

Fla. Inland Navigation District, waiver of rules

Number: INFORMAL

Date: January 26, 2001

Mr. Thomas A. Sheehan, III
General Counsel
Florida Inland Navigation District
Post Office Box 3888
West Palm Beach, Florida 33402-3888

RE: FLORIDA INLAND NAVIGATION DISTRICT--ADMINISTRATIVE PROCEDURE ACT--
ADMINISTRATIVE RULES--waiver or variance of rules for financial aid grant program. s.
120.542, Fla. Stat.

Dear Mr. Sheehan:

On behalf of the Florida Inland Navigation District (FIND) you have asked whether rules promulgated to facilitate waterway related assistance programs administered by the district are subject to the waiver and variance provisions in section 120.542, Florida Statutes. In sum, it would appear that FIND's administration of assistance programs does not involve a regulatory act by a governmental entity that would subject rules promulgated to administer the program to the waiver and variance provisions in section 120.542, Florida Statutes.

You state that pursuant to section 374.976, Florida Statutes, FIND may establish programs to provide assistance to local governments within the boundaries of the district for intracoastal waterway related programs. The district has adopted rules to govern such programs and has established a grant program under which local governments may apply for funding. In order to facilitate proper review of requests for funding and to timely adopt a budget under the TRIM requirements of section 200.065, Florida Statutes, FIND has established deadlines for submitting information pertinent to a funding application. In recent years, local governments have begun petitioning for variances and waivers under section 120.542, Florida Statutes, in order to extend or avoid these deadlines.

Section 374.982, Florida Statutes, created FIND as an independent special taxing district. Section 374.976, Florida Statutes, authorizes the district to undertake programs to "alleviate the problems associated with its waterway or waterways[.]" It is the Legislature's intent that FIND

"may sponsor or furnish assistance and support to member counties and local governments within the district in planning and carrying out beach renourishment and inlet management projects. Such assistance and support, if financial in nature, shall be contributed only after a finding by the board that inlet management projects are a benefit to public navigation in the district and that the beaches to be nourished have been adversely impacted by navigation inlets, navigation structures, navigation dredging, or a navigation project. . . "[1]

If the district sponsors a program to offer support or assistance, it must adopt rules to govern the program, pursuant to Chapter 120, Florida Statutes. At minimum, the rules must prohibit the

encumbrance of funds for a project beyond three years following approval of the project and, except for funds provided to enhance public navigation, law enforcement on the waterways, or environmental education projects within the district, shall prohibit financial support unless matching funds are provided by the recipient. The rules may be waived for a project approved in a county that is recovering from a state of emergency declared under Chapter 252, Florida Statutes.[2]

The district has adopted rules, codified in Chapter 66B-2, Florida Administrative Code, to facilitate its financial assistance program. Pursuant to the rules, applications for assistance must be submitted during the authorized submission period, March 1st through May 1st of each year.[3] Applications are initially reviewed by the local FIND commissioner before being submitted to the district office to be reviewed for completeness and eligibility. Any deficiencies must be brought into compliance before the date established by the board in the application package.[4] Applications deemed complete and in compliance are forwarded to the board for review at a presentation in which the applicant will be evaluated and rated.[5]

A final rating score is given which determines whether an applicant will receive funding assistance, with the specific amount of funds dependent upon the applicant's ranking and the specific needs of individual counties.[6] Section 120.542, Florida Statutes, recognizes that strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results. The Legislature felt it appropriate, therefore, to adopt a procedure for agencies to provide relief to persons "subject to regulation" by granting "variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section." [7] Variances and waivers are to be granted when a person subject to the rule "demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness." For purposes of the statute, "substantial hardship" is defined as "a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver." Moreover, the statute states 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." [8]

The basic question presented, however, is whether the variance and waiver provisions may be used when an agency such as FIND is awarding grant assistance. The general premise underlying the waiver and variance provision is that it gives agencies flexibility to deal with unusual circumstances, such that if an unusual circumstance appears to be more the norm than the exception, the rule should be revised.[9]

The First District Court of Appeal in *Mariner Properties Development, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, [10] however, has held that section 120.542, Florida Statutes, pertains only to regulatory functions of a state agency and is not applicable to instances where an agency's rule governs its proprietary functions. In that case the court noted that while the Board of Trustees of the Internal Improvement Trust Fund (board) sometimes acted as a regulatory agency, it is also vested with the power and duty to manage and control sovereignty lands. The court found that actions by the board in this regard are proprietary rather than regulatory in nature. It was concluded that a petition for a variance and waiver directed toward rules imposing standards and criteria relating to the construction of a private dock facility

on sovereignty submerged lands was properly dismissed since section 120.542, Florida Statutes, does not pertain to rules involving the exercise of proprietary power.

The administration of a program to award grants or financial assistance by FIND, likewise, does not appear to be regulatory in nature, but rather could be likened to action in carrying out a proprietary interest much as the board of trustees acts in its stewardship of sovereignty submerged lands. Rules adopted by an agency to facilitate the requirements of a statute vesting such proprietary authority would not, therefore, be subject to the waiver and variance provisions in section 120.542, Florida Statutes.

Accordingly, it would appear that the rules promulgated by FIND in administering its program to provide grants of financial assistance are not subject to the waiver and variance provisions in section 120.542, Florida Statutes. It should be noted that whether or not the district chooses to accept applications filed beyond the deadline is not controlled by this conclusion. Moreover, the analysis and conclusions presented in this situation do not necessarily apply to other agencies and their programs.

Sincerely,

Lagran Saunders
Assistant Attorney General

ALS/tgk

[1] Section 374.976(1)(b), Fla. Stat.

[2] Section 374.976(2), Fla. Stat.

[3] Rule 66B-2.006(1), Fla. Admin. Code. See *also* Rule 66B-2.0061, Fla. Admin. Code, allowing emergency applications to be submitted at any time of the year to provide assistance to eligible applicants for the removal of navigation obstructions and repair or replacement of waterway facilities damaged by a declared natural disaster.

[4] Rule 66B-2.006(2), Fla. Admin. Code.

[5] Rule 66B-2.006(3), Fla. Admin. Code.

[6] Rule 66B-2.006(4) and (5), Fla. Admin. Code.

[7] Section 120.542(1), Fla. Stat.

[8] Section 120.542(2), Fla. Stat.

[9] See "Flexibility, Flexibility, Flexibility, The New Variance and Waiver Provision," Donna E. Blanton and Robert M. Rhodes, Fla. Bar Journal, March 1997, p. 35, at 38.

[10] 743 So. 2d 1121 (Fla. 1st DCA 1999).