

are found in the *ordinance*. An ordinance is not subject to the same requirements under §166.021(4), *supra*, as is a charter or special act. Therefore, the village council may raise the benefits to retired municipal employees within the one-mill limitation set by ordinance without a referendum of the electors.

073-489—December 26, 1973

# ADMINISTRATIVE LAW

## POWER OF AGENCY TO ADOPT ADMINISTRATIVE RULE MUST COME FROM STATUTORY AUTHORITY

To: Mallory E. Home, Senate President, Tallahassee

Prepared by: Michael Parrish, Assistant Attorney General

### QUESTIONS:

1. Is expressed and specific statutory authority necessary for the promulgation of an administrative rule or regulation of a board or agency of the state which affects the rights and interests of the general public or any segment thereof?
2. If the above is answered in the affirmative, is §14-60.09 of the rules of the Florida Department of Transportation an effective promulgation authorized by a sufficient grant of statutory authority?
3. If question 2 is answered in the negative, should the Florida Department of Transportation be allowed to continue to enforce §14-60.09 of its rules and regulations?

### SUMMARY:

An administrative agency of the state must have specific statutory authority in order to promulgate rules and regulations. Neither §330.29, F. S., nor the statutory sections therein cited appear to provide statutory authority for the Department of Transportation to adopt Rule 14-60.09, relating to airspace zoning regulations.

### AS TO QUESTIONS 1 AND 2:

As noted in your letter, there is ample authority for the proposition that an administrative board or agency of the state must have specific statutory authority in order to promulgate rules and regulations.

As you observed, the Supreme Court of Florida has held:

Administrative authorities are creatures of statute and have only such powers as the statute confers on them. Their powers must be exercised in accordance with the statute bestowing such powers, and they can act only in the mode prescribed by statute. [Edgerton v. International Company, Inc., 89 So.2d 488 (Fla. 1956).]

*Accord:* Lewis v. Florida State Board of Health, 143 So.2d 867 (1 D.C.A. Fla., 1962), in which the court said, at pp. 875 and 876:

The rule-making power of the Board is limited to the making of rules and regulations necessary to the enforcement of the act. It is incumbent upon an agency relying on an act as authority for its regulations to prescribe only such regulations as come within the specifications laid down.

The particular agency rule about which you inquire is §14-60.09 of the Rules of the Florida Department of Transportation, which rule reads in pertinent part:

Airspace zoning jurisdiction is jointly assumed with other political

subdivisions within the state by the department over construction or alteration of any structure and height of material growth which (1) is located within the boundaries of any airport licensed by the state for public use, (2) is penetrating the conical surface as defined in 14-60.02(E) and (3) is penetrating other airspaces within the state lying 500 feet or more above ground level. Until such time as the local political subdivision adopts airspace zoning, the department shall regulate such airspace described in (1), (2) and (3) immediately above.

Section 14-60.09 cites as authority for its enactment §330.29, F. S., which section authorizes a division of the Department of Transportation to

(1) . . . perform such acts, issue and amend such orders, and make, promulgate, and amend such reasonable general or special rules, regulations and procedures, and establish such minimum standards, *consistent with the provisions of §§330.27-330.36, 330.38 and 330.39 as it shall deem necessary to carry out the provisions of §§330.27-330.36, 330.38 and 330.39*, and to perform its duties thereunder . . . (Emphasis supplied.)

The only section enumerated above which deals with the subject of airport zoning is §330.35, F. S. An analysis of each subsection of §330.35 reveals the limitations on its scope. Section 330.35(1) provides:

(1) Nothing in §§330.28-330.36, 330.38, 330.39 shall be construed to limit any right, power, or authority of the state or a municipality to regulate airport hazards by zoning.

That subsection, although preserving any existing right of the state to regulate airport hazards by zoning, clearly does not *create* any such right.

Section 330.35(2), F. S., provides that airports licensed for general public use are eligible for approach zone protection pursuant to the procedures prescribed in Ch. 333, F. S. Chapter 333, the Airport Zoning Law of 1945, authorizes *political subdivisions of the state* to adopt and enforce airport zoning regulations. It contains no such authorization for the state in general or for the Department of Transportation in particular.

Section 330.35(3), *supra*, reads:

(3) The division is hereby granted all powers conferred upon political subdivisions of this state by chapter 333 to regulate airport hazards *at state-owned airports*. The procedure shall be to form a joint zoning board with the political subdivision of the state in which the *state-owned airport* is located as prescribed in chapter 333. (Emphasis supplied.)

This section grants to the Department of Transportation the same powers to adopt and enforce airport zoning regulations as is given to political subdivisions of the state by Ch. 333, *supra*, but imposes two specific limitations on the exercise of such powers. The first of such limitations is that such powers may only be exercised to regulate airport hazards "at state-owned airports." The second limitation is that such powers may only be exercised by a "joint zoning board" composed of representatives of the Department of Transportation and representatives of the political subdivision in which the state-owned airport is located.

The exercise of such powers is further limited by the procedural requirements of §333.05, F. S., which are applicable to all airport zoning authorities. Furthermore, it should be noted that §330.38, F. S., specifically provides:

Nothing in §§330.28-330.36, 330.38, 330.39 shall apply to or confer division jurisdiction or control over any county aviation authority,

county port authority or municipal authority or any airports under their control.

On the basis of the foregoing, it would seem that §330.29, *supra*, and the statutory sections therein cited, as presently existing, provide no statutory authority for the Department of Transportation to adopt or enforce its regulation 14-60.09, and that legislation to clarify this matter would be desirable.

AS TO QUESTION 3:

It goes without saying that a state agency should not continue to enforce a regulation that it had no authority to adopt; and, as noted by you, if there is a reasonable doubt as to the lawful existence of a particular power that is being exercised by an administrative agency, the further exercise of that power should be arrested. *State v. Atlantic Coast Line R. Co.*, 47 So. 696 (Fla. 1908).

073-490—December 27, 1973

SURETY BONDS

INDIVIDUAL RATHER THAN COLLECTIVE BOND REQUIRED  
OF TRUSTEES OF HISTORIC PENSACOLA  
PRESERVATION BOARD

To: *Richard (Dick) Stone, Secretary of State, Tallahassee*

Prepared by: *Michael Parrish, Assistant Attorney General*

QUESTION:

May a "blanket bond" be used in lieu of the individual surety bond required of each member of the Historic Pensacola Preservation Board of Trustees by §266.103(2), F. S.?

SUMMARY:

A "blanket bond" may not be used in lieu of the individual surety bond required of each member of the Historic Pensacola Preservation Board of Trustees by §266.103(2), F. S.

Section 266.103(2), F. S., requires that *each* member of the Historic Pensacola Preservation Board of Trustees "give a surety bond in the sum of five thousand dollars . . . conditioned upon the faithful performance of *his* duties." (Emphasis supplied.) It is clear from the language chosen by the legislature that it intended that each individual member give a bond personal to himself and conditioned upon the performance of his own duties. This intent is further reflected in §113.07(3), F. S., which makes the filing of the bond a qualification for office by providing that no official required to give such a bond "shall be qualified to hold office or perform the duties thereof" until the bond is filed. *See also* §113.05, F. S., which prohibits the issuance of a commission to a person who is required "to give bond" until such bond is duly executed, *approved*, and filed.

In an informal letter dated April 5, 1972, I reached a similar conclusion with respect to the statutory bonding requirements for deputy sheriffs, which appear at §30.09(1), F. S., and are substantially the same as the pertinent provisions of the statute in question. There I stated:

It is my opinion that, in the statute as written, the legislature did not contemplate blanket bonds for deputy sheriffs. Therefore, each deputy sheriff . . . is required to enter into and give a separate performance bond as provided by law, and such bond so entered into by each deputy . . . must be filed by him . . . and must be approved. . . .