STATE COURT APPELLATE REVIEW OF ADMINISTRATIVE ORDERS

by David M. Caldevilla[1] *(updated 4/12/2010)*

I. Introduction – Generally speaking, when a state or local government agency renders an order or decision, persons aggrieved by the agency action may seek appellate review of it. Appellate review of most state agency action is governed by the Florida Administrative Procedure Act (the "**APA**"), with certain exceptions. Appellate review of most local government agency action is obtained by certiorari and other extraordinary writs, declaratory relief, and injunctive relief.

A. Appellate Review Pursuant to the APA – The APA is found in Chapter 120, Florida Statutes, and the appellate review available under the APA is generally governed by Section 120.68, Florida Statutes.

1. Is the Lower Tribunal an "Agency" as Defined by the APA? The APA governs the review of agency actions. The term "agency" is defined by Section 120.52(1), Florida Statutes, which states:

> (1) "Agency" means:
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> (a) The Governor in the exercise of all executive powers other than those derived from the constitution.
>
> (b) Each:
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> 1. State officer and state department, and each departmental unit described in s. 20.04.
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> 2. Authority, including a regional water supply authority.
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> 3. Board, including the Board of Governors of the State University System and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature.

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4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.

5. Regional planning agency.

6. Multicounty special district with a majority of its governing board comprised of nonelected persons.

7. Educational units.

8. Entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, any metropolitan planning organization created pursuant to s. 339.175, any separate legal or administrative entity created pursuant to s. 339.175 of which a metropolitan planning organization is a member, an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

2. Most Local Governments are not "Agencies" Under APA - It is important to note that the foregoing definition of "agency" includes counties and municipalities, but only to the extent they are expressly made subject to the APA by general or special law or existing judicial decisions. §120.52(1)(c), Fla. Stat. Thus, as a general rule, most local government decisions fall outside of the APA. *Florida Water Services Corp. v. Robinson*, 856 So.2d 1035, 1038 (Fla.5th DCA 2003), *citing, Hill v. Monroe County*, 581 So.2d 225 (Fla. 3d DCA 1991) (chapter 120 does not apply to the regulations enacted by a county commission unless the county is expressly made subject to the chapter by general or special law); *Board of County Commissioners of Hillsborough County v. Casa Development, Ltd.*, 332 So.2d 651 (Fla. 2d DCA 1976) (board of

county commissioners is not an agency covered by the APA); *Sweetwater Utility Corp. v. Hillsborough County*, 314 So.2d 194 (Fla. 2d DCA 1975) (board of county commissioners is not an agency subject to judicial review under APA); *Cherokee Crushed Stone, Inc. v. City of Miramar* 421 So.2d 684, 685 (Fla. 4th DCA 1982) (action of the City Commission was administrative action, but was not covered by APA because no special or general law has constituted the City of Miramar an "agency" under §120.52(1)(c)).

**** Practice Tip – Do your research!** Sometimes it can be very tricky to determine whether the agency is governed by the APA or not. The case of *Coastal Fuels Marketing, Inc. v. Canaveral Port Authority*, 962 So.2d 942 (Fla. 5th DCA), *rev. den*., 973 So.2d 1120 (Fla. 2007) was an appeal on a final order issued by the Canaveral Port Authority in a bid protest dispute. Even though §120.52(1)(b)2 states that an agency "means … Each … Authority, including a regional water supply authority," the Fifth DCA held that the Canaveral Port Authority is not the agency, but the governing body of the Canaveral Port District, and that the District is "an independent special taxing district" within a specific geographic territory of Brevard County and has no statewide or regional jurisdiction. Because the District is a non-APA agency, the Fifth DCA concluded that it lacked jurisdiction and transferred the case to the Brevard County Circuit Court with directions that the notice of appeal be treated as a petition for certiorari.

3. **Examples of Local Governmental Entities that are an "Agency" Under the APA -** Exceptions to this general rule, however, do exist, and therefore, it is important to perform legal research concerning the local governmental entity to determine whether it is subject to the APA before seeking appellate review. Here are some examples:

   (a) *Pinellas County Construction Licensing Board v. Legate,* 1999 WL 1486393, at *5 (DOAH Mar. 25, 1999) - Under Section 12(6) of Chapter 75-489, Laws of Florida (1975), as amended, the Pinellas County Construction Licensing Board is an agency as defined in Section 120.52(1)(c), Florida Statutes. Accord, *Pinellas County Construction Licensing Board v. Barbour*, 1995 WL 1053082, at *2 (DOAH Jun. 23, 1995); *Pinellas County Construction Licensing Board v. Robertson*, 1995 WL 1052786, at *3 (DOAH Jan. 13, 1995).

   (b) *Volusia County v. City of Daytona Beach*, 420 So. 2d 606, 610 (Fla. 5th DCA 1982) – The Volusia County Council was made a state agency by Chapter 401, Part III, Florida Statutes.

B. **Non-APA Circuit Court Review** – If the agency is not subject to the APA, appellate review is generally obtained in the state circuit court pursuant to certiorari or other extraordinary writs, declaratory relief, or injunctive relief. *See*, § III below.

C. **Beware of Exceptions** – There are exceptions to the foregoing general rules. Appellate review of some agency decisions are governed by special statutory procedures. Therefore, it is important to perform legal research concerning the governmental entity rendering the decision, to determine what type of judicial review is available.

1. **Public Service Commission** - For example, review of Florida Public Service Commission ("**PSC**") decisions are governed by Article V, Section 3(a)(2) of the Florida Constitution, and Section 350.128, 364.381, 366.10, and 120.80(13)(e), Florida Statutes, and 47 USC §252(e)(5). Under these statutes, judicial review of a PSC decision might be before the Florida Supreme Court, the Florida First District Court of Appeal, or the federal district court, depending on the nature and subject matter of the PSC decision.

2. **Department of Highway Safety and Motor Vehicle**s – As another example, appellate review of the Department of Highway Safety and Motor Vehicles final orders which cancel, suspend, or revoke a driver's license is by certiorari review in the circuit court pursuant to Section 322.31, Florida Statutes, instead of appellate review pursuant to the APA.

II. **Appellate Review of Agencies Subject to the APA** – Assuming the agency is subject to the APA, judicial review of the agency action is generally governed by Section 120.68, Florida Statutes and Florida Rule of Appellate Procedure 9.190.

A. **Standing to Appeal** – Just because a party may have the requisite standing to request an administrative hearing, this does not mean that same party who is unhappy with the agency action automatically has standing to appeal it. *Florida Chapter of Sierra Club v. Suwannee American Cement Co.,* 802 So.2d 520, 522 (Fla. 1st DCA 2001); *Daniels v. Florida Parole & Probation Commission*, 401 So.2d 1351, 1354 (Fla. 1st DCA 1981), *affirmed*, 444 So.2d 917 (Fla. 1983).

1. **More Narrowly Defined for Appeal** - It is well-settled that the APA defines a party more narrowly for the purposes of obtaining appellate review than for the purposes of initiating an administrative proceeding. *O'Connell v. Florida Dept. of Community Affairs*, 874 So.2d 673, 675 (Fla. 4th DCA 2004); *Florida Chapter of Sierra Club*, 802 So.2d at 521.

2. **Four Part Test** - Under Section 120.68(1), only a "party who is adversely affected by final agency action is entitled to judicial review." Case law explains that Section 120.68(1) presents four requirements for standing to appeal: (a) the agency action must be final, (b) the agency must be subject to the APA, (c) the appellant must have been a party to the agency action, and (d) the appellant must be adversely affected by the agency action. *O'Connell*, 874 So.2d at 675; *citing Legal Environ. Asst. Found., Inc. v. Clark*, 668 So.2d 982, 986 (Fla. 1996); *Daniels v. Florida Parole & Probation Comm'n*, 401 So.2d 1351 (Fla. 1st DCA 1981), *aff'd sub nom. Roberson v. Florida Parole & Probation Comm'n*, 444 So.2d 917 (Fla. 1983).

3. **Application -** Thus, if the agency's final order determined that a party would not be adversely affected by the agency action, that party will lack standing to appeal, unless the appellant raises the adverse affects of the agency action on appeal. For example, in *Clark*, the Florida Supreme Court entertained the appellant's arguments that its due process rights were violated by the agency, but concluded that the appellant was not adversely affected by, and therefore, had no standing to challenge, the action ultimately approved by the agency's final order.

B. Choice of Appellate Venue - Unlike the party appealing a trial court's order in a civil or criminal case, a party appealing an agency's order under the APA can sometimes select from more than one venue to file the appeal.

1. **Appellate Courts -** Judicial review of state agency decisions is generally conducted in the appellate district "where the agency maintains its headquarters or where a party resides or as otherwise provided by law." §120.68(2)(a), Fla. Stat.

   (a) Transfer of Appellate Venue - When multiple administrative proceedings are consolidated for final hearing and the parties to the consolidated proceeding seek appellate review in more than one district court of appeal, the district courts of appeal are authorized to transfer and consolidate the review proceedings. The decision to transfer venue to another district court of appeal may depend on "such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts." §120.68(2)(b), Fla. Stat.

   (b) Statutes Limiting Appellate Venue - Certain statutes governing some state agencies provide exceptions to the

general rule, and limit appellate venue to a particular court Some examples of these exceptions are as follows:

(1) **Department of the Lottery Decisions** - Section 24.110, Florida Statutes states, "The venue for all civil or administrative actions against the department shall be in Leon County." On its face, this statute appears to require that appeals of the Department of the Lottery's administrative orders would have to be brought before the First District Court of Appeal. However, the statute does not address the situation where the Department of the Lottery is the appellant. *See also, Florida State Lottery v. Woodfin*, 871 So.2d 931 (Fla. 5th DCA 2004) (this provision did not apply in motorist's and passenger's personal injury action against State Lottery and its employee, relating to collision with vehicle owned by State Lottery and driven by employee; accident occurred in county other than State Lottery's home county, plaintiffs, their treating physicians, the employee, two eyewitnesses, and responding police officers all resided in that other county, doctor advised one plaintiff not to travel because she had a serious kidney condition, it would be expensive, inconvenient, and prejudicial to plaintiffs to require all witnesses in case to travel to State Lottery's home county, and the case did not involve an attack on the operation of the lottery).

(2) **Public Service Commission –**

(a) **Florida Supreme Court -** The Florida Supreme Court's review of PSC decisions is limited to orders "relating to rates or services of utilities providing electric, gas, or telephone service." See Fla. Const. art V, §3(b)(2); Fla. R. App. P. 9.030(a)(1)(B)(ii).

(b) **Federal District Court** - However, certain PSC decisions implementing the Telecommunications Act of 1996 must be reviewed in federal district court. §120.80(13)(e), Fla. Stat.; 47 USC §252(e)(5).

(c) **First DCA** - The First District Court of Appeal handles all other appeals of PSC

actions. §§ 350.128(1), 364.381, 366.10, Fla. Stat.

(3) Juvenile Facility Siting Decisions of the Governor and Cabinet – Decisions of the governor and cabinet concerning the siting of juvenile facilities must be appealed to the First District Court of Appeal. §985.682(12), Fla. Stat.

(4) Correctional Facility Siting Decisions of the Governor and Cabinet - Decisions of the governor and cabinet concerning the siting of correctional facilities must be appealed to the First DCA. §944.095(9), Fla. Stat.

2. FLAWAC - Under certain circumstances, the Governor and Cabinet, sitting as the Florida Land and Water Adjudicatory Commission ("**FLAWAC**") may provide appellate review of:

- Certain rules and orders issued by the Department of Environmental Protection ("**DEP**") or by a water management district ("**WMD**"). *See* §§ 373.114, 373.217(1), and 373.4275(1), Fla. Stat.

- Certain local government rezoning and permitting decisions that involve interdistrict transfers of groundwater. *See,* §373.2295(11) and (13), Fla. Stat.

- Local government "development orders in any area of critical state concern, or in regard to any development of regional impact." *See,* §380.07(2), Fla. Stat..

- Public land arthropod control plans. *See,* §388.4111(2), Fla. Stat.

(a) Distinct Procedures - FLAWAC appeals are governed by the particular statutes and FLAWAC's rules in Florida Administrative Code Chapter 42-2.

(1) FLAWAC Appeals of DEP and WMD Rules and Orders – Appellate review is initiated by filing and serving a request for review within 20 days after adoption of the rule or rendition of the order. §373.114(1)(a), Fla. Stat.; Fla. Admin. Code Rules 42-2.013 through 42-2.0132. FLAWAC's appellate procedures are set forth in Florida Administrative Code Chapter 42, and should be closely consulted and followed.

(a) **Effect on Ability to Seek Judicial Review -** Taking a FLAWAC appeal concerning a DEP or WMD rule or order pursuant to §373.114 is not a prerequisite to judicial review pursuant to Section 120.68. *See* § 373.114(1)(e), Fla. Stat. According to §373.4275(3), the proper initiation of a FLAWAC appeal under §373.114 or §373.4275 tolls the time for seeking judicial review pursuant to Section 120.68. *See also, Griffin v. St. Johns River Water Management District,* 409 So.2d 208 (Fla. 5th DCA 1982).

Be Careful!!! - A dissenting opinion by Second DCA Judge Casanueva casts doubt on whether the Legislature can enact a statute that tolls the 30-day period for seeking judicial review of an agency order. *See, Peninsular Properties Braden River, LLC v. City of Bradenton*, 965 So.2d 160, 162-64 (Fla. 2d DCA 2007) (Casanueva, J., dissenting), *rev. den.*, 974 So.2d 386 (Fla. 2008).

(2) **Development Orders** – FLAWAC "appeals" of local government development orders must be initiated within the 45-day time period described in Section 380.07(2) and Rule 42-2.005. It should be noted, however, that the FLAWAC review process established by Section 380.07 and Chapter 42-2 for development orders is actually in the nature of a de novo administrative proceeding, rather than a true "appellate" proceeding. *See, e.g., Caloosa Property Owners Ass'n v. Palm Beach County Bd. of County Comm'rs,* 429 So.2d 1260 (Fla. 1st DCA 1983); *Young v. Department of Community Affairs*, 625 So.2d 831 (Fla. 1993).

(3) **Public Land Control Plans –** As with development orders, FLAWAC "appeals" of public land control plan are actually in the nature of a de novo administrative proceedings, rather than true "appellate" proceedings. *See,* §388.4111(2)(c), Fla. Stat.; Fla. Admin. Code Rules 42-2.020 through 42-025. The "appeal" must be initiated within the 75-day time period set forth in Rule 42-2.021(2).

3. ***Practice Tip*** **– Consider Any Conflicting Decisions Between Appellate Tribunals** - Before filing the appeal, appellant's counsel should consider performing preliminary research to determine whether there are any conflicting decisions between the available appellate tribunals concerning the points to be raised on appeal. If so, it may be prudent to file the appeal in the tribunal having the most favorable precedent.

C. Obtaining Judicial Review of Final, Non-Final, and Emergency Agency Actions - Except as modified by the APA and Florida Rule of Appellate Procedure 9.190, judicial review of administrative action is generally governed by the same procedures associated with appeals in civil cases. §120.68(2)(a), Fla. Stat.

1. Authority - According to section 120.68, Florida Statutes:

> (1) A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.
>
> (2)(a) ... All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. ...

2. Point of Entry - Section 120.569, Florida Statutes states:

> (1)... Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain a hearing or judicial review; and shall state the time limits which apply.

This requirement is similar to the former Section 120.59(4), Florida Statutes (1995) (repealed in 1996) and is intended to provide a person affected by agency action with a "clear point of entry" into a proceeding to challenge that agency action. *See, e.g., Capeletti Bros. v. Dept. of Transportation,* 362 So.2d 346, 348 (Fla. 1st DCA 1978), *cert. den.,* 368 So.2d 1374 (Fla. 1979); *Prime Orlando Properties, Inc. v. Dept. of Bus. Reg*., 502 So.2d 456 (Fla.

1st DCA 1986); *Denson v. Sang*, 491 So.2d 288 (Fla. 1st DCA 1986).

3. Initiating Judicial Review of Final Agency Orders

(a) Rendition – Before appealing, you need to know whether the agency has actually rendered an appealable final order.

(1) Effect of Agency's Failure to Rule on Exceptions - If the agency's final order does not consider or make rulings on the parties' exceptions as required by Section 120.57(1)(k), Florida Statutes, the order may not be deemed rendered yet. *Cocktails Plus v. Dept. of Business and Professional Regulation*, 32 Fla. L. Weekly D1610c (Fla. 1st DCA June 29, 2007). *But see, Harris v. Florida Real Estate Commission*, 358 So.2d 1123 (Fla. 1st DCA), cert. den., 365 So.2d 711 (Fla. 1978) (an agency's failure to enter a proper order "is an occasion for judicial review, not an impediment of it").

(2) Effect of Agency's Failure to Include Notice of Rights - If the agency's final order fails to apprise the parties of their rights of judicial review as required by Section 120.569(1), Florida Statutes, it might not be considered "rendered" for purposes of the deadline for initiating an appeal. *See, Latin Express Service, Inc. v. Dept. of Revenue*, 660 So.2d 1059 (Fla. 1st DCA 1995). In *Latin Express*, the appellant's notice of administrative appeal was not considered untimely where agency's final order did not apprise the appellant of its right to judicial review as required by former Section 120.59(4). Instead of being untimely, the appellant's notice was considered premature because the agency had not entered a final order in compliance with the APA's requirements.

**** Practice Tip*:** Although agencies are required to notify affected parties on how to challenge or obtain review of agency orders, the agencies sometime fail to recognize when their decisions are subject to review. *See, Rice v. Dept. of Health & Rehab. Serv.,* 386 So.2d 844 (Fla. 1st DCA 1980) (court would consider appeal of agency's letter refusing to allow parents to register child's birth under anyone's surname but father's); *Palm Springs General Hospital, Inc. v. Health Care Cost Containment Bd.*,

560 So.2d 1348 (Fla. 3d DCA 1990) (letter from board was a final agency action and was appealable); *First Nat. Bank of Broward County v. Lewis*, 397 So.2d 416 (Fla. 4th DCA 1981) (state comptroller's letter was a final agency action and subject to judicial review). Therefore, if in doubt, counsel should independently examine and research the effect of the agency's decision to ensure that the client's rights to challenge the agency's decision are preserved.

(3) **Effect of Motion for Rehearing** - To postpone rendition of a final order, a motion must be timely, authorized, and the type enumerated by Florida Rule of Appellate Procedure 9.020(h). Most state agencies do not have rules authorizing motions for rehearing. Therefore, one cannot assume rendition of the final order has been tolled or suspended by a motion for rehearing. *See, Systems Management Assoc., Inc. v. Dept. of Health & Rehab. Serv.,* 391 So.2d 688 (Fla. 1st DCA 1980).

**** Practice Tip*:** Before filing a motion for rehearing, counsel should carefully research the agency's rules. Some state agencies have adopted their own rules authorizing rehearing or reconsideration. *See, e.g., City of Hollywood v. Public Employees Relations Comm'n*, 432 So.2d 79 (Fla. 4th DCA 1983). On the other hand, if the agency does not rules authorizing motions for rehearing, such a motion will not suspend rendition of the order for purposes of initiating an appeal.

(4) **Effect of Agency Amending its Final Order** - Within a reasonable time after filing its final order, the issuing agency has inherent authority to change or modify the final order to correct clerical errors and errors arising from mistake or inadvertence. *Taylor v. Dept. of Prof. Reg*., 520 So.2d 557 (Fla. 1988). If an amended final order is entered to correct such errors, the time for taking the appeal begins to run from the date of filing the amended final order. *Id.* However, this "does not allow the tolling of the time as a motion for rehearing." *Id.,* 520 So.2d at 560.

(5) **Effect of Party's Failure to Receive Order** - If a party does not receive a copy of final order and is

otherwise unaware of its issuance until after time for appeal had expired, an opportunity to appeal may still exist. In such cases, the party desiring an appeal should be afforded an evidentiary hearing to determine whether he or she received a copy of the final order and/or other notice of the final order. If not received, reissuance of the agency's order is appropriate. *See, e.g., Smith v. Dept. of Rev.*, 34 Fla. L. Weekly D371d (Fla. 1st DCA Feb. 17, 2009); *W.T. Holding, Inc. v. Agency for Health Care Administration*, 682 So.2d 1224 (Fla. 4th DCA 1996).

(b) **What To File** - Judicial review of an agency's final order is instituted by filing a notice of administrative appeal in accordance with the Florida Rules of Appellate Procedure, within 30 days after the rendition of the order. §120.68(2)(a), Fla. Stat. According to the Florida Rules of Appellate Procedure, the appellant must timely file two notices of administrative appeal and the filing fee prescribed by law. *See*, Fla.R.App.P. 9.110(c), 9.190(b)(1), and 9.900(e). *See also*, Amendment to Florida Rule of Appellate Procedure 9.200(a) and Adoption of Florida Rule of Appellate Procedure 9.190, 681 So.2d 1132 (Fla. 1996). The State of Florida or its agencies, when appearing as appellant or petitioner, are exempt from paying the filing fees. *See*, §§ 25.241(3)(a) and 35.22(3)(a), Fla. Stat. A form for Notice of Administrative Appeal can be found at Florida Rule of Appellate Procedure 9.900(e).

(c) **Where To File** - The original notice of administrative appeal must be filed with the clerk of the lower tribunal, and a copy must be filed with the clerk of the appellate court, accompanied by the prescribed filing fees. *See,* Fla.R.App.P. 9.110(c).

**** Practice Tip***: In the context of administrative appeals, it is critical to remember that the "lower tribunal" is the agency that actually issued the final order. In proceedings under Section 120.56, Florida Statutes and certain other statutes (such as Section 766.311, Florida Statutes), the final order is issued by the Division of Administrative Hearings ("**DOAH**") and not the respondent agency. In proceedings challenging agency action pursuant to Sections 120.565, 120.569 or 120.57, Florida Statutes, DOAH merely issues a recommended order, and the final order is subsequently issued by the respondent agency. The notice of administrative appeal is to be filed with the agency

actually issued the final order. Failure to recognize this important distinction can have devastating consequences. *See, Butterfield v. Dept. of Environmental Reg*., 470 So.2d 95 (Fla. 5th DCA 1985) (filing of notice of administrative appeal with DOAH was not sufficient to invoke appellate court's jurisdiction over final order issued by Department of Environmental Protection).

(d) **When To File** - The notice of administrative appeal must be filed (received) within 30 days of "rendition" of the order to be reviewed. *See* Fla.R.App.P. 9.020(h) and 9.110(b); §120.68(2)(a), Fla. Stat. If the 30th day falls on a Saturday, Sunday, or "holiday" enumerated in Florida Rule of Appellate Procedure 9.420(f), the filing period runs on the next day that is not a Saturday, Sunday, or enumerated holiday. Jurisdiction of the appellate court will not vest unless the notice is timely filed within the 30-day period. If the notice is not timely, the appeal will be dismissed. *See, Bank of Port St. Joe v. Dept. of Banking & Finance*, 362 So.2d 96 (Fla. 1st DCA 1978); *Guest v. Dept. of Prof. Reg.,* 429 So.2d 1225 (Fla. 1st DCA 1983); *Systems Management Associates, Inc. v. Dept. of Health & Rehab. Serv.,* 391 So.2d 688 (Fla. 1st DCA 1981). If an appeal of an adverse final order is not taken in a timely fashion, the decision will become irrevocable and further litigation over the same issue may be forever barred by the doctrines of res judicata and/or collateral estoppel.

**** Practice Tip*** **-** According to case law, only one of the two notices of administrative appeal needs to be timely filed at either the lower tribunal/agency or the appellate court, in order to invoke the appellate court's jurisdiction under Rule 9.110. *See, Frank Edelin Buick v. Calvin*, 389 So.2d 649 (Fla. 1st DCA 1980); *Hines v. Lykes Pasco Packing*, 374 So.2d 1132 (Fla. 2d DCA 1979); *Franchi v. Florida Dept. of Commerce*, 375 So.2d 1154 (Fla. 4th DCA 1979).

(e) **Joinders** – A party to the cause in the lower tribunal who desires to join in an appellate proceeding as a petitioner or appellant shall file a notice of joinder within 10 days of service of the petition for review or the notice of administrative appeal or within the 30-day time period prescribed by rule 9.110(b), whichever is later. *See,* Fla.R.App.P. 9.360(a). The rules do not indicate where to file the notice of joinder. Therefore, in an abundance of caution, it would be prudent to file it in both the lower tribunal and the appellate court.

*** Recent Development -** Rule 9.360(a) was recently amended to require a filing fee for joinders. *In Re: Amendments to Florida Rules of Appellate Procedure*, 34 Fla. L. Weekly S60 (Fla. Jan. 29, 2009).

(f) Cross-Appeals – An appellee may cross-appeal by serving a notice of cross-appeal within 10 days of service of the appellant's notice of appeal, or within the 30-day time period prescribed by rule 9.110(b), whichever is later. *See,* Fla.R.App.P. 9.110(g). The rules do not indicate where to file the notice of cross-appeal. Therefore, in an abundance of caution, it would be prudent to file it in both the lower tribunal and the appellate court.

*** Recent Development -** Rule 9.110(g) was recently amended to require a filing fee for cross appeals. *In Re: Amendments to Florida Rules of Appellate Procedure*, 34 Fla. L. Weekly S60 (Fla. Jan. 29, 2009).

(g) Review Sought in Wrong Court or Wrong Remedy Sought? – What happens if the appellant mistakenly seeks judicial review in the appellate court pursuant to Section 120.68, but the agency is actually a local government exempt from the APA? In that situation, the parties should request that the case be transferred to the appropriate circuit court and amended as a certiorari proceeding. *See*, Fla.R.App.P. 9.040(b)(1)("If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an appropriate court"); Fla.R.App.P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought…"); Fla.R.App.P. 9.040(d) ("At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits"); *Cohn v. Zoning Board of Appeals of City of Lake Worth*, 420 So.2d 403 (Fla. 4th DCA 1982).

4. Initiating Judicial Review of <u>Non-Final</u> Agency Orders - Judicial review of an agency's non-final order is similar to certiorari review of a trial court's non-appealable, non-final order. The appellate court will only review a non-final agency order when "review of the final agency decision would not provide an adequate remedy." §120.68(1), Fla. Stat.; Fla.R.App.9.190(b)(2) and 9.100(b) and (c).

(a) What to File - Judicial review of an agency's non-final order is initiated by filing a petition to review non-final

agency action with the appellate court. *See*, Fla.R.App.P. 9.190(b)(2) and 9.100(c)(3), and §120.68(1), Fla. Stat. A filing fee is also required, if prescribed by law. *See* Fla.R.App.P. 9.100(b). As previously noted, the State of Florida or its agencies, when appearing as appellant or petitioner, are exempt from the normal supreme court and district court of appeal filing fees. *See* §§ 25.241(3) and 35.22(3), Fla. Stat.

(b) **Contents of Petition** - Unlike a notice of administrative appeal, the petition to review non-final agency action is to include a complete presentation of the appealing party's arguments. The petition must include the basis for invoking the appellate court's jurisdiction, the facts relied upon, the nature of the relief sought, supporting legal arguments, and citations to authority. *See*, Fla.R.App.P. 9.100(g).

(c) **Where to File -** Petitions for extraordinary writs are to be filed in the court having direct appellate and supervisory jurisdiction over the subject matter of the dispute. *See, State ex rel. Florida Real Estate Commission v. Anderson*, 164 So.2d 265, 268 (Fla. 2d DCA 1964); *Florida Dept. of Community Affairs v. Escambia County*, 582 So.2d 1237 (Fla. 1st DCA 1991); *DuPont v. Hershey*, 576 So.2d 442 (Fla. 4th DCA 1991). In administrative proceedings, "Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law." §120.68(2)(a), Fla. Stat. As is the case with plenary appeals, the petitioner usually has the choice of filing the petition in the judicial district where the agency maintains its headquarters or where any party resides. *Id.* An exception to this general rule is that the Florida Supreme Court and the First DCA provide exclusive review of certain agency decisions, as discussed in §II.B, infra.

(d) **When to File** - The petition to review of non-final agency action must be filed (received) within 30 days of rendition of the non-final order to be reviewed. See, Fla.R.App.P. 9.190(b)(2) and 9.100(c)(3).

**** Practice Tip*:** A party is generally entitled, but not required, to seek judicial review of a non-final order. The decision to forego judicial review of a non-final agency order does not preclude raising the issue in a plenary appeal from the final order. *See*, Fla.R.App.P. 9.130(g).

(e) Effect of Seeking Wrong Relief - "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought[.]" Fla.R.App.P. 9.040(c). *See* also Art. V, §2(a), Fla. Const. (no cause shall be dismissed because an improper remedy was sought).

Example: If a party's notice of administrative appeal improperly seeks review of a non-final order, the appellate court should treat the party's notice and its initial brief as a petition to review non-final agency action seeking relief under Rule 9.100(c)(3). *See, e.g., Wingate v. Dept. of Highway Safety & Motor Vehicles*, 442 So.2d 1023 (Fla. 5th DCA 1983); *Elmore v. City of Orange City*, 528 So.2d 997 (Fla. 5th DCA 1988). *See also, Allied Education Corp. v. Dept. of Education*, 573 So.2d 959 (Fla. 1st DCA 1991).

5. Initiating Judicial Review of <u>Emergency</u> Agency Orders - Certain state agencies are authorized to take "emergency" action to prevent an immediate danger to the public health, safety, and welfare, or other undesirable events. *See, e.g.,* §373.119, Fla. Stat. (authorizes water management districts to issue emergency orders when immediate action is needed to protect the public health, safety, or welfare; the health of animals, fish or aquatic life; a public water supply; or recreational, commercial, industrial, agricultural or other reasonable uses); §373.246, Fla. Stat. (authorizes water management district and Department of Environmental Protection to issue emergency water shortage orders); §404.091, Fla. Stat. (authorizes Department of Health to issue emergency orders to protect public health and safety or the environment); §455.245, Fla. Stat. (authorizing Department of Business and Professional Regulation. to issue emergency orders suspending professional licenses of persons convicted of certain crimes); §456.073(8), Fla. Stat. (authorizes the State Surgeon General to issue final summary orders "for the purpose of summary suspension of a license, or for the restriction of the license, of a licensee"); §456.074, Fla. Stat. (The Department of Health "shall issue an emergency order" suspending the license of a health care provider licensed under chapters 458-466 or 484 "who pleads guilty to, is convicted or found guilty of, or who enters a plea of nolo contendere to, regardless of adjudication, a felony under chapter 409, chapter 817, or chapter 893 or under 21 U.S.C. ss. 801-970 or under 42 U.S.C. ss. 1395-1396"); §509.035, Fla. Stat. (authorizes the Division of Hotels and Restaurants of the Department of Business and Professional Regulation to order immediate closure of food service establishment) §1003.22(9), Fla. Stat. (authorizes the county health department director or administrator or the State Health Officer to declare a

communicable disease emergency and exclude affected children from school attendance).

(a) **Requirements** - It is well-settled that emergency orders issued by state agencies must comply with the APA. *See, Capeletti Bros. v. Dept. of Transportation*, 362 So.2d 346, 347-348 (Fla. 1st DCA 1978), cert. den., 368 So.2d 1374 (Fla. 1979); *Commercial Consultants Corp. v. Dept. of Business Reg.,* 363 So.2d 1162, 1164-1165 (Fla. 1st DCA 1978); *Bank of Credit & Commerce International (Overseas) Ltd. v. Lewis*, 570 So.2d 383, 385 (Fla. 1st DCA 1990); *Allied Education Corp. v. Dept. of Education*, 573 So.2d 959, 961 (Fla. 1st DCA 1991). For example, as explained by the First DCA:

> Absent [the APA's] procedures, emergency action taken by an agency prior to providing an opportunity for the affected person(s) to be heard would run afoul of well-established constitutional guarantees of procedural due process. ... In order to construe [former] section 246.2265 [now appears at §1005.38(7), Fla. Stat.] [i.e., the statute relied on by the agency to immediately cease and desist certain licensed activities] so as to find it constitutional, we read it in pari materia with [former] §120.60(8) [now §120.60(6)] and find that the procedures set forth in the APA must be followed by the [agency] when issuing a cease and desist order to a licensee.

Allied Education, 573 So.2d at 961. *But see, Bethencourt-Miranda v. State Dept. of Health*, 910 So.2d 927 (Fla. 1st DCA 2005) (concluding that §456.074(1) does not require the Department of Health to make the factual findings required by §120.60(6), when issuing an emergency order suspending the license of a health care provider who pleads guilty to a drug crime).

(b) **Prior Hearing Required Absent Emergency** - Under the APA, agencies can only take "summary" action (i.e., action which affects the fundamental rights of a party before giving the party notice and opportunity to be heard and present evidence) in emergency situations. *Bank of Credit*, 570 So.2d at 385; *Commercial Consultants*, 363 So.2d at 1165; *Capeletti Bros*., 362 So.2d at 348.

(c) **Emergency Suspension of Licenses and Permits** - Section 120.60, Florida Statutes controls agency actions

pertaining to licenses. The APA defines a "license" to include a "permit," among other things. §120.52(10), Fla. Stat. Section 120.60(6), Florida Statutes states:

> (6) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances if:
>
> (a) The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution.
>
> (b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and
>
> (c) The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon.

Accordingly, if an agency wants to suspend, restrict or limit a license or permit on an "emergency" basis, the restriction must be predicated upon an "immediate serious danger to the public health, safety, or welfare." As explained by the First DCA:

> In license revocation proceedings, as in other proceedings affecting a party's substantial interests, an adverse determination of a party's substantial interests is ineffective until an order has properly been entered ... after proceedings under Section 120.57. The only exception to that rule in license revocation proceedings is for prevention of "immediate serious danger to the public health, safety, or welfare."

Capeletti Bros., 362 So.2d at 348. Because the agency is allowed to act before it accords basic due process rights to the parties, the agency's statement of reasons for acting must be factually explicit and persuasive concerning the existence of a genuine emergency. *Anderson v. Department of Health and Rehabilitative Services*, 482 So.2d at 499; *Commercial Consultants,* 363 So.2d at 1165. *But see, Bethencourt-Miranda v. State Dept. of Health*, 910 So.2d 927 (Fla. 1st DCA 2005) (concluding that §456.074(1) does not require the Department of Health to make the factual findings required by §120.60(6), when issuing an emergency order suspending the license of a health care provider who pleads guilty to a drug crime).

(d) **Authority to Appeal Emergency Orders and Rules** - Under Sections 120.525(3)(c) and 120.54(4)(a)3, Florida Statutes, "The agency findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable." *See also Anderson v. Dept. of Health & Rehab. Serv.,* 482 So.2d 491 (Fla. 1st DCA 1986); *Commercial Consultants*, 363 So.2d 1162. Moreover, Section 120.569(2)(n), Florida Statutes, contains the following provisions which govern summary or emergency orders:

> If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoinable from the date rendered.

Thus, as a general rule, emergency orders are immediately appealable.

(e) **Appellate Court Jurisdiction** - Appellate courts have generally accepted jurisdiction over appeals from emergency orders entered by state agencies. *See, e.g., Capeletti Bros*., 362 So.2d 346; *Commercial Consultants*, 363 So.2d 1162; Anderson, 482 So.2d 491; *Milton v. Dept. of Health & Rehab. Serv.,* 542 So.2d 1039 (Fla. 1st DCA 1989); *Witmer v. Dept. of Bus. & Prof. Reg*., 631 So.2d 338 (Fla. 4th DCA 1994). *See also, Denney v. Conner*, 462 So.2d 534 (Fla. 1st DCA 1985). *But see, West Coast Regional Water Supply Authority v. Southwest Florida Water Management District,* 646 So.2d 765 (Fla. 5th DCA 1994) (district court declined to accept jurisdiction to review a water management district's "non-final"

emergency order, which was directly appealed without proceeding first to an administrative hearing).

(f) Standard of Review - If the appellate court accepts jurisdiction, a direct appeal from an emergency order is limited to determining whether the emergency order is invalid on its face. Where the agency conducted no evidentiary proceedings before entering its order, the appellate court must review the order without benefit of a record establishing the facts underlying agency action and elucidating agency policies. Every element necessary to the order's validity must appear on its face. *Commercial Consultants*, 363 So.2d at 1164; *Anderson*, 482 So.2d at 495; *Milton*, 542 So.2d at 1039.

D. Obtaining Judicial Review of Agency Rules

1. APA Limitations - The APA imposes strict limitations upon an agency's authority to create rules and regulations, and establishes procedures which allow affected parties to test their legal validity.

2. Direct Appeal Concerning Invalidity of Agency Rules - Before 1992, a person substantially affected by an agency rule could seek direct judicial review of the rule's validity, without first challenging the rule in an administrative proceeding. However, in 1992, the Legislature added the following requirement now found in Section 120.68(9), Florida Statutes:

> No petition [for review] challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to [Section 120.68, Florida Statutes] except to review an order entered pursuant to a proceeding under 120.56 or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

See also, Ch. 92-166, §10, Laws of Fla. (1992). Therefore, unless the party only challenges the constitutionality of the rule and can demonstrate no disputed issues of fact exist, a petition seeking direct judicial review of an agency's rule will be dismissed. *See, Baillie v. Dept. of Natural Resources*, 632 So.2d 1114 (Fla. 1st DCA), *rev. den.,* 642 So.2d 1362 (Fla. 1994).

3. Direct Appeal of Agency's Emergency Rules - Section 120.68(9) does not expressly address whether it is intended to preclude direct

judicial review of an agency's emergency rules. However, Section 120.54(4), Florida Statutes sets forth the procedural requirements governing an agency's adoption of emergency rules, and Sections 120.525(3)(c) and 120.54(4)(a)3, Florida Statutes state in pertinent part that an agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable. *See also, Florida Medical Ass'n, Inc. v. State, Department of Health, Florida Bd. of Medicine* 766 So.2d 406 (Fla. 1st DCA 2000) (accepting jurisdiction over appeal challenging agency's emergency rule).

E. Issues Unique to Appeals from State Agency Decisions

1. Record on Appeal - The record in an appeal from a state agency's order is governed by Florida Rule of Appellate Procedure 9.190(c). §120.68(5), Fla. Stat.

**** Practice Tip*:** The burden of including sufficient documents in the record on appeal to demonstrate reversible error is completely upon the appellant. *See* Fla.R.App.P. 9.200(e). If the record is incomplete, the appellate court is left uninformed as to whether the parties' attorneys made any stipulations, admissions, or concessions which were considered by the lower tribunal. In order to direct the appellate court's attention to the errors in the record, it is imperative that the record on appeal be prepared in the manner contemplated by the Florida Rules of Appellate Procedure. If the agency clerk leaves something out of the record or fails to number the pages, the parties by stipulation, the lower tribunal before the record is transmitted, or the court may correct the record. *See*, Fla.R.App.P. 9.200(e) and (f).

(a) Matters Which Should Not Be Included in Record - The contents of the record on appeal is limited to matters raised in, and/or considered by, the lower tribunal. *See, e.g., Pasco County School Bd. v. Public Employees Relations Commission*, 336 So.2d 483 (Fla. 1st DCA 1976).

(b) Cost of Preparing Record - Florida Rule of Appellate Procedure 9.200(a) provides that the record shall consist of the "original documents." Further, Rule 9.200(d) requires the agency clerk to prepare and transmit the "original record" unless "the parties stipulate or the lower tribunal orders that the original record be retained". Where the agency clerk makes copies of the record instead of sending the original documents, it may be improper for the agency clerk to charge the appellant for those copies absent statutory authority. *See, Dept. of Environmental Reg. v. Manasota-88, Inc.,* 584 So.2d 133 (Fla. 1st DCA 1991) (court invalidated an agency rule which established a

charge of 50 cents per page for preparation of record on appeal).

2. Supersedeas Relief or Stay Pending Appeal - Many appeals take more than a year to complete. If the appellant is required to comply with the agency's order while the appeal is pending, the appellate relief may become useless or come too late. If supersedeas relief (or a "stay") is in effect, the "status quo" is maintained while the appeal is proceeding.

(a) General Rule - Generally, simply filing a notice of appeal or petition to review non-final agency action does not stay the effect of the agency's order. §120.68(3), Fla. Stat.; Fla.R.App.P. 9.190(e)(1). The party seeking to stay a final or non-final order pending appellate review is usually required to file a motion seeking a stay. The lower tribunal and the appellate court generally have discretion to grant, deny, condition, or modify a stay. *See,* Fla.R.App.P. 9.190(e)(2) and 9.310(a); §120.68(3), Fla. Stat.

(b) <u>Recent Development</u> - Automatic Stay Rule for Public Bodies and Officers Has Been <u>Eliminated</u> for APA Appeals – The Florida Supreme Court recently amended Florida Rules of Appellate Procedure 9.190(e)(1) and 9.310(b)(2) to eliminate the "automatic stay" for governmental entities with respect to appeals of administrative actions under the APA. *See, In re Amendments to the Florida Rules of Appellate Procedure*, 2 So.3d 89 (Fla. 2008), *rehearing den.*, (Fla. Jan. 30, 2009). Effective January 1, 2009, the amended version of Rule 9.310(b)(2) now provides:

> Public Bodies; Public Officers. The timely filing of a notice shall automatically operate as a stay pending review, except in criminal cases, <u>in administrative actions under the Administrative Procedure Act, or as otherwise provided by chapter 120, Florida Statutes</u>, when the state, any public officer in an official capacity, board, commission, or other public body seeks review; provided that an automatic stay shall exist for 48 hours after the filing of the notice of appeal for public records and public meeting cases. On motion, the lower tribunal or the court may extend a stay, impose any lawful conditions, or vacate the stay.

(Underline in original to indicate additions). As amended, Rule 9.190(e)(1) now provides:

> Effect of Initiating Review. The filing of a notice of administrative appeal or a petition seeking review of administrative action shall not operate as a stay, except that such filing shall give rise to an automatic stay as provided in rule 9.310(b)(2) or chapter 120, Florida Statutes, or when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries.

(Underline in original to indicate additions). Therefore, governmental entities who appeal agency orders under the APA can no longer rely on the automatic stay, and must instead, file a formal motion for stay like any non-governmental entity appellant. *See,* §II.E.2(a) above. However, the amendments provide the Legislature with "flexibility" to provide for a stay by statute.

(c) **Exception - Automatic Stay for NICA** – When the Florida Birth-Related Neurological Injury Compensation Association ("**NICA**") appeals an administrative law judge's final order awarding benefits to a claimant, NICA's "appeal shall operate as a suspension of the award, and [NICA] shall not be required to make payment of the award involved in the appeal until the questions at issue therein shall have been fully determined." *See also,* Fla.R.App.P. 9.190(e)(1) (recognizing NICA's entitlement to an automatic stay "when timely review is sought of an award by an administrative law judge on a claim for birth-related neurological injuries").

(d) **Stays in Licensure Proceedings** - "[I]f the agency decision has the effect of suspending or revoking a license, supersedeas [i.e., a stay] shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state." The applicable procedures are found in Florida Rule of Appellate Procedure 9.190(e)(2)(B) and (C). *But see, Bethencourt-Miranda v. State Dept. of Health*, 910 So.2d 927 (Fla. 1st DCA 2005) (denying health care provider's motion for stay pending appeal of the Department of Health's emergency license suspension order issued pursuant to §456.074(1)).

(e) **Review of Agency's Stay Orders -** If the lower tribunal enters an order which grants, denies, conditions, or

modifies the stay, review of such an order is available by filing a motion with the appellate court. *See* Fla.R.App.P. 9.190(e)(2)(A) and 9.310(f). Although no deadline for seeking review is identified in the rules, cautious counsel should consider requesting review as soon as possible. Delaying the request for review will lead the appellate court to conclude that the appellant has not been prejudiced by the agency's order concerning the stay.

3. **Preservation of Error** - Generally, appellate courts will refuse to consider an issue for the first time on appeal, unless the appellant preserved the issue by previously raising it in the lower tribunal, or the issue involves fundamental error. *See, e.g., Florida Dept. of Corrections v. Bradley*, 510 So.2d 1122 (Fla. 1st DCA 1987).

(a) **Exception for Constitutional Violations** - In administrative proceedings, however, the administrative law judges and state agencies generally lack authority to determine constitutional issues. Therefore, in many instances, an appellate court reviewing an agency's decision can also consider constitutional issues for the first time on appeal as well. *See, Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of Internal Improvement Trust Fund*, 427 So.2d 153 (Fla. 1982); *Rice v. Dept. of Health & Rehab. Serv.,* 386 So.2d 844 (Fla. 1st DCA 1980).

**** Practice Tip:*** A cautious litigant should still consider alleging constitutional issues in initial pleadings and the prehearing stipulation. Further, in many situations, a particular constitutional issue will not result in reversible error unless the appellant was prejudiced by the error or some other factual basis is established. Therefore, it may be necessary have evidence and proposed findings of fact in the record to help establish the appellant was prejudiced or that a constitutional violation has occurred. For example, if the appellant claims that the agency's decision violates the equal protection clause, the evidence before the administrative law judge should have included that the appellant is a member of a protected class, and that the agency's decision was based on that fact.

(b) **Exception for Subject Matter Jurisdiction** - The lower tribunal's lack of subject matter jurisdiction over a particular dispute is an issue that can be raised at any point in the litigation, including for the first time on appeal. *See, e.g., Adkins v. Burdeshaw,* 220 So.2d 39 (Fla. 1st DCA 1969). For example, a state agency has no subject matter jurisdiction to adjudicate contract rights. *See, e.g., Peck*

Plaza Condominium v. Div. of Florida Land Sales and Condominiums, Dept. of Business Reg., 371 So.2d 152, 153-54 (Fla. 1st DCA 1979); *Grippe v. Florida Dept. of Business and Professional Reg.*, 729 So.2d 459 (Fla. 4th DCA 1999). Presumably, this is an issue that could be raised for the first time on appeal.

(c) Determining Whether Error Was Preserved for Appeal - In deciding whether to appeal an adverse ruling (or in responding to your opponent's appeal), it is critical to determine whether the appellant previously raised the issue in the lower tribunal. Depending on the particular issue, it may have been preserved by one or more of the following vehicles:

(1) Petition for Administrative Proceeding - Was the issue alleged in the appellant's petition?

(2) Answer, or Motion in Opposition - Did the appellant file an answer to the petition, or a motion to dismiss or strike it? If so, was that motion decided against him? Points raised by a motion which was never ruled upon by the lower tribunal will generally not be considered by the appellate court. *See, Glades Oil Co., Inc. v. R.A.I. Management Inc.,* 510 So.2d 1193, 1194 (Fla. 4th DCA 1987) (appellate court cannot review matters not ruled upon below). *Cf.,* Fla.R.App.P. 9.110(h) (scope of review is limited to rulings or matters occurring before filing of notice of appeal). Simply put, "The [lower tribunal] can hardly be held in error for a ruling which it did not make." *Coffman v. Kelly*, 256 So.2d 79, 80 (Fla. 1st DCA 1972).

(3) Other Motions - If the issue to be appealed was originally raised by the appellee's motion, did the appellant oppose that motion? If so, is the appellant's opposition to the motion in the record on appeal?

(4) Prehearing Stipulation - Did your client raise the issue to be appealed in the parties' prehearing stipulation? If not, does the prehearing stipulation have language stating that the parties waive all other issues not specifically set forth in the stipulation? If such a waiver is included in the prehearing stipulation, the appellant may be estopped from raising the issue on appeal. Once the parties

stipulate as to the issues, they are bound by them. *See Health Care & Retirement Corp. of America v. Dept. of Health & Rehab. Serv.,* 516 So.2d 292, 295 (Fla. 1st DCA 1987).

(5) **Hearing Transcripts** - Did the appellant raise the issue orally at a motion hearing or at the formal administrative proceeding? If so, was a court reporter at that hearing? Has the transcript been ordered? If no court reporter was present, is the appellant able to reconstruct the record? *See* Fla.R.App.P. 9.200(a)(3) and (b)(4).

(6) **Objections to Evidence** - If the appellant intends to argue on appeal that the administrative law judge erred by considering certain inadmissible testimony or other evidence, did the appellant object to the admission of that evidence? A party in an administrative proceeding may not fail to voice objections to the admission of evidence, and then claim prejudice when the agency rules against him. *Warren v. City of St. Petersburg*, 11 FALR 4949, 4952 (FLAWAC 1989).

**** Practice Tip***: If an objection is made, but the administrative law judge does not rule on it, the appellant may be deemed to have waived the right to appeal the issue. *See, LeRetilley v. Harris,* 354 So.2d 1213, 1214 (Fla. 4th DCA), *cert. den*., 359 So.2d 1216 (Fla. 1978).

(7) **Proffer of Excluded Evidence** - If the appellant intends to argue on appeal that the administrative law judge erred in excluding his evidence, did the appellant proffer that evidence? *See, e.g., Ritter's Hotel v. Sidebothom,* 194 So. 322 (Fla. 1940) (party seeking to introduce evidence must make offer of what he proposes to prove in order to have trial court's ruling excluding evidence reviewed on appeal).

(8) **Proposed Recommended Order** - Did the appellant present the issue in a proposed recommended order?

(9) **Exceptions to Recommended Order** - Did the appellant file exceptions to the administrative law judge's recommended order in order to bring the

issue being appealed to the attention of the agency head having jurisdiction over the final order? All parties to a formal administrative proceeding have the right to file "exceptions" to challenge findings of fact or conclusions of law contained within an ALJ's recommended order. *See* § 120.57(1)(b), (k), Fla. Stat. A party cannot raise issues on appeal that were not previously raised by a timely exception in the administrative agency lower tribunal. *See, Comm'n on Ethics v. Barker*, 677 So.2d 254, 256 (Fla.1996); *Kantor v. Sch. Bd. of Monroe County*, 648 So.2d 1266 (Fla. 3d DCA 1995); *Henderson v. Department of Health, Bd. of Nursing*, 954 So.2d 77, 81 (Fla. 5th DCA 2007); *Couch v. Comm'n on Ethics*, 617 So.2d 1119, 1124 (Fla. 5th DCA 1993).

4. Issues Unique to Appeals from Agency Orders

(a) Improper Rejection of Fact Findings - In reviewing the administrative law judge's recommended order and the parties' exceptions, the agency with final order authority is not authorized to reject or modify the administrative law judge's findings of fact unless a review of the entire record of evidence in the case reveals the findings of fact were not based upon "competent substantial evidence" or that "the proceedings on which the findings were based did not comply with essential requirements of law." §120.57(1)(l), Fla. Stat. As stated by the First DCA:

> It is the [administrative law judge's] function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based upon competent, substantial evidence. ... If, as is often the case, the evidence presented supports two inconsistent findings, it is the [administrative law judge's] role to decide one way or the other. The agency may not reject the [administrative law judge's] finding unless there is no competent substantial evidence from which the finding could be reasonably inferred. The agency is not authorized to weigh the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Heifetz v. Dept. of Business Reg., 475 So.2d 1277 (Fla. 1st DCA 1985) (citations omitted). The cases involving improper agency rejection of fact findings are legion.

(b) **Improper Rejection of Legal Conclusions** - The agency's final order may reject or modify the conclusions of law but only as to those legal issues "over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified." §120.57(1)(l), Fla. Stat.

(c) **Issue of Fact or Law?** - It is well-settled that an agency cannot avoid its statutory duty to accept the administrative law judge's findings of fact by calling them "conclusions of law." *Morris v. Dept. of Prof. Reg.,* 474 So.2d 841 (Fla. 5th DCA 1985); *Leapley v. Bd. of Regents*, 423 So.2d 431 (Fla. 1st DCA 1982); *Dept. of Labor & Employment Security v. Little,* 588 So.2d 281 (Fla. 1st DCA 1991). Sometimes, the issues can be properly characterized as "mixed question of fact and law;" in which case, the agency is afforded more latitude by the appellate court. *See, Harloff v. City of Sarasota,* 575 So.2d 1324 (Fla. 2d DCA), *rev. den.,* 583 So.2d 1035 (Fla. 1991).

(d) **"Policy Considerations" and "Special Insight"-** Sometimes an agency can reject the administrative law judge's fact findings based on the standard of review announced in *McDonald v. Dept. of Banking & Finance*, 346 So.2d 569 (Fla. 1st DCA 1977) and its progeny. In *McDonald,* the court held:

> In determining whether substantial evidence supports the agency's substituted findings of fact, a reviewing court will naturally accord greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight. ...

> At the other end of the scale, where the ultimate facts are increasingly matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility, a reviewing court will give correspondingly less weight to the hearing officer's findings in determining the substantiality of evidence supporting the agency's substituted findings.

McDonald, 346 So.2d at 579. However, an agency's purported reliance on policy considerations or special insight should be rejected if the disputed issue was susceptible to ordinary methods of proof using expert witnesses. *See, Harac v. Dept. of Prof. Reg*., 484 So.2d 1333, 1337 (Fla. 3d DCA 1986) (qualifications of applicant for architecture license are susceptible to ordinary methods of proof); *Westchester General Hospital v. Dept. of Health & Rehab. Serv.,* 419 So.2d 705 (Fla. 1st DCA 1982) (issues concerning certificate of need are susceptible to ordinary methods of proof); *Ganson v. State, Dept. of Administration*, 554 So.2d 516, 521, n. 13 (Fla. 1st DCA 1989) (determination of whether situational depression is the same mental disorder as bipolar affective disorder is susceptible of ordinary proof, using expert witnesses, and does not require any particular agency expertise). An agency's purported reliance on policy considerations or special insight should also be rejected where the non-rule policy considerations are not fully explained in the final order and supported by the record. §120.57(1)(e)2, Fla. Stat.; *Koltay v. Division of General Regulation*, 374 So.2d 1386, 1391 (Fla. 2d DCA 1979) (no reasoning was offered in agency's final order which indicate special policy considerations were the primary factor for rejecting hearing officer's findings).

**** Practice Tip***: Some agencies, like the Department of Environmental Protection, are specifically prohibited by statute from applying non-rule policy statements against an adversary in an administrative proceeding. *See* §403.051(2)(b), Fla. Stat. *See also, Taylor v. Cedar Key Special Water & Sewer District*, 13 FALR 456 (DER 1990). *See also* §120.56(4), Fla. Stat. Therefore, counsel should carefully review the statutes which identify and limit the particular agency's authority.

(e) Reliance on Evidence not Presented at Hearing - The agency issuing the final order has no authority to consider

evidence which has not been previously presented during the administrative hearing. *Short v. Florida Dept. of Law Enforcement*, 589 So.2d 364 (Fla. 1st DCA 1991).

(f) **Creating New Findings of Fact** - The agency issuing the final order has no authority to create supplemental findings of fact not found in the administrative law judge's recommended order. *See, Friends of Children v. Dept. of Health & Rehab. Serv*., 504 So.2d 1345, 1358 (Fla. 1st DCA 1987).

(g) **Reliance on Unauthorized Evidentiary Presumptions** - State agencies have no implied or inherent authority to establish presumptions in their rules. *B.R. v. Dept. of Health & Rehab. Serv.,* 558 So.2d 1027, 1029 (Fla. 2d DCA 1989), *rev. den.,* 567 So.2d 434 (Fla. 1990); *McDonald v. Dept. of Prof. Reg*., 582 So.2d 660 (Fla. 1st DCA 1991); *Chandler v. Dept. of Health & Rehab. Serv.,* 593 So.2d 1183 (Fla. 1st DCA 1992). Therefore, absent specific statutory authority, an agency may not rely upon a presumption in reaching its decision.

(h) **Agency's Written Final Order Differs from Agency Oral Determination** - An agency's written order should not deviate from the agency's orally announced determination. *Nair v. Dept. of Bus. and Prof. Reg.,* 654 So.2d 205 (Fla. 1st DCA 1995). *See also* §286.011, Fla. Stat. (the "Sunshine Law").

(i) **Agency's Statutory Interpretation is Clearly Erroneous** - Appellate courts typically afford great weight to an agency's construction of a statute or rule that the agency is charged with enforcing and interpreting, unless the agency's interpretation it is clearly erroneous, or contrary to the plain meaning of the rule or statute. *See, e.g., Falk v. Beard*, 614 So.2d 1086, 1089 (Fla.1993); *Sullivan v. Fla. Dep't of Envtl. Prot.,* 890 So.2d 417, 420 (Fla. 1st DCA 2004).

(j) **Agency Failed to Follow Its Own Rules** - An agency's failure to follow its own rules can constitute reversible error. *See, e.g., Vantage Healthcare Corp. v. Agency for Health Care Admin.,* 687 So.2d 306, 308 (Fla. 1st DCA 1997).

(k) **Agency Failed to Follow Its Own Prior Case Law** - An agency's failure to follow its own decisions can constitute

reversible error. *See, e.g., Nordheim v. Dept. of Env. Protection,* 719 So.2d 1212 (Fla. 1st DCA 1998).

(l) **Agency Changed Its Policies or Rule Interpretations Without Evidentiary Basis or Formal Rulemaking** – *See, e.g., Courts v. AHCA*, 965 So.2d 154 (Fla. 1st DCA 2007), and cases cited therein.

(m) **Agency Attorney Also Advises Agency Head Regarding Final Order** - The APA contemplates that decisions will be made by an impartial adjudicator. This goal may be thwarted if the same attorney representing the agency in the administrative proceeding also serves as the attorney advising the agency head concerning the final order. *See, e.g., Cherry Communications, Inc. v. Deason*, 652 So.2d 803 (Fla. 1995).

(n) **Agency Head did not Sign the Final Order –** The APA generally requires an agency's final order to be issued by the "agency head." An agency head generally cannot delegate that duty to another employee of the agency. *See, Collier County Board of County Commissioners v. Fish & Wildlife Conservation Commission,* 993 So.2d 69 (Fla. 2d DCA 2008) (commission improperly delegated its final order authority to agency's executive director where statute assigned responsibility for final orders to agency head, and agency head was defined as the entire commission).

(n) **Amicus Curiae** - Many administrative cases involve issues of great public importance and/or far reaching effect. In appropriate cases, appellate counsel should consider attempting to identify and enlist the assistance of special interest groups or governmental entities who may have an interest in the outcome of the appeal to file an amicus curiae brief. *See,* Fla.R.App.P. 9.370.

- **Recent Rule Amendment** – Rule 9.370 was recently amended to allow the filing of a one-page notice in cases pending before the Florida Supreme Court, indicating an intent to file an amicus brief on the merits if the Court accepts jurisdiction.

III. Non-APA Judicial Review of Local Administrative Body's Quasi-Judicial, Quasi-Legislative, and Executive Acts

A. **Differences Between Quasi-Judicial, Quasi-Legislative, and Executive Acts -** Local agency action that is not otherwise subject to review under the APA is reviewable by certiorari only if it is a quasi-judicial, not quasi-

legislative or executive. *See, e.g., Broward County v. G.B.V. Intern., Ltd.*, 787 So.2d 838 (Fla. 2001). It is, therefore, important to understand the differences between these three types of government functions.

1. **Quasi-Judicial -** A "quasi-judicial" act results when public officers investigate facts or ascertain the existence of facts, and draw conclusions from them, as a basis for their official action, and exercise discretion of a judicial nature. *See, Canney v. Pub. Instruction of Alachua County,* 278 So.2d 260, 263 (Fla. 1973); *Anoll v. Pomerance*, 363 So.2d 329, 330 (Fla. 1978). A local government's action is quasi-judicial in nature when it is dependent upon a showing made at a noticed hearing required by law to afford due process to affected parties. *See, Seminole Enter. v. City of Casselberry*, 811 So.2d 693, 696 (Fla. 5th DCA 2001). When there are no laws or ordinances requiring a decision based on notice and a hearing, the government action is either legislative or executive in nature.

2. **Quasi-Legislative** - "Quasi-legislative" action results in the formulation of a general rule of policy, whereas "quasi-judicial" action results in the application of a general rule of policy. *See, Evergreen Tree Treas. v. Charlotte County Board of County Commissioners*, 810 So.2d 526, 532 (Fla. 2d DCA 2002). For example, in *City of Cape Canaveral v. Rich*, 562 So.2d 445 (Fla. 5th DCA 1990), the appellate court ruled that a city's adoption of a sewage impact fee is a quasi-legislative function which cannot be reviewed by certiorari.

3. **Executive** - The executive function of government involves executing and carrying out the laws, as opposed to making the laws and adjudicating them. *See*, 16A Am. Jur. 2d §255 Constitutional Law. *See also, e.g., State v. Bloom*, 497 So.2d 2 (Fla. 1986) (decision to prosecute is an executive order rather than a quasi-judicial function); *Dept. of Health and Rehabilitative Services v. B.J.M.*, 656 So.2d 906 (Fla. 1995) (agency's decision on how to allocate its services involves exercise of executive power); *Glock v. Moore*, 776 So.2d 243 (Fla. 2001) (power to grant pardons and clemency are within domain of executive branch); *Tyson v. Viacom, Inc.,* 760 So.2d 276 (Fla. 4th DCA 2000) (enforcement of laws is an executive function of government).

4. **Additional Case Law Discussing the Distinctions:** *See, e.g., Terry v. Board of Trustees of City Pension Fund,* 854 So.2d 273 (Fla. 4th DCA 2003) (decision of board of trustees of city pension fund to reduce former firefighter's disability pension payments was quasi-judicial action and not legislative action because board did not adopt a rule or ordinance of general applicability, and instead applied and interpreted existing rules to determine the amount of

benefits); *Stansberry v. City of Lake Helen,* 425 So.2d 1157 (Fla. 5th DCA 1982) (since there were no civil service laws or other ordinances requiring notice of, or a hearing on, the discharge of city employee, determination to discharge city book-keeper was a "legislative or executive action, not quasi-judicial," and thus not subject to certiorari review); *Volusia County v. City of Daytona Beach*, 420 So.2d 606 (Fla. 5th DCA 1982) (county's decisions concerning certificates of public convenience and necessity for emergency medical transportation services are quasi-executive or quasi-legislative, not quasi-judicial function, and therefore, not subject to certiorari review by circuit court).

B. Judicial Review of Local Administrative Body's Quasi-Judicial Decision

1. "First Tier" Certiorari Review in Circuit Court - "Review of quasi-judicial decisions of any administrative body, agency, board, or commission not subject to the Administrative Procedure Act shall be commenced by filing a petition for certiorari in accordance with rules 9.100(b) and (c), unless judicial review by appeal is provided by general law." *See,* Fla.R.App.P. 9.190(b)(3). *See also,* Fla. R. App. P. 9.100(c)(2) ("petition to review quasi-judicial action of agencies, boards, and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari"). This "first tier" certiorari review is available a matter of right. *See, Florida Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092 (Fla.2000).

A. Jurisdiction - The Circuit Court has jurisdiction to perform certiorari review of a local administrative body's quasi-judicial decision pursuant to Article V, Section 5(b) of the Florida Constitution. *See also*, Fla. R. App. P. 9.030(c)(2); *G.W. Dev. Corp. v. Village of North Palm Beach*, 317 So.2d 828 (Fla. 4th DCA 1975).

B. Which Rules Govern - Petitions for writs of certiorari in the circuit court appear to be covered by both Florida Rule of Appellate Procedure 9.100 and Florida Rule of Civil Procedure 1.630, but unfortunately those two rules have slightly different procedures and requirements. According to Florida Rule of Appellate Procedure 9.010, the Florida Rules of Appellate Procedure govern all proceedings commenced in the circuit courts in the exercise of the jurisdiction described by Rule 9.030(c). Moreover, Rule 9.010 and Florida Rule of Judicial Administration 2.135 also state that the Florida Rules of Appellate Procedure supersede all conflicting statutes and rules of procedure. Therefore, it appears that Rule 9.100 should

control over any different procedures set forth in Rule 1.630. However, cautious counsel should attempt to satisfy both Rule 9.010 and Rule 1.630, to the greatest extent possible.

C. When to File – The petition must be filed within 30 days of rendition of the order to be reviewed. An untimely petition must be dismissed for lack of jurisdiction. *See, e.g., Chalet Suzanne, Inc. v. Drew,* 163 So.2d 13 (Fla. 2d DCA 1964); *Hayes v. State*, 151 So.2d 671 (Fla. 2d DCA 1963).

D. Preliminary Basis for Relief - When a petition seeking certiorari review of a local government body's quasi-judicial decision is filed, the circuit court is required to make an initial determination of whether the petition "demonstrates a preliminary basis for relief," also referred to as a "prima facie case for relief." *See,* Fla. R. App. P. 9.100(f)(3) and (g); Fla. R. Civ. P. 1.630(d). If this initial determination reveals that the petition demonstrates a preliminary basis for certiorari relief, the court must require the respondents to file an answer. This may be accomplished by an "order to show cause" or a "summons in certiorari." *See*, Fla. R. App. P. 9.100(h); Fla. R. Civ. P. 1.630(d)(1) and (e). If, on the other hand, the petition fails to demonstrate a preliminary basis for certiorari relief, the court may deny or dismiss it without requiring further action by the Respondents. *See, e.g., Wingate v. State Dept. of Highway Safety & Motor Vehicles*, 442 So.2d 1023 (Fla. 5th DCA 1983); *In re Adoption of Stinebaker*, 382 So.2d 413 (Fla. 5th DCA 1980).

E. Standard of Review - Where a party is entitled as a matter of right to seek "first tier" certiorari review in the circuit court from non-APA administrative action, the circuit court must determine: (a) whether procedural due process is accorded, (b) whether the essential requirements of the law have been observed, and (c) whether the administrative findings and judgment are supported by competent substantial evidence. *City of Deerfield Beach v. Vaillant*, 419 So.2d 624, 626 (Fla. 1982); *Broward County v. G.B.V. Intern., Ltd.*, 787 So.2d 838 (Fla. 2001).

F. Review Sought in Wrong Court or Wrong Remedy Sought? – What happens if the appellant mistakenly seeks non-APA certiorari review in the circuit court, but the agency is actually governed by the APA? In that situation, the parties should request that the case be transferred to the appropriate appellate court and amended as a Section 120.68 appeal. *See*, Fla.R.App.P. 9.040(b)(1)('If a proceeding is commenced in an inappropriate court, that court shall transfer the cause to an

appropriate court"); Fla.R.App.P. 9.040(c) ("If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought…"); Fla.R.App.P. 9.040(d) ("At any time in the interest of justice, the court may permit any part of the proceeding to be amended so that it may be disposed of on the merits"); *Cohn v. Zoning Board of Appeals of City of Lake Worth*, 420 So.2d 403 (Fla. 4th DCA 1982).

2. **"Second Tier" Certiorari Review in District Court of Appeal –** After the "first tier" certiorari review in the circuit court, the parties may then seek "second-tier" certiorari review of the circuit court decision by petitioning for review in the district court of appeal.

   A. **Not Available as a Matter of Right –** Unlike "first tier" certiorari review in the circuit, the "second-tier" certiorari review in the district court of appeal is not a matter of right. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla.2003).

   B. **Standard of Review -** The scope of the district court's review on second-tier certiorari is limited to whether the circuit court (1) afforded procedural due process, and (2) applied the correct law. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla.2003); *Broward County v. G.B.V. Intern., Ltd.*, 787 So.2d 838 (Fla. 2001); *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla.1982)**.**

3. **Court Has Limited Power -** When the local agency order under review is quashed on certiorari, the court must return the controversy back to the local agency tribunal as if no order or judgment had been entered, and the parties stand upon the pleadings and proof as it existed when the order was made with the rights of all parties to proceed further as they may be advised to protect or obtain the enjoyment of their rights under the law in the same manner and to the same extent which they might have proceeded had the order reviewed not been entered. The court has no power in exercising its certiorari jurisdiction to enter a judgment on the merits of the controversy or to direct the local agency to enter any particular order or judgment. *Broward County v. G.B.V. Intern., Ltd*., 787 So.2d 838 (Fla. 2001).

C. **Judicial Review of Local Administrative Body's Quasi-Legislative or Executive Action** – Judicial review of a local government agency's quasi-legislative or executive actions is pursuant to a complaint for declaratory relief or injunctive relief in the circuit court. The standard of review for quasi-legislative and quasi-executive acts is whether the local government's action was arbitrary, capricious, confiscatory, or violative of constitutional guarantees. *See, Board of County Commissioners of*

Hillsborough County v. Casa Development, Ltd., II, 332 So.2d 651 (Fla. 2d DCA 1976).

D. Circuit Court or County Court Appeals – Some statutes authorize an "appeal" to the circuit court or county court, instead of seeking certiorari review, declaratory relief, or injunctive relief.

1. Code Enforcement Decisions – Circuit Court Appeal - Pursuant to §162.11, Fla. Stat., "an aggrieved party, including the local governing body, may appeal a final administrative order of an enforcement board to the circuit court. Such an appeal shall not be a hearing de novo but shall be limited to appellate review of the record created before the enforcement board." *See, e.g., Hoyt v. State*, 810 So. 2d 1007 (Fla. 4th DCA 2002); *Holiday Isle Resort & Marina Associates v. Monroe County*, 582 So. 2d 721 (Fla. 3d DCA 1991).

2. County Court Review – Although, generally, judicial review of non-APA agency decisions is performed by the circuit court, sometimes county courts have jurisdiction to perform judicial review. County Courts are granted this power pursuant to Article V, Section 6(b) of the Florida Constitution, which sets out the jurisdiction of county courts and provides that they "shall exercise the jurisdiction prescribed by the general law." Pursuant to §§ 162.13, 162.21(8), and 767.12(1)(d), Fla. Stat., local governments may enact ordinances providing for county court review of code enforcement decisions and animal control authority decisions. See, *Metropolitan Dade County v. Hernandez*, 708 So.2d 1008 (Fla. 3d DCA 1998) (animal control citation appeal to county court, rather than circuit court); *Marion County v. Grunnah*, 962 So.2d 931 (Fla. 5th DCA 2007) (appeal to county court of code enforcement board's dangerous dog determination).

IV. Other Extraordinary Writs May Be Available to Review APA Agencies and Non-APA Agencies –

A. **Generally -** Besides certiorari, Article V of the Florida Constitution authorizes circuit courts, district courts of appeal, and the Florida Supreme Court to issue other extraordinary writs (e.g., prohibition, mandamus, quo warranto), which may be available to review state or local agency actions, depending on the facts and circumstances, and the particular type of court. *See, e.g., Charlotte County v. IMC-Phosphates Co.,* 824 So.2d 298 (Fla.1st DCA 2002) (granting writ of prohibition against agency head); *Community Health Charities of Florida v. State Dept. of Management Services*, 961 So.2d 372 (Fla. 1st DCA 2007) (granting writ of mandamus against a state agency for improperly dismissing "without prejudice" a properly pled petition for administrative proceeding).

B. **Where to File -** Petitions for extraordinary writs are to be filed in the court having direct appellate and supervisory jurisdiction over the subject matter of the dispute. *See, State ex rel. Florida Real Estate Commission v. Anderson*, 164 So.2d 265, 268 (Fla. 2d DCA 1964); *Florida Dept. of Community Affairs v. Escambia County,* 582 So.2d 1237 (Fla. 1st DCA 1991); *DuPont v. Hershey*, 576 So.2d 442 (Fla. 4th DCA 1991).

V. Appellate Attorney's Fees and Costs

1. **Appellate Attorneys' Fees** – The procedures for recovering appellate attorneys' fees in judicial proceedings are found in Florida Rules of Appellate Procedure 9.190(d) and 9.400(b). Both rules are similar and should be generally governed by the same case law. The motion for appellate attorney's fees must be served no later than the deadline for serving the reply brief. If the motion is granted, the appellate court will usually remand the matter to the lower tribunal or a special magistrate for a determination of the reasonable amount, subject to further review by the appellate court by motion filed within 30 days of rendition of the order issued by the lower tribunal or magistrate.

A. **Substantive Authority Necessary** - Rules 9.190(d) and 9.400 provide the procedural vehicle for requesting appellate attorneys' fees, but provide no independent substantive authority for awarding such fees. *See e.g.,, Lewis v. Lewis*, 689 So.2d 1271 (Fla. 1st DCA 1997); *United Services Auto. Ass'n v. Phillips*, 775 So. 2d 921, 922 (Fla. 2000). Accordingly, independent statutory or contractual grounds for the moving party's attorneys' fee claim must exist and must be cited in the motion. *Lehigh Corp. v. Byrd*, 397 So.2d 1202 (Fla. 1st DCA 1981); *Cooke v. French*, 340 So.2d 541, 544 (Fla. 1st DCA 1976).

B. **Potential Substantive Authority for Attorney's Fees in Appeals Governed by the APA include the following:**

(1) **§120.595(5), Fla. Stat. – "**When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding."

(2) **§120.569(2)(e), Fla. Stat. –** Authorizes an award of attorneys' fees when a pleading, motion, or other paper is "interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."

(3) **§57.105, Fla. Stat.** - Effective June 4, 2003, the Florida Legislature amended Section 57.105, Florida Statutes to make its requirements applicable in APA administrative proceedings. *See,* Ch. 2003-94, Laws of Fla. (2003). According to Section 57.105(5), the award is only available to a "prevailing party." Also, there is a condition precedent set forth in Section 57.105(4), Florida Statutes, which states that the motion must be served on the opposing party at least 21 days before the motion is filed.

(4) **§57.111(4)-(6), Fla. Stat. – "**Unless otherwise provided by law," this statute authorizes an award of attorney's fees and costs to a "prevailing small business party" in certain adjudicatory proceedings or administrative proceedings pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. Also "does not apply to any proceeding involving the establishment of a rate or rule or to any action sounding in tort." The amount of the award generally cannot exceed $50,000.

(5) **§286.11, Fla. Stat. -** Whenever an action has been filed against any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision to enforce the "Florida Sunshine Law" or to invalidate the actions of any such board, commission, agency, or authority, which action was taken in violation of Sunshine Law, and the court determines that the defendant or defendants violated the Sunshine Law, the court shall assess a reasonable attorney's fee against such agency, and may assess a reasonable attorney's fee against the individual filing such an action if the court finds it was filed in bad faith or was frivolous. Any fees so assessed may be assessed against the individual member or members of such board or commission; provided, that in any case where the board or commission seeks the advice of its attorney and such advice is followed, no such fees shall be assessed against the individual member or members of the board or commission. However, this subsection does not apply to a state attorney or his or her duly authorized assistants or any

officer charged with enforcing the provisions of the Sunshine Law.

(6) **§59.56, Fla. Stat.** – "In the absence of an expressed contrary intent, any provision of a statute or of a contract entered into after October 1, 1977, providing for the payment of attorney's fees to the prevailing party shall be construed to include the payment of attorney's fees to the prevailing party on appeal." Therefore, depending on the nature of the case, other statutory or contractual provisions could be used as a basis for the award of appellate attorneys' fees.

2. **Appellate Costs –** Unlike motions for appellate attorneys' fees, motions to tax appellate *costs* are to be filed in the *lower tribunal* (not the appellate court) within 30 days after the appellate court issues its mandate. *See*, Fla. R. App. P. 9.400(a).

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