See *id.*

The authors agree with Professor Rossi that the creation of the new variance and waiver provision eliminates the need for a choice between those two unattractive alternatives. Professor Rossi also states that:

[a]lthough there is a risk of exceptions redefining rules, the legislative oversight process in Florida provides an opportunity to modify rules if this should occur, and agency attempts to develop new policy through waiver of rules will potentially be subject to challenge before DOAH, pursuant to the mechanisms that previously appeared in section 120.535.<sup>103</sup>

The authors agree with this point as well. The new APA makes it more difficult for agencies to avoid rulemaking altogether. At the same time that more flexibility was granted to agencies through the variance and waiver provision, legislators also strengthened statutory directives that agency policies must be expressed through formal rules rather than through policies, guidelines, or other, less formal directives.<sup>104</sup> Thus, the Legislature has not only emphasized its commitment to expressing policy through rulemaking, but also has acknowledged that rigid adherence to rules occasionally can result in nonsensical results and that a mechanism to address such circumstances is necessary.

The new variance and waiver provision also may help achieve another goal of the Commission relating to the less adversarial resolution of disputes between agencies and citizens.<sup>105</sup> Before the introduction of the variance and waiver provision, a citizen unable to comply with a rule had little choice but to file a formal challenge to the rule, which generally involved an adversarial hearing before an administrative law judge.<sup>106</sup> By seeking a variance or waiver, citizens who can satisfy the statutory criteria for exceptions to the rules can avoid protracted litigation—a benefit both to agencies and those they regulate.

### III. SECTION 120.542, FLORIDA STATUTES

The new APA creates section 120.542, Florida Statutes. Subsection (1) of the statute describes the legislative intent behind the enactment:

Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons

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103. *Id.* (citations omitted).

104. See FLA. STAT. §§ 120.54(1), .56(4), .57(1)(e) (Supp. 1996).

105. See FINAL REPORT, *supra* note 6, at 37.

106. See FLA. STAT. § 120.56(1), (3) (Supp. 1996).

subject to regulation. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. This section does not authorize agencies to grant variances or waivers to statutes. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.<sup>107</sup>

In addition to describing the Legislature's reasons for enacting the statute, this subsection makes clear that agencies are specifically authorized to grant variances and waivers to their own rules, but not to substantive statutes. As discussed earlier, this statement was included to avoid potential constitutional problems under the nondelegation doctrine.<sup>108</sup> The subsection also references "rules adopted under the authority of this section."<sup>109</sup> That phrase refers to the uniform rules that are referenced in sections 120.542(3), (5), and (6), and in section 120.54(5). It is not within the authority of an agency to substantively supplement or refine by rule the statutory standards for issuing a waiver or variance.<sup>110</sup>

Subsection (1) also specifies the Legislature's intent concerning the relationship between section 120.542 and variance and waiver provisions in substantive statutes.<sup>111</sup> By stating that section 120.542 is supplemental to the substantive variance and waiver provisions in the Florida Statutes, the Legislature has indicated that variances and waivers can be sought either under the general authority in the APA or under the authority of specific substantive statutes. Thus, a petition for variance or waiver may address the criteria of both the relevant substantive statutes and section 120.542.<sup>112</sup>

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107. *Id.* § 120.542(1).

108. See *supra* notes 76-81 and accompanying text.

109. FLA. STAT. § 120.542(1) (Supp. 1996).

110. See *id.*

111. See *id.*

112. Interestingly, the Legislature in 1996 included variance and waiver provisions virtually identical to those in section 120.542 within at least one substantive statute. See Act effective July 1, 1996, ch. 96-277, § 5, 1996 Fla. Laws 1121, 1148. In a major rewrite of the state's underground petroleum storage tank clean-up program, the Legislature included the following language concerning the petroleum clean-up reimbursement requirements:

[DEP] is authorized to grant variances and waivers from the documentation requirements of paragraph (e)2, and from the requirements of rules applicable in technical and financial audits conducted under this section. Variances and waivers shall be granted when the person responsible for site rehabilitation demonstrates to [DEP] that application of a financial or technical auditing requirement would create a substantial hardship or would violate principles of fairness. For purposes of this subsection, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this subsection, "principles of fairness" are violated when the application of a requirement affects a particular person in a manner significantly different from the way it affects other

Following the adoption of the new APA, the authors were questioned about the effect of section 120.542 on agencies such as the Environmental Regulation Commission and the Marine Fisheries Commission, both of which have rulemaking authority pursuant to statute but have no authority to issue orders.<sup>113</sup> The questions concerned whether section 120.542 implicitly grants these agencies the authority to issue orders relating to variance or waiver petitions. In the authors' view, it would be inappropriate to assume that the Legislature, through the variance and waiver provision, implicitly intended to grant such authority to these agencies. Rather, petitions for variances and waivers should be directed to the agencies under which these commissions operate and that administer the commissions' rules. In the case of variances or waivers to rules of the Environmental Regulation Commission, the petition should be filed with DEP. As noted in Part I, DEP already has statutory authority to grant variances to the Florida Air and Pollution Control Act and to the rules that implement it.<sup>114</sup> In the case of variances or waivers to rules of the Marine Fisheries Commission, the petition should be directed to the Board of Trustees of the Internal Improvement Trust Fund. The Attorney General has recently taken a contrary point of view, finding that petitions for variances and waivers should be directed to the Marine Fisheries Commission.<sup>115</sup>

Section 120.542(2), Florida Statutes, requires agencies to grant variances and waivers to their own rules when a person subject to the rule demonstrates that he or she can achieve, or has achieved, the purpose of the underlying statute by other means and when application of the rule "would create a substantial hardship or would violate principles of fairness."<sup>116</sup> A "substantial hardship" is defined in section 120.542(2) as a "demonstrated economic, technological, le-

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similarly situated persons who are affected by the requirement or when the requirement is being applied retroactively without due notice to the affected parties.

FLA. STAT. § 376.3071(12)(k)(5)(a) (Supp. 1996). According to Betsy Hewitt of DEP's Office of the General Counsel, this language was included by legislators in case the revised APA did not pass. See Workshop on Proposed Amendments to Rules 62-773, Fla. Admin. Code (July 8, 1996) (transcript of proceedings) (on file with authors).

113. The Environmental Regulation Commission was created by section 20.255(7), Florida Statutes, as part of DEP. The Marine Fisheries Commission was created by section 370.026, Florida Statutes, and is part of the Board of Trustees of the Internal Improvement Trust Fund. The Environmental Regulation Commission is explicitly granted rulemaking authority by sections 403.1838 and 403.3804, Florida Statutes. The Marine Fisheries Commission is granted rulemaking authority by sections 370.025, 370.027, 370.062, and 370.16, Florida Statutes.

114. See *supra* text accompanying notes 16-18.

115. See 96-68 Op. Fla. Att'y Gen. 1 (1996); see also Draft of proposed Fla. Admin. Code ch. 28-104, Variance or Waiver, at 14 (Sept. 26, 1996) [hereinafter Uniform Rules Draft] (tracking the Attorney General opinion).

116. FLA. STAT. § 120.542(2) (Supp. 1996).

gal, or other type of hardship to the person requesting the variance or waiver.”<sup>117</sup> Further, the statute shows that “‘principles of fairness’ are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.”<sup>118</sup> As previously noted, these criteria are similar to the criteria for administrative exceptions that are discussed most frequently in the legal literature.<sup>119</sup> By allowing petitioners to demonstrate that the statutory criteria can be accomplished by other means, legislators have recognized the concept of a “better mousetrap,”<sup>120</sup> and acknowledged that an agency’s means of accomplishing a statutory directive may not be the only acceptable approach.

In mandating that agencies grant variances and waivers when petitioners demonstrate they have satisfied the statutory requirements, legislators were perhaps hoping to avoid creating a statute that would never be used, like Minnesota’s general variance statute. As noted earlier, the Minnesota statute authorizes agencies to adopt rules for granting variances and waivers if they choose to do so.<sup>121</sup> The Florida Legislature’s decision to mandate that variances and waivers be granted under certain circumstances should help ensure uniform application of the law by the various state agencies subject to the APA and may lessen the likelihood of successful constitutional challenges. However, it is important to note that the initial determination of whether a petition meets statutory standards rests with the agency, and in most cases will afford the agency broad discretion.

Section 120.52, Florida Statutes, now defines the terms “variance” and “waiver.”<sup>122</sup> A variance is an agency modification to all or part of the literal requirements of a rule,<sup>123</sup> while a waiver is an agency decision “not to apply all or part of a rule to a person subject to the rule.”<sup>124</sup> Only those parties subject to a rule may request a variance or a waiver; an agency may not grant either measure on its own motion.<sup>125</sup> Similarly, a third party may not request a

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117. *Id.*

118. *Id.*

119. See *supra* notes 49-51 and accompanying text.

120. The “better mousetrap” concept was frequently used by commissioners during discussions on the proposed changes to describe the idea of allowing citizens to develop their own means of accomplishing statutory requirements. See FINAL REPORT, *supra* note 6, app. D, at 1.

121. See *supra* notes 36-42 and accompanying text.

122. See FLA. STAT. § 120.52(18)-(19) (Supp. 1996).

123. See *id.* § 120.52(18).

124. *Id.* § 120.52(19).

125. See *id.* § 120.542(5); see also FINAL REPORT, *supra* note 6, app. C, at 3; *id.* app. D, at 2.

variance or waiver on behalf of another person.<sup>126</sup> Although agencies are not authorized to grant variances and waivers without specific requests to do so, agencies are required to inform citizens who inquire about relief from rule requirements of the remedies available through section 120.542 and to provide them with copies of that section and its accompanying uniform rules.<sup>127</sup> Additionally, if requested to do so, agencies must provide citizens with copies of the underlying statute upon which a rule is based.<sup>128</sup> An early draft of the uniform rules provides that when a person requests information on the remedies available pursuant to section 120.542, the agency must provide the information within ten days of the receipt of the request.<sup>129</sup> This draft also states that an agency must provide the name and address of the appropriate contact person for additional information and must indicate the procedure for filing a petition with the agency.<sup>130</sup>

#### IV. PROCEDURAL REQUIREMENTS

Section 120.542(5) specifies the procedural requirements for requesting a variance or waiver from an agency. The statute requires that each petition specify the rule for which the variance or waiver is requested, the type of action requested, any specific facts that would justify a waiver or variance, and any reasons why the variance or waiver requested would further the purposes of the underlying statute.<sup>131</sup> The statute states that these requirements are in addition to any requirements mandated by uniform rules.<sup>132</sup> At the time this Article was being prepared for publication, the uniform rules governing variances and waivers still were in draft form. A draft of the rules states that petitions for variances and waivers shall be in accordance with section 120.542, and also repeats the statutory criteria.<sup>133</sup> Additional requirements include a caption, a citation to the statute the rule is implementing, a directive that petitions be filed with the agency that adopted the rule, and a statement

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126. See FLA. STAT. § 120.542(5) (Supp. 1996).

127. See *id.* § 120.542(4). The new APA directs that the Administration Commission adopt uniform rules by July 1, 1997. See *id.* § 120.54(3). These rules must establish procedures that will be used by each agency subject to the APA unless the Administration Commission grants an exception. See *id.* § 120.54(5)(a)(1). Although agencies are given until July 1, 1998, to comply with the uniform rules, see *id.*, the portions of those rules relating to variances and waivers should be observed as soon as they are adopted by the Administration Commission.

128. See *id.* § 120.542(4).

129. See Uniform Rules Draft, *supra* note 115, at 16.

130. See *id.*

131. See FLA. STAT. § 120.542(5) (Supp. 1996).

132. See *id.*

133. See Uniform Rules Draft, *supra* note 115, at 14-15.

of whether the variance or waiver is permanent or temporary.<sup>134</sup> If the variance is temporary, the petition must include dates indicating the duration of the requested variance or waiver.<sup>135</sup>

Section 120.542 provides that notices of variance and waiver requests must be published in the Florida Administrative Weekly, and that uniform rules provide an opportunity for interested persons to comment.<sup>136</sup> The draft of the uniform rules states that any interested person may submit written comments on the petition for a variance or waiver within thirty days of the notice provided by section 120.542(6), and that the agency shall retain any comments in the record concerning the petition.<sup>137</sup> The proposed uniform rules also make clear that the opportunity to comment on a variance or waiver petition does not confer standing upon the person making the comments in any proceeding arising from a petition for a variance or waiver.<sup>138</sup>

An agency must grant or deny a variance or waiver request within ninety days, or the request is deemed approved.<sup>139</sup> This provision is consistent with other applications for a "license" under the APA.<sup>140</sup> Although the statute does not address whether or not an applicant may waive the ninety-day requirement, the presumption should be that he or she can do so. There may be circumstances under which an agency would deny the request for a variance or waiver within the ninety-day period, but perhaps could be convinced to grant the request if the petitioner provides additional information. Thus, allowing petitioners to waive the ninety-day requirement may be beneficial to all concerned.

Any agency decision on a variance or waiver petition must be in writing and must be supported by competent substantial evidence.<sup>141</sup> The decision constitutes an order that may be challenged in an adjudicatory proceeding.<sup>142</sup> Section 120.542 states that any proceeding pursuant to sections 120.569 and 120.57, Florida Statutes,<sup>143</sup> in regard to a variance or waiver, "shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other

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134. See *id.* at 15.

135. See *id.*

136. See FLA. STAT. § 120.542(6) (Supp. 1996).

137. See Uniform Rules Draft, *supra* note 115, at 15.

138. See *id.*

139. See FLA. STAT. § 120.542(7) (Supp. 1996).

140. See *id.* § 120.60.

141. See *id.* § 120.542(7).

142. See *id.*

143. See *id.* §§ 120.569, .57. These sections govern agency decisions that affect substantial interests.

proceeding authorized by [chapter 120].”<sup>144</sup> Thus, a person challenging the denial of a permit in a section 120.57 proceeding could combine that hearing with a challenge to the agency’s denial of a variance or waiver from the permit requirements.<sup>145</sup>

Agencies must maintain records of the disposition of variance and waiver requests and file an annual report with the Governor and the Legislature.<sup>146</sup> Orders granting or denying variance or waiver petitions also are subject to the indexing requirements of section 120.53(2), Florida Statutes.<sup>147</sup> Requiring agencies to file an annual report with the Governor and Legislature allows monitoring of requests for variances and waivers and agencies’ dispositions of those requests. If a substantial number of variances and waivers are granted concerning a particular rule, that may signal the rule should be modified. The general premise behind the variance and waiver provision is that it gives agencies flexibility to deal with unusual circumstances. If the unusual circumstance appears to be more the norm than the exception, the rule should be revised.

Sections 120.542(3) and 120.542(8) reference temporary and emergency variances and waivers. The provisions are among the few additions made to the variance and waiver proposal after the proposed statute was formally recommended to the Legislature by the Commission. Specifically, subsection (3) states that the uniform rules may include procedures for the granting or denying of emergency or temporary variances and waivers, as well as for expedited time frames for considering such requests.<sup>148</sup> Subsection (8) requires that temporary or emergency variances and waivers “be identified separately from other waivers and variances” in annual reports to the Governor and the Legislature.<sup>149</sup> A draft of the uniform rules addresses requirements for petitions for emergency variances or waivers.<sup>150</sup> These draft rules require the petitioner to identify specific facts that make the situation an emergency and that demonstrate the petitioner will suffer immediate and substantial hardship unless the variance or waiver is issued more expeditiously than the timeframes otherwise provided for in the statute.<sup>151</sup> The draft of the uni-

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144. *Id.* § 120.542(7).

145. For example, if an applicant requested a permit or a license and received a notice of intent to deny the request, the applicant could file a petition pursuant to sections 120.569 and 120.57 for an adjudicatory hearing on the denial. The applicant could then request that the adjudicatory proceeding be abated while the applicant petitions for a variance or waiver. If the petition for a variance or waiver were denied, then the adjudicatory proceedings on both denials could be combined.

146. See FLA. STAT. § 120.542(8) (Supp. 1996).

147. See *id.* § 120.53(2)(a)(2).

148. See *id.* § 120.542(3) (emphasis added).

149. *Id.* § 120.542(8).

150. See Uniform Rules Draft, *supra* note 115, at 16.

151. See *id.*

form rules also states that an agency shall grant or deny a petition for an emergency variance or waiver within thirty days of its receipt.<sup>152</sup> If the petition is not granted within this time, or if the petitioner does not waive the application of the timeframe, the petition is deemed approved.<sup>153</sup> Agencies are authorized through the proposed uniform rules to deny petitions for emergency variances or waivers based upon the agency's decision that the situation is not an emergency.<sup>154</sup> In that circumstance, the petition would be treated like any other petition filed under regular procedures outlined in section 120.542(7).<sup>155</sup>

## V. CONCLUSION

The new variance and waiver provision may be the most significant element of the comprehensive revision of Florida's APA. It is unique in that it requires all agencies subject to the APA to grant variances and waivers when petitioners can satisfy the detailed criteria of the statute and the uniform rules implementing the statute. The provision is intended to give agencies much-needed flexibility to address unique or unusual situations that are not contemplated by agency rules which, by necessity, are written to address general circumstances. The Florida provision likely will be monitored by other states as a possible means of bringing the much-heralded and elusive "common sense" into governmental decisionmaking.

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152. See *id.*

153. See *id.*

154. See *id.*

155. See *id.*