STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OCALA HERLONG, LLC,

Petitioner,

vs. Case No. 17-3348RU

DEPARTMENT OF TRANSPORTATION,

Respondent.
_______________________________/

FINAL ORDER

A final hearing was held in this case, pursuant to sections 120.56(4), 120.569, and 120.57(1), Florida Statutes,[1/] before Cathy M. Sellers, a designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"). The final hearing was conducted on July 13, 2017, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Susan Schwartz, Esquire
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STATEMENT OF THE ISSUE

Whether a statement included in the Department of Transportation's 2014 Median Handbook constitutes an unadopted rule, as defined in section 120.52(20), in violation of section 120.54(1)(a).

PRELIMINARY STATEMENT

On June 13, 2017, Petitioner, Ocala Herlong, LLC, filed a Petition for the Administrative Determination of the Invalidity of an Agency Statement, requesting an administrative determination that a statement in Respondent, Department of Transportation's, 2014 Median Handbook ("Handbook") constitutes a rule under section 120.52(16) that violates section 120.54(1)(a), and prohibiting Respondent from applying or otherwise relying on the statement or a substantially similar statement.

The final hearing was set for, and held on, July 13, 2017. Petitioner presented the testimony of Gary Sokolow. Joint Exhibits 1 through 20 were admitted into evidence without objection. Respondent did not call any witnesses to testify at the final hearing.

The one-volume Transcript was filed on July 21, 2017. The agreed deadline for filing proposed final orders was August 4, 2017. Both parties timely filed their proposed final orders, which were duly considered in preparing this Final Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner, Ocala Herlong, LLC, is a Florida limited liability company that owns property located at 2905 North Pine Avenue, Ocala, Florida. This property abuts the State Highway System ("SHS").

2. Respondent, Department of Transportation, is the state agency that is responsible for, among other things, overseeing access connections to the SHS and the planning, design, and use of traffic control features and devices, including traffic signals, channelizing islands, medians, median openings, and turn lanes, in the SHS right of way.

II. The Statute

3. The statute at issue in this proceeding, section 335.199, Florida Statutes, states in pertinent part:

> 335.199 Transportation projects modifying access to adjacent property.-
>
> (1) Whenever the Department of Transportation proposes any project on the State Highway System which will divide a state highway, erect median barriers modifying currently available vehicle turning movements, or have the effect of closing or modifying an existing access to an abutting property owner, the department shall notify all affected property owners, municipalities, and counties at least 180 days before the design of the project is finalized. The department's notice shall provide a written explanation regarding the need for the project and indicate that all affected

> parties will be given an opportunity to provide comments to the department regarding potential impacts of the change.

§ 335.199, Fla. Stat.

4. The statute requires that for projects that will (among other things) erect median barriers modifying currently available vehicle turning movements, affected property owners will be notified at least 180 days before the project's design is finalized.

III. Background of the Challenged Statement

5. Respondent publishes a document titled "Median Handbook." The cover of the Median Handbook explains that its purpose is to:

> guide the professional through existing rules, standards, and procedures . . . on the best ways to plan for medians and median openings. Unless specifically referenced, this is not a set of standards nor [sic] a Departmental procedure. It is a comprehensive guide to allow the professional to make the best decisions on median planning.

The Median Handbook has not been adopted as a rule pursuant to the rulemaking procedures in section 120.54.

6. On June 13, 2017, Petitioner initiated this proceeding by filing a Petition for the Administrative Determination of the Invalidity of an Agency Statement, pursuant to section 120.56(4), challenging a provision in section 1.3.8 of Respondent's Handbook as an unadopted rule that violates section 120.54(1)(a).[2/]

7. Section 1.3.8 of the Handbook is titled "Florida Statute 335.199 - Public Involvement." This section addresses the meaning and applicability of section 335.199, which was enacted in 2010.

8. The provision alleged to be an unadopted rule (hereafter, the "Challenged Statement") appears on page 20 of the Handbook. This provision, which refers to Committee Substitute for Committee Substitute for Senate Bill (or "SB") 1842,[3/] states:

> This bill applies to any proposed work program project beginning design on or after November 17, 2010. The language of the bill states 'whenever the Department of Transportation' proposes any project,' **so this language does not apply to permit applications. However, for permit applications that affect medians and median openings**, the effected [sic] people and businesses should be informed and involved by the permittee as soon as possible.

9. Upon the enactment of section 335.199,[4/] Respondent's staff, including its chief engineer and its legislative liaison, engaged in email discussions, dated November 17 and 18, 2010, regarding the effect the statute would have on Respondent's existing procedures regarding median openings and access management[5/] and the application of its access management standards in Florida Administrative Code Rule 14-97.003. Although the email discussion referred to an "implementation plan," at this point, Respondent's discussion primarily focused

on whether its procedures and existing rules would need to be amended to address section 335.199.

10. However, by November 29, 2010, Respondent's staff were raising questions as to whether section 335.199 applied to "permit jobs"——referring to the construction of connections to the SHS, which require connection permits pursuant to section 335.1825 and Florida Administrative Code Chapter 14-96. Specifically, in an email dated November 29, 2010, from Respondent's legislative liaison to Respondent's secretary and chief engineer, the following matters were discussed:

> Brian: You asked me to forward any further questions/comments on the median bill, SB 1842. I had some further thinking-out-loud with DS folks who outlined a couple more thoughts.
>
> Recall the opening words of the new language in the bill: Whenever the Department of Transportation proposes any project.
>
> 1. These comments/questions are all about permit jobs. Let's use a hypothetical permit application to put in a big gas station. Let's say a left-turn lane will need to be lengthened, so maybe an opening needs to be closed; maybe another needs to be relocated, etc.
>
> - It's a permit job, not a project DOT is proposing. Does the bill apply at all?
> - If the bill does apply, how is the time of issuance of the permit impacted?

11. On November 30, 2010, Respondent's chief engineer and district operations directors conducted a videoconference to

address, among other things, the "[e]ffects of legislative action on SB 1842. How will department practices be impacted, on a statewide basis? Specifically as it relates to permit reviews."

12. As a result of the November 30, 2010, videoconference, Respondent's staff made the decision that "SB 1842 will not apply to permit projects since the Bill says [']whenever the Department of Transportation proposes a project[']. We should not try to expand the Bill or read it in a broader sense."

13. On December 18, 2010, Respondent's chief engineer sent an email to Respondent's secretary and others, titled "SB 1842 transportation projects modifying access to adjacent properties." That email (hereafter, the "Blanchard Memo"), which addresses the applicability of section 335.199 to projects, permit applications, and permittees, states in pertinent part:

> This bill applies to any proposed work program project beginning on or after November 17, 2010. The language of the bill states [']whenever the Department of Transportation proposes any project['], so this language does not apply to permit applications. However, for permit applications that affect medians and median openings, the effected [sic] people and businesses should be informed by the permitee [sic] as soon as possible.

On December 20, 2010, Respondent's secretary responded: "OK."

14. After receiving Respondent's secretary's approval, on December 21, 2017, Respondent's chief engineer distributed the Blanchard Memo to Respondent's district secretaries.[6/]

15. Respondent's document regarding Topic No. 625-010-021-h, titled "Median Openings and Access Management" and dated February 20, 2013, was revised to include, in section 7.2, a statement substantially similar to the Blanchard Memo. This document was approved by Respondent's secretary.

16. In 2014, Respondent published an updated version of its Handbook containing the Challenged Statement (which is set forth in paragraph 6, above).

17. The Challenged Statement has not been adopted pursuant to the rulemaking procedures in section 120.54.

18. Respondent contends that the Challenged Statement is not a rule but is instead merely a reiteration of the statute's language stating that the 180-day notice requirement applies only when Respondent proposes a project.

IV. Effect of the Challenged Statement

Statute Applicable Only to "Work Program" Projects

19. By its terms, the Challenged Statement concludes that section 335.199 applies only to "work program" projects.

20. At the final hearing, Respondent's party representative, Gary Sokolow,[7/] acknowledged that section 335.199 does not define the term "project," and that a person could not determine, from reading the statute, what would (or would not) be considered a "department project" for purposes of determining applicability of the statute.

21. He further acknowledged that the Challenged Statement contains the words "work program" to define projects covered by the statute, but that the statute itself does not contain the words "work program" to define the projects to which it applies.

22. Sokolow also acknowledged that a "work program project" is a specific type of project.[8/] He testified that Respondent undertakes "safety" projects that are not "work program" projects and that entail the erection of median barriers that change vehicle turning movements.

23. This evidence establishes that a "work program project" is a specific kind of project, and further establishes that Respondent does undertake projects which are not "work program" projects, and that involve erecting median barriers that change vehicle turning movements.

Statute Not Applicable to Connection Permit Applications

24. By its terms, the Challenged Statement also concludes that section 335.199 does not apply to applications for connection permits to obtain access to the SHS.[9/]

25. Pursuant to section 335.1825, a connection permit must be obtained in order for the owner of property abutting the SHS to construct a connection to the SHS. To obtain a connection permit, the owner of property for which the connection is sought must file, with Respondent's pertinent district office, an application for a connection permit. The permit application must

detail the specific design features of the proposed connection to the SHS. As part of a permit application, the applicant may suggest or request that a median opening be created to accommodate traffic flow as related to the proposed connection to the SHS. Respondent reviews the application for compliance with the applicable requirements of chapter 14-96, and either issues the connection permit or denies the application.

26. Rule 14-96.003(4) states that traffic control features and devices in the right of way——which expressly include medians, median openings, and turn lanes——are not a means of access to the SHS. The rule further states that connection permits are only issued for connections——not for existing or future traffic control features or devices at or near the permitted connections; thus, while a permit may describe such traffic control features or devices, such description does not create any type of interest in such features. Fla. Admin. Code R. 14-96.003(4). Therefore, although a connection permit applicant may request or suggest the construction of a traffic control device, such as a median opening or other device, the applicant is not entitled to such a device.

27. Additionally, Respondent, in the context of reviewing a connection permit application, may, on its own volition, determine that it is appropriate, based on traffic and safety studies, to erect a median, create a median opening, or close an

existing median opening——even where (as here) such median erection, opening, or closure has not been requested by the connection permit applicant.

28. To this point, Sokolow distinguished between median changes associated with Respondent's work program projects and those associated with permit applications in that, in the former, the changes are necessitated by Respondent's projects, while in the latter, they are necessitated by a new connection to the SHS. However, he confirmed that Respondent's decision-making process regarding creation of a new median opening and closing of an existing median process in the permit application context is the same as when Respondent itself constructs a project that requires creation of a new median opening and closure of an existing opening, in that in both contexts, Respondent's decisions regarding medians are driven by traffic and safety studies.

29. This evidence establishes that based on Respondent's rules and as a matter of its practice, all decisions to propose, approve, construct, or modify traffic control features——such as erecting a median or opening or closing a median opening——are, in all scenarios, solely within Respondent's control and discretion.

<u>Binding Nature of the Challenged Statement</u>

30. When questioned about the effect of the Challenged Statement as set forth in the Handbook, Sokolow testified: "[m]andatory - it's stating that this is what Brian Blanchard

asked us to do. . . . It should be followed unless there is a darn good reason not to follow it."   When asked whether Respondent's district offices could elect not to follow the Challenged Statement, Sokolow responded "[m]y opinion is no. They really need to follow what it says there."

31. Specifically regarding the third sentence in the Challenged Statement, which states "for permit applications that affect medians and median openings, the effected [sic] people and businesses should be informed and involved by the permittee as soon as possible," Sokolow testified that Respondent wanted to ensure that affected property owners would be given notice of connection permit applications that would affect medians and median openings——whether by the permittee (who technically, at the time of applicant processing, would be an "applicant," rather than a "permittee") or by Respondent.

32. However, he acknowledged that Respondent did not have any rules or policies requiring it, rather than a connection permit applicant, to notify property owners regarding applications for connection permits that would affect medians and median openings. He further acknowledged that pursuant to the Challenged Statement, Respondent includes, in notices of intent to issue highway connection permits that would affect a median or median opening, the requirement that the applicant give notice to affected people or businesses as soon as possible.

33. The upshot of Sokolow's testimony is that Respondent's districts must comply with the determination that the statute is applicable only to Respondent's work program projects and is not applicable to permit connection applications, but that the notice directive in the third sentence of the Challenged Statement is not "mandatory" because the notice may be provided either by the permittee or by Respondent. To that point, Sokolow acknowledged that this sentence requires such notice to be provided to affected people and businesses, so providing such notice is not discretionary in the sense that a permittee may simply choose whether or not to provide the notice; however, he contended that the notice requirement is not binding or mandatory for permittees because, as a matter of practice, Respondent, rather than the permittee, sometimes provides the notice. Sokolow acknowledged that Respondent did not have any formal standards for determining when Respondent, in lieu of the permittee, would assume responsibility for providing the notice.

Impact of the Challenged Statement on Petitioner

34. As noted above, Petitioner owns property in Ocala, Florida, that abuts the SHS. Because the Challenged Statement prescribes the notice to be provided for projects that will affect medians and median openings on the SHS, and, thus, potentially impact access to and from Petitioner's property, Petitioner is substantially affected by the Challenged Statement.

Feasibility and Practicability of Rulemaking

35. Respondent does not argue, and did not present evidence to show, that if the Challenged Statement is determined to be a rule, rulemaking is not feasible or practicable.[10/]

CONCLUSIONS OF LAW

36. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.56(4), 120.569, and 120.57(1).

37. For the reasons discussed above, it is determined that Petitioner is a substantially affected person who has standing to challenge the Challenged Statement as an unadopted rule in this proceeding.

38. Section 120.56(4) establishes the procedure applicable to challenging agency statements that have not been adopted as rules pursuant to section 120.54. This statute states in pertinent part:

> (a) Any person substantially affected by an agency statement that is an unadopted rule may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state facts sufficient to show that the statement constitutes an unadopted rule.
>
> * * *
>
> (c) If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that

> rulemaking is not feasible or not practicable under s. 120.54(1)(a).
>
> (d) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Register.
>
> (e) If an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action.

39. Petitioner bears the burden in this proceeding to prove, by a preponderance of the evidence, that the Challenged Statement is an unadopted rule that violates section 120.54(1)(a). Ag. for Pers. with Disab. v. C.B., 130 So. 3d 713, 717 (Fla. 1st DCA 2013); S.W. Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001).

40. The sole issue in this proceeding is whether the Challenged Statement is a "rule," as that term is defined in section 120.52(16).[11/]

41. The term "rule" is defined in section 120.52(16)[12/] as:

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes

> any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

42. Whether an agency statement is a rule turns not on the agency's characterization of the statement by some appellation other than "rule," but, rather, on the effect of the statement. Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977).

43. A statement of general applicability is a statement that purports to affect not just a single person or in singular situations, but to a category or class of similarly-situated persons or activities. See McCarthy v. Dep't of Ins., 479 So. 2d 135, 137 (Fla. 1st DCA 1985). Thus, a statement need not apply to every person or activity within the agency's jurisdiction; rather, it is sufficient that it apply uniformly to a class of persons or activities over which an agency exercises jurisdiction. See Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 83 (Fla. 1st DCA 1997).

44. Additionally, because the definition of "rule" expressly includes statements of general applicability that implement or interpret law, an agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, adversely affect rights, require compliance, or otherwise have the direct

and consistent effect of law is a rule. State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enterprises-Florida, Inc. v. Dep't of HRS, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); St. Francis Hosp. v. Dep't of HRS, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

45. Here, the evidence establishes that the Challenged Statement is generally applicable. As discussed above, Respondent's districts statewide are uniformly required to adhere to the Challenged Statement; they do not have the discretion to choose whether to follow or disregard the Challenged Statement.

46. The evidence also establishes that the Challenged Statement is binding or mandatory with respect to connection permit holders. Simply because Respondent may, as a matter of practice, elect, on a case-by-case basis, to provide the notice rather than placing that burden on the permittee does not render the Challenged Statement non-binding on permittees.[13/] See Harvey, 356 So. 2d at 326.[14/] Indeed, the language in the Challenged Statement regarding notice provision is directed solely at permittees; there is no language that shifts that burden to Respondent or identifies any circumstances under which Respondent, rather than the permittee, will assume that burden. As such, the Challenged Statement requires compliance.

47. The Challenged Statement also interprets and implements section 335.199.

48. Section 335.119 is susceptible to multiple reasonable interpretations that result in different outcomes, and, thus, is ambiguous. As discussed above, the statute can reasonably be read to apply only to work program projects; to projects that entail both work program projects and non-work program projects; and also to projects that arise in the context of connection permit applications where Respondent——which has sole control over the placement of median barriers and the location of median openings——decides to close existing median openings or create new median openings to maintain required traffic and safety standards. Cent. Fla. Reg'l Transp. Auth. v. Post-Newsweek Stations, Orlando, Inc., 157 So. 3d 401, 404 (Fla. 5th DCA 2015)(a statute is ambiguous if its language is susceptible to more than one reasonable interpretation and permits more than one outcome).

49. Tasked with administering this ambiguous statute, Respondent was placed in the position having to determine its meaning. The evidence shows that Respondent's staff, in an earnest effort to administer and implement the statute in a manner that was consistent with its existing transportation programs and regulatory processes and timeframes, engaged in extensive dialogue about the types of projects to which the statute applied and whether (or not) the statute applied to

projects resulting in median changes that arise in the permit application project.

50. Respondent ultimately determined that section 335.199 should be read as imposing the 180-day statutory notice requirement only on Respondent's "work program" projects. This decision had the effect of limiting the universe of Respondent's projects to which the statutory notice requirement would apply, and it further excluded those circumstances in which Respondent, in the connection permitting context, erects medians or locates or relocates median openings to address traffic and safety issues. Moreover, recognizing the importance of ensuring that property owners whose access to the SHS may be affected by median changes that arise in the connection permitting context receive notice of those changes and have an opportunity to provide comment and input, Respondent included the third sentence in the Challenged Statement, imposing a notice requirement on connection permittees that is nowhere mentioned in section 335.199. In sum, the Challenged Statement does not simply echo or reiterate the statute; rather, it imposes limitations and requirements that are not apparent from the statute's plain language.

51. The circumstances in this case are comparable to those in Department of Revenue v. Vanjaria Enterprises, 675 So. 2d 252 (Fla. 5th DCA 1996). In Vanjaria, at issue was whether a procedure that the Department of Revenue ("DOR") used to

determine the amount of taxable property in multi-use real estate properties constituted an unadopted rule. The statute specifically exempted from taxation the portion of multi-use properties that were used exclusively as dwelling units. The statute was susceptible to more than one interpretation with respect to how to determine the portion of the property used exclusively as dwelling units for purposes of calculating the tax owed. Vanjaria used one method, based on the percentage of its rent payments allocated for its motel use. DOR chose another method, based on the proportion of the total square footage of the property that consisted of motel use, which it had developed and included in a sales and use tax training manual. DOR's method resulted in Vanjaria owing a substantially larger amount of tax than it had paid using the alternative method to calculate the taxes owed. On appeal, the court affirmed that the procedure was an unadopted rule because it implemented and interpreted the statute, created DOR's entitlement to taxes, adversely affected property owners, and established a uniformly applicable procedure that DOR was required to apply in determining the taxes owed on dwelling units in multi-use properties.

52. Likewise, here, the Challenged Statement interprets the statute and implements it in a manner that Respondent chose in order to render it workable and consistent with Respondent's existing transportation programs and regulatory processes and

timeframes. The Challenged Statement adversely affects owners of property adjacent to the SHS who, by virtue of Respondent's interpretation of section 335.199, will not receive the statutory notice when Respondent elects to erect medians or to close or relocate median openings pursuant to traffic and safety dictates within the connection permitting context. In imposing a notice burden on permittees, it mandates compliance with a newly-created requirement not established in the statute. Like the agency procedure in Vajaria, the Challenged Statement is a rule.

53. At this point, it bears reiterating that in developing the Challenged Statement, Respondent thoughtfully considered alternative interpretations of section 335.199 and chose the one that it believed best embodied the Legislature's intent in enacting an ambiguous statute. However, whether Respondent chose the best interpretation, or even an authorized interpretation, of the statute is immaterial in this proceeding. The question here is whether Respondent's interpretation, set forth in the Challenged Statement, constitutes a rule that has not been adopted pursuant to the rulemaking procedure in section 120.54.

54. For the reasons discussed above, it is concluded that the Challenged Statement is an unadopted rule that violates section 120.54(1)(a).[15/]

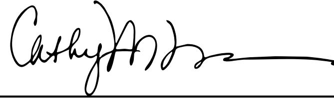
ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. The provision that is published on page 20 of Respondent's 2014 Median Handbook and that has been identified in this proceeding as the Challenged Statement is an unadopted rule that violates section 120.54(1)(a), Florida Statutes.

2. Jurisdiction is retained to conduct further proceedings as necessary to award attorney's fees and costs as applicable pursuant to section 120.595(4), Florida Statutes. Petitioner shall have 30 days from the date of this Final Order in which to file a motion for attorney's fees and costs, to which will be attached all supporting documentation, including documentation demonstrating that the 30-day notice set forth in section 120.595(4)(b) was provided; appropriate affidavits, such as those attesting to the reasonableness of the fees sought; and other documentation to support the claim for attorney's fees and costs, such as time sheets, bills, and receipts. If such motion is filed, Respondent shall have 21 days in which to file a response in opposition disputing Petitioner's legal entitlement to an award of attorney's fees and costs and/or the amount of those fees and costs sought by Petitioner.

DONE AND ORDERED this 6th day of September, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of September, 2017.

ENDNOTES

[1/] All references are to the 2016 version of Florida Statutes unless otherwise stated.

[2/] To clarify, although Petitioner characterizes Respondent's statement as an "unadopted and invalid" rule, this proceeding, which was brought under section 120.56(4), concerns only whether the agency statement is a rule that has not been adopted pursuant to the rulemaking procedures in section 120.54, in violation of section 120.54(1)(a). This proceeding does not address whether the agency statement constitutes an "invalid exercise of delegated legislative authority" under section 120.52(8); that standard is applicable only to challenges of proposed rules, existing rules, and emergency rules pursuant to sections 120.56(2), 120.56(3), and 120.56(5), respectively.

[3/] Committee Substitute for Committee Substitute for Senate Bill 1842 was passed during a special session of the Florida Legislature in 2010 and is codified at section 335.199, titled "Transportation projects modifying access to adjacent property."

[4/] The email discussion between Respondent's staff referred to SB 1842. After the bill was passed, it became chapter 2010-281, Laws of Florida, with an effective date of November 17, 2010.

The 2010 version of Florida Statutes published on the Legislature's website, Online Sunshine, includes section 335.199, which was created by SB 1842. Therefore, even though Respondent's discussion referred to SB 1842 or "the bill," this Order refers to this legislation as "section 335.199."

[5/] See paragraph 15, infra.

[6/] Respondent is a decentralized agency having seven district offices, established on a geographic basis, around the state. Each district is managed by a district secretary.

[7/] Sokolow is employed by Respondent as a senior transportation planner, and was involved in preparation of the Challenged Statement.

[8/] The term "work program" is a term of art defined in section 339.135, Florida Statutes. This statute defines and describes the types of projects that are part of Respondent's "district work programs," its "tentative work program," and its "adopted work program." These terms describe lists of projects being planned and that are in various stages of proposal for funding through legislative appropriation.

[9/] Although the regulation and management of access to the SHS is not directly at issue in this unadopted rule challenge proceeding, some background regarding the role of connection permits in managing access to the SHS is helpful to understanding the effect of the Challenged Statement. Florida's State Highway System Access Management Act, sections 335.18 through 335.188, Florida Statutes, establish that every owner of property that abuts a road on the SHS has a right to reasonable access to the abutting state highway and, further, authorize the establishment, by rule, of a system for regulating and managing access to the SHS to ensure the public's right and interest in a safe and efficient highway system. To implement this statutory directive, Respondent has adopted Florida Administrative Code Chapter 14-96, governing the issuance of permits for connections by abutting property owners to the SHS.

[10/] Respondent also does not argue, and did not present evidence to show, that the Challenged Statement falls within one of the exemptions from the definition of rule in section 120.52(16)(a) through (c).

[11/] This proceeding does not address either the substantive validity of the Challenged Statement or whether Respondent made

the correct decision in changing the location of a median opening in relation to the issuance of a connection permit to a business owning property near Petitioner's property. Petitioner has challenged Respondent's action to close the median opening across from its property pursuant to sections 120.569 and 120.57(1), and that matter is in abeyance pending the resolution of this proceeding.

[12/] Section 120.52(16) expressly excludes from the definition of "rule" certain items not applicable here.

[13/] The third sentence of the Challenged Statement provides: "[h]owever, for permit applications that affect medians and median openings, the effected [sic] people and businesses should be informed and involved by the permittee as soon as possible." Respondent posits that the use of the word "should" in this sentence makes notice provision by permittees permissive rather than mandatory. Although that is one reading of this sentence, an alternative reading——likely preferable in this context, given the potential impact of median changes on affected property——treats the word "should" as synonymous with "ought"——thus obligating permittees to provide notice as soon as possible. See Merriam-Webster Collegiate Dictionary, 11th ed. (2003). This reading is consistent with Sokolow's testimony that notice of median changes, in the permitting context, needs to be provided——whether it is provided by the permittee or Respondent. Furthermore, even if the third sentence of the Challenged Statement were to be interpreted as permissive rather than mandatory, that does not negate the effect of the first two sentences of the Challenged Statement, which, as discussed above, impose limitations on the statute's reach that are not stated in the statute.

[14/] In Harvey, the court determined that the agency's statement, which imposed enhanced training and experience requirements as a qualification for certain employment positions, constituted a rule, even though the agency had the discretion to waive those requirements in certain circumstances. The court stated: "we do not consider that the Director's discretion mitigates the decisive effect, as rules, of the minimum training and experience requirements. . . . [T]he prescribed minimum requirements . . . remain the yardstick by which the applicant's qualifications must be measured." Similarly, here, the notice requirement in the third sentence is made applicable to all connection permits and, as discussed above, the evidence establishes that the burden to provide the notice is on the permittee unless, under unspecified circumstances, Respondent assumes that burden. As with the

agency statement in Harvey, here, the Challenged Statement imposes a requirement that is not contemplated by the statute.

[15/] Section 120.56(4)(e) states: "[i]f an administrative law judge enters a final order that all or part of an unadopted rule violates s. 120.54(1)(a), the agency must immediately discontinue all reliance upon the unadopted rule or any substantially similar statement as a basis for agency action." § 120.54, Fla. Stat. (emphasis added).

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.