STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ATLANTIC HOUSING PARTNERS, LLLP,	)	
Petitioner,	)	
vs.	)	Case No. 09-2267RP
FLORIDA HOUSING FINANCE CORPORATION,	)	
Respondent,	)	
and	)	
EASTWIND DEVELOPMENT, LLC; HOUSING TRUST GROUP, LLC; THE GATEHOUSE GROUP, LLC; AMERICAN REALTY DEVELOPMENT CORP.; AND LANDMARK DEVELOPMENT CORP.,	)	
Intervenors.	)	

FINAL ORDER

Pursuant to notice, a final hearing was conducted in this case on May 26 and 27, 2009, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole & Bryant, P.A.
301 South Bronough Street, Fifth Floor
Post Office Box 1110
Tallahassee, Florida 32302-1110

For Respondent: Hugh R. Brown, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

For Intervenors Eastwind Development, LLC, and Housing Trust Group, LLC:

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

For Intervenors Gatehouse Group, LLC; American Realty Development Corporation; and Landmark Development Corporation:

J. Stephen Menton, Esquire
Rutledge, Ecenia & Purnell, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue in this case is whether certain proposed rules of Respondent, which require applicants in Respondent's Universal Application funding cycle to designate their own applications as either "Priority I" or "Priority II" applications that may be submitted by any "Pool of Related Applicants" and which give preference to Priority I applications over Priority II applications in selection for funding, constitute invalid exercises of delegated legislative authority.[1]

PRELIMINARY STATEMENT

A Petition for Administrative Determination of Invalidity of Proposed Rule was filed at the Division of Administrative

Hearings ("DOAH") by Petitioner, Atlantic Housing Partners, LLLP, on April 27, 2009. On May 6, 2009, Petitions for Leave to Intervene were filed by Eastwind Development, LLC, and Housing Trust Group, LLC. A Petition for Leave to Intervene was filed by The Gatehouse Group, LLC; American Realty Development, LLC; and Landmark Development Corporation on May 8, 2009. Both Petitions for Leave to Intervene were granted pending determination of the parties' standing. Standing was, thereafter, stipulated to by the parties prior to the commencement of the final hearing.

At the final hearing held on the date and place set forth above, Petitioner called two witnesses: Steve Auger, executive director of Respondent (which will also be referred to herein as "Florida Housing"), and Scott Culp, executive vice president of Petitioner. Florida Housing called one witness, Steve Auger. Intervenors called two representative witnesses: Sean Wilson, executive vice president of Housing Trust Group, LLC; and Marc S. Plonskier, president of The Gatehouse Group, LLC. Petitioner's Exhibits 1 through 33 and 38 were admitted into evidence. Respondent/Intervenors' Exhibits 2 through 6, 14, and 16 through 19 were admitted. Official Recognition was taken of Sections 420.507, 420.508, 420.5087 and 420.5099, Florida Statutes (2008); and CS/CS/HB 161 and CS/CS/SB 360 (Enrolled) from the 2009 Legislative Session.

The parties ordered a transcript of the final hearing. They were given ten days from the date the transcript was filed at DOAH to submit proposed final orders. The Transcript was filed at DOAH on June 2, 2009. The parties then stipulated to June 18, 2009, as the date for filing their proposed final orders. The parties timely submitted Proposed Final Orders, and they were duly considered in the preparation of this Final Order.

FINDINGS OF FACT

The Parties

1. Petitioner is a Florida limited liability partnership engaged in the development of affordable housing[2] in this state. Petitioner regularly submits applications for public financing of affordable housing developments; and in 2008, submitted 46 such applications to Respondent. Petitioner possesses the requisite skill, experience and credit-worthiness to successfully produce affordable housing. Petitioner and its predecessor entities have successfully completed the construction of over 90 affordable housing developments and in excess of 22,000 affordable housing units in Florida from funds distributed by Florida Housing.

2. Respondent is a public corporation created by Section 420.504, Florida Statutes (1980), to administer the governmental function of financing or refinancing affordable housing and

related facilities in Florida. Its statutory authority and mandates appear in Part V of Chapter 420, Florida Statutes (2008), at Sections 420.501 through 420.55, Florida Statutes (2008). Respondent has a board of nine individuals who govern its operations.

3. Intervenors, Eastwind Development, LLC; Housing Trust Group, LLC; The Gatehouse Group, LLC; American Realty Development, LLC; and Landmark Development Corporation are each Florida limited liability corporations engaged in the business of providing affordable housing. Eastwind and Housing Trust Group are relatively small developers as compared to Petitioner; e.g., Housing Trust Group has approximately ten employees and has developed about 12 projects in Florida and one in Georgia. Gatehouse, American Realty and Landmark are also smaller developers than Petitioner. By way of example, those entities submitted nine, six and seven applications, respectively, in the 2008 application cycle.

The Proposed Rule

4. Florida Housing has proposed several new or revised definitions, instructions, exhibit forms, and application sections to its existing rules concerning application by developers for state funding to construct affordable housing. The proposed rules create a priority ranking system for use by

Florida Housing when reviewing competing applications for funding.

5. The rule language itself does not, per se, create the new priority ranking system. Rather, the amended rules incorporate by reference the "2009 Universal Application Instructions: Multifamily Mortgage Revenue Bonds (MMRB) Program-HOME Investment Partnerships (HOME) Rental Program-Housing Credit Program." It is in the Instructions that language appears regarding the priority system.

6. A sampling of the new priority language can be found in the Application Instructions, March 19, 2009, Draft, page 5, which states in part:

> During the ranking process, as outlined in the Ranking and Selection Criteria section of the Application Instructions, preference will be given to Priority I Applications.

And at Page 93, the proposed Instructions also state:

> [U]nless otherwise provided, when applying the SAUL Cycles for the Special Set-Asides and each Geographic Set-Aside, Priority I Applications will be considered for funding first and if funds remain after funding all eligible Priority I Applications in each set-aside that can be funded, the Priority II Applications in that set-aside will be considered for funding.

The priority system itself will be more fully discussed herein.

Historical Application Context

7. Prior to the implementation of what is now called the Universal Cycle (discussed more fully below), Florida Housing implemented various approaches and processes to equitably allocate funds to developers of affordable housing. The allocation process has historically evolved over the years based on changing needs in the State, input from developers, and other relevant factors.

8. Prior to 2002, the process used by Florida Housing was called the "Combined Cycle." The significance of the Combined Cycle was that it attempted to allocate funds by using a single competitive application process for all applicants at one time. In other words, all applications for potential funding under various programs were "combined" into one application and allocation process. Under that process, applications were prepared by applicants requesting funds from the various programs and competing for those funds, much like a competitive bidding process. Unlike the application forms now being used, the prior applications required detailed and voluminous information concerning each proposed project. The Combined Cycle applications had to be complete and accurate when submitted with no chance to edit, correct, or provide additional explanation. With this limitation in mind, applicants spent a

good deal of time making certain the initial application was complete and correct.

9. An unintended result of the rigid Combined Cycle process was that good quality applications were sometimes eliminated from funding consideration due to something as minor as a spelling or typographical error. Applicants during this time period became very adept at filling out the application forms.[3] The applications were generally of high quality and applicants generally demonstrated their ability to move forward with development.

10. The Combined Cycle process was ultimately supplanted by the Universal Cycle in 2002, and that process is currently in place. The Universal Cycle will be described more fully below.

Available Funding

11. It is the duty and responsibility of Florida Housing to interact with entities interested in developing affordable housing in this state. Florida Housing allocates resources to fund affordable housing, most of which comes from three programs referred to as: "HOME," the federally funded multi-family mortgage revenue bond program; "SAIL," the State Apartment Incentive Loan; and the federal low income housing tax credit program (referred to herein as the "tax credit").

12. The government, in its effort to protect financially marginalized citizens from excessive housing costs, provides the

aforementioned funds to developers to build affordable housing. A discussion of the various funding sources is in order to better understand the process.

13. Tax Credits: Low income housing tax credits come in two varieties: competitively awarded "9%" tax credits, and non-competitively awarded "4%" tax credits. The "9%" and "4%" designations relate to the approximate percentage of a development's eligible cost basis that is awarded in annual tax credits.

14. For the nine percent tax credits, each state receives an allocation of tax credits every year from the federal government using a population-based formula. Tax credits are a dollar for dollar offset on federal income tax liability. When Florida Housing awards tax credits to an applicant, the applicant gets the credit amount every year for ten years. The developer may sell its future stream of tax credits to a syndicator, who, in turn, sells them to investors (which are often Fortune 500 companies that have profits that the investor seeks to shelter from federal income taxes).

15. As an example, if an award of $1 million in tax credits every year for ten years is sold for 85 cents on the dollar, it generates $8.5 million in equity to the developer to help finance construction of its proposed project. Unlike the proceeds from issuance of bonds where there is debt that has to

be paid back over time, the $8.5 million the developer gets from that award is cash equity, so there is no debt associated with it. Tax credits are a very rich subsidy and, consequentially, are the most sought after funding source that Florida Housing distributes.

16. The four percent tax credits are "non-competitive" tax credits that get paired with tax exempt mortgage revenue bonds. As long as more than half of the total development cost of an affordable rental development is financed through the issuance of tax exempt bonds, the developer is eligible for an award of four percent tax credits. As with the nine percent credits, four percent credits are awarded every year for ten years, and the developers then syndicate these credits. The tax credit program was created in 1986 by the federal government and every year since then, Florida Housing has received an allocation of tax credits.

17. HOME Funds: Florida Housing also receives a portion of the state's tax exempt bond allocation, some of which it issues to finance the construction of affordable multi-family rental housing. The tax exempt bond proceeds are loaned to developers to finance the construction of a development. The cash flow generated from rental income pays back those bonds over time.

18. SAIL Funds: Funds are also available through a portion of documentary stamp tax revenues collected on real estate transactions in Florida. For state fiscal year 2009-2010, the Legislature did not appropriate any money for SAIL due to the state's current budget crisis. As a result, the challenged rule provisions in the instant case will not apply to the SAIL program in the 2009 application cycle.

19. All of these resources are allocated to finance the construction or substantial rehabilitation of affordable housing. A portion of the units are then set aside for residents earning a certain percentage of area median income ("AMI"); generally, the units are targeted to tenants earning 60 percent of AMI or below.

The Universal Cycle

20. The process used by Florida Housing to review and approve the Universal Cycle applications operates generally as follows:

- Applicants submit applications by a specified date.
- Respondent reviews all applications to determine if certain threshold requirements are met. A score is assigned to each application.
- A list of all applications, along with their score, is published by Respondent on its website. The applicants are then given a specific period of time to

alert Respondent of any errors they believe Respondent made in its initial review of the application. Applicants also have an opportunity to cure any errors within their applications (although there are certain mandatory items which cannot be cured).

- After the cure period, Respondent issues a "final" score for each application. Applicants are then given an opportunity to contest their final score by way of an informal or formal administrative hearing.
- After the appeal period, Respondent issues the final rankings which determine which of the applicants will be selected to receive funding from one of the programs.
- The selected applicants are then invited to the credit underwriting process wherein third party financial consultants (selected by Respondent, but paid for by the individual applicants) determine whether the project proposed in the application is financially sound.

21. The scoring of applications first addresses whether certain threshold requirements, such as the applicant's experience, appropriate zoning, sufficient infrastructure in the area, and minimum set-asides (more later on this issue), are being met and whether there is a basic plan for financing the

project. Florida Housing then looks at such features as programs for tenants, amenities of the development as a whole and of the individual units, local government contributions to the project, and local government ordinances and planning efforts that support affordable housing in general. The initial scoring of applications very frequently results in perfect scores (66) for many applicants.

22. Because there are so many applications with perfect scores, Florida Housing has built a tiebreaker system into its review process. Tiebreakers include such things as leveraging, i.e., the amount of corporate (applicant) resources available per set-aside unit. Proximity is another tiebreaker which takes into account how close the proposed project is to such things as public transportation, schools, grocery stores and medical facilities. Proximity points are also awarded for being geographically separated from other similar developments that have been financed within the past three years. The number of units allocated for the most extremely low income individuals has also been used as a tiebreaker. For the upcoming (2009) Universal Cycle, a tiebreaker has been established which addresses the timeliness of submission of evidence of the developer's ability to proceed.

23. Lastly, Respondent assigns a randomly selected "lottery number" to each application. The applications are all

identified and inserted into a computer software program which randomly assigns a number from one through a high number commensurate with the number of applications at issue. The lottery number is a final tiebreaker of sorts and applications are finally ranked--all other things being equal--in lottery number order.

24. Final rankings are used to determine which applications are preliminarily selected for funding. Some applications are selected to meet certain targeting goals that address housing needs of particular demographic groups (such as farm workers, commercial fishery workers, the homeless, or the elderly). There are also goals addressing specific geographic needs (such as the Florida Keys or inner city areas). These are referred to as "special set aside" or targeting goals.

25. After the set-aside goals are addressed, Respondent then uses the final rankings to achieve a distribution of affordable housing units among counties with small, medium or large populations. Within the county size groups, Respondent uses a formula called SAUL (an acronym for Set-Aside Unit Limitation) to evenly distribute the units.[4] This formula helps prevent any one large county, for example, from getting all the large county units, even if all the applications for that county receive perfect scores and prevail on all tiebreakers.

26. The SAUL process is described with examples in the Universal Application Instructions at pages 94 through 100. The process is further described as follows:

> When an Application is selected for tentative funding, the total number of set-aside units committed to in that Application will be credited toward meeting the SAUL for the county in which the proposed Development is located. The total number of set-aside units for each Application will be computed by multiplying the total number of units within the proposed Development by the highest Total Set-Aside Percentage the Applicant committed to as stated in the last row of the set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application. Results that are not a whole number will be rounded up to the next whole number.

Id. at 95.

27. The tentatively approved applications would, therefore, be used to address the SAUL for their targeted county. As an example, if there were 20 applications from large counties, the top seven were all from Broward County and Florida Housing had established a SAUL for Broward County of 200 units, then as Florida Housing was going through the ranking, it would fund up to 200 units in Broward County and only then select the next highest ranked application from a different county.

28. Sometimes Florida Housing finds that it receives a lot of applications from just a few counties in the medium county grouping. If the only medium county applications Florida

Housing receives are from Hernando and Pasco counties, for example, then those are the only medium counties it can fund. If Florida Housing receives applications from a wide array of counties, then the SAUL mechanism tries to get funding to as many counties as it can before the funding runs out.

29. The purpose of the complex application review process in the Universal Cycle is to equitably and reasonably distribute affordable housing throughout the state.

The Rule Amendment Process

30. Respondent often finds it necessary to tweak its Universal Cycle review rules to address needed changes, to prevent perceived abuses of the process, or to make the distribution of funds more equitable. Amendments to the rules are generally made on an annual basis.

31. Proposed amendments to the Universal Cycle application review rules are the basis for the instant rule challenge. Florida Administrative Code Rules 67-21.003 and 67-48.004 adopt, by reference, Respondent's Universal Cycle Application Instructions, application form, and exhibits forms. Those items contain changes to the Universal Cycle review process. A description of the process for making those proposed changes, which are euphemistically referred to as Priority I-Priority II or "PI-PII" by the parties, will follow.

32. The amendment process for the instant rule changes commenced in the early fall of 2008.[5] The first public meeting on the changes was held August 8, 2008; it was followed by four rule-development workshops: September 25, 2008, in Tallahassee; October 30, 2008, in Orlando; December 11, 2008, in Bonita Springs; and February 17, 2009, in Tallahassee. The public meeting and workshops resulted in a number of comments, both written and oral, from developers. The written comments, including emails, letters, and other documents, were posted on Respondent's website for review by all interested persons.

33. One of the primary concerns raised by some developers during the rule development period had to do with the increase in the number of applications being filed in recent years. The perception by many who submitted comments was that the increased number of applications was due to some larger developers "gaming" the system. That is, some developers believed that larger developers were filing numerous applications simply for the purpose of acquiring more favorable lottery numbers in the tiebreaker phase of review. Indeed, in the 2008 Universal Cycle, roughly 85 percent of the tax credits allocated by Florida Housing were determined by the lottery number assigned to the application, so the importance of the lottery number is apparent.

34. There were also some comments offered during the rulemaking process as to another effect of the large number of applications by some developers, the "barricade" application concept. These concerns addressed a belief by some developers that applications were being filed which were not financially feasible. The perception was that the applicant filing a barricade application did not intend to actually build the project; rather, the applications were filed to use up the SAUL for a specific county so that funds would then go to other counties and other projects. The evidence presented on this concept was not persuasive, although the witnesses seemed very sincere about their concerns.

35. The concern about possibly insincere applications was somewhat borne out by the fact that in 2007, only about 24 of 187 applications submitted passed the threshold review. During the period given to developers to cure their deficient applications (those that did not pass threshold review), about one third of the applications were not cured. That is, they were simply withdrawn from the review process.

36. There has been a marked increase in the number of applications filed during recent years. In 2006, there were 104 applications filed; in 2007, there were 187; and in 2008, there were 282 applications filed. Over the period of those three years, there had also been an increase in the funds available

for distribution by Florida Housing, a fact which may explain why there were more applications being filed. Conversely, Florida Housing had begun approving larger funding amounts per project, thus somewhat negating the impact of the increase in available funds. So while there was indeed more money to distribute, the money was not going to more projects; each individual project was just getting more money than before.

Rationale for the Rule Amendments

37. Based upon the increased number of applications submitted during the Universal Cycle in recent years (and in response to the concerns stated by many developers), Florida Housing determined it best to limit the number of applications from any one developer (including any single purpose entities created by a developer). The method employed by Respondent to effectuate this goal was to initiate a priority system. The priority system proposed by Respondent allowed each related-party applicant to designate up to three of its applications as Priority I; the remainder of that applicant's applications would be deemed Priority II. An applicant could designate three additional applications as Priority I, if those applications were submitted as a joint venture with a qualified not-for-profit organization. The purpose of this caveat to the rule was to encourage the involvement of not-for-profit applicants.

38. The purpose of the rule was also to generate as many "quality" applications by as many different applicants as possible. Florida Housing believes that if each developer is forced to internally prioritize its applications, only the best applications will be filed. Some developers, Petitioner included, indicate that all of their applications will be exceptional and prioritization would not change that fact. There was no competent evidence presented to suggest that applications filed in the 2008 Universal Cycle were of an inferior nature.[6]

39. In the 2008 Universal Cycle, a small number of developers (including Petitioner), who submitted the largest number of applications received the largest percentage of allocated funds. In fact, over 40 percent of the tax credit allocation went to two large developers. Likewise, 40 percent of the SAIL funds went to a single developer. This resulted in a concentration of Florida Housing's development portfolio in a smaller group of developers. Florida Housing views that concentration as a "disastrous" situation in the current financial market.

40. Set-asides are an important component of the application review and approval process. Every three years a study is performed on each county within the state to determine how many renter households within the county are earning

60 percent or less of the AMI and paying more than 40 percent of their annual income for rent. These are referred to as "cost-burden" households. The cost-burden households are broken down into the following groups: families, the elderly, farmworkers and commercial fishermen. The study also assesses needs for persons who are homeless.

41. Funds are also allocated by way of geographic targeting.[7] Counties are divided into three groups: small, medium, and large (based on population). Each of the three groups must receive at least ten percent of the funds, but the need is determined and then adjusted up to ten percent if it is actually less than that. Once the percentages are established, funds are allocated in accordance with the stated percentages. The example given by Florida Housing was that if large counties were deemed to have 66 percent of the need, medium counties 30 percent, and small counties four percent, then the small county percentage would be moved up to ten percent (the smallest allowed amount) and the large county would be reduced to 60 percent.

42. There are also some set-asides for the preservation of existing affordable housing complexes. And there is a small set-aside for rural development as well. Each set-aside group essentially has its own separate funding from its share of the funds distributed by Florida Housing. An area of state critical

concern, the Florida Keys, is given the highest priority during review. Then the various groups (families, the elderly, farmworkers, commercial fishermen and homeless) are considered. Then, after each of these, the geographic set-asides are considered.

43. For 2009, there are no SAIL funds available, so the families-elderly-farmworker/fisherman-homeless categories are not a concern. Instead, the area of critical concern, the preservation projects and geographic targeting are addressed as relevant set-asides.

44. Under the PI-PII system, PI applications are given consideration in advance of PII applications. That is, all PI applications are funded before a PII application is considered. The only significant exception to that rule is that certain preservation set-asides may be funded from PII, even if PI applications are not filed. There may be other situations that could result in a PII being funded prior to a PI, but no such scenario was elucidated at final hearing.

45. Anecdotal evidence suggests that not-for-profit developers have shied away from the Universal Cycle due to a perception that the increase in applications has turned the system into an "odds game" in which it is not feasible for them to participate. The ability of established for-profit developers to increase their number of Priority I applications

by partnering with not-for-profits is a goal of the rule to address this problem. Florida Housing believes the increased involvement by not-for-profits will be beneficial to the affordable housing program.

46. The priority system will also likely have an impact on several key factors relating to the equitable distribution of affordable housing around the state. By having to concentrate its efforts on three (or six) key applications, a developer is more likely to make those designated applications complete and thorough at the outset of the process. This will allow for faster commencement of projects by some applicants as more due diligence is performed prior to the completion of the review process.

47. Applicants will also be more likely to file their PI applications in the strongest markets, i.e., where the projects are most needed. This will help Florida Housing more quickly and efficiently approve additional units in its most critical areas of concern.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56, Fla. Stat.[8]

49. Respondent engaged in rulemaking under Section 120.54, Florida Statutes. There is no dispute as to whether Respondent followed the rulemaking procedures and process correctly.

50. Petitioner and each of the Intervenors, as persons who are "Developers" as defined by Florida Housing, have standing to participate in this proceeding.

51. Petitioner and Intervenors challenge the proposed application instructions (incorporated by reference in the new rule amendments) as an invalid exercise of delegated legislative authority. They claim that Florida Housing does not have specific authority to require an applicant to designate applications as Priority I or II, to limit applicants to only three non-joint venture PI applications, to limit applicants to only six total PI applications, and to re-designate applications as Priority II.

52. Rulemaking is a legislative function, and as such, it is within the exclusive authority of the Legislature under the separation of powers provision of the Florida Constitution. See Southwest Florida Water Mgmt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594, 598-599 (Fla. 1st DCA 2000). An administrative rule is valid only if adopted under a proper delegation of legislative authority. See Save the Manatee; Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260 (Fla. 1991); Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1978).

53. The administrative rulemaking standard is set forth in Section 120.536, Florida Statutes, and in the closing paragraph of the statutory definition of "invalid exercise of delegated legislative authority" in Subsection 120.52(8), Florida Statutes, which states:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

54. Subsections (8)(b) and (c) of Section 120.52, Florida Statutes, although they are interrelated, address two different problems or issues. Board of Trustees of Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 701 (Fla. 1st DCA 2001); See also St. Johns River Water Mgmt. Dist. v. Consolidated Tomoka Land Co., 717 So. 2d 72, 81 (Fla. 1st DCA 1998). In addition, Subsections (8)(b) and (c) of Section 120.52, Florida Statutes, have to be read in pari materia with

the closing paragraph of the statute, also known as the "flush left paragraph," which was intended to restrict agency rulemaking. Golden West Financial Corporation v. Department of Revenue, 975 So. 2d 567, 571 (Fla. 1st DCA 2008).

55. An invalid exercise of delegated legislative authority exists where "[t]he agency has exceeded its grant of rulemaking authority" in promulgating a proposed rule. See § 120.52(8)(b), Fla. Stat. In addition, pursuant to Subsection 120.52(8)(c) through (e), Florida Statutes, rules cannot enlarge, modify, or contravene the specific provisions of law implemented, be vague, or be arbitrary or capricious.

56. Subsections (1) and (2) of Section 120.56, Florida Statutes, provide, in pertinent part, as follows:

> 120.56 Challenges to rules.-
>
> (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.
>
> (a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
>
> * * *
>
> (e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. . . Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. . . .

> (2) CHALLENGING PROPOSED RULES/ SPECIAL PROVISIONS.
>
> (a) . . .The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.
>
> * * *
>
> (c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

57. Petitioner has met its initial burden of going forward in this case through the presentation of its case-in-chief.

58. The burden then shifts to Respondent to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority. Id. See also Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243, 251 (Fla. 1st DCA 2002).

59. A proposed rule may be challenged pursuant to Section 120.56, Florida Statutes, only on the ground that it is an "invalid exercise of delegated legislative authority." An Administrative Law Judge ("ALJ") is without authority to declare a proposed rule invalid on any other ground. To do so would be an impermissible extension of the judge's authority beyond the boundaries established by the Legislature. See, e.g., Schiffman v. Department of Professional Regulation, Board of Pharmacy, 581

So. 2d 1375, 1379 (Fla. 1st DCA 1991) ("An administrative agency has only the authority that the legislature has conferred it by statute."); Lewis Oil Co., Inc. v. Alachua County, 496 So. 2d 184, 189 (Fla. 1st DCA 1986). Thus, for example, an ALJ may not invalidate a proposed rule simply because, in the judge's opinion, it does not represent the wisest or best policy choice. See Board of Trustees of Internal Improvement Trust Fund v. Levy, 656 So. 2d 1359, 1364 (Fla. 1st DCA 1995)("The issue before the hearing officer in this [rule challenge] case was not whether the Trustees made the best choice in limiting the lengths of docks within the preserve, or whether their choice is one that the appellee finds desirable for his particular location."); Dravo Basic Materials Co., Inc. v. State, Department of Transportation, 602 So. 2d 632, 634 (Fla. 2d DCA 1992) ("It is not our task, however, to write the best rule for DOT. That was not the task of the hearing officer.")

60. Invalid exercise of delegated legislative authority is defined in Subsection 120.52(8), Florida Statutes, as follows:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives. . . .

61. A rule must be authorized by a grant of rulemaking authority and must implement specific powers and duties provided by the enabling legislation. Southwest Fla. Water Mgt. Dist. v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1st DCA 2000).

62. Florida Housing's rulemaking authority is generally set forth in Section 420.507, Florida Statutes, which says in pertinent part:

> The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:

* * *

(12) To make rules necessary to carry out the purposes of this part and to exercise any power granted in this part pursuant to the provisions of Chapter 120.

* * *

(22) To develop and administer the State Apartment Incentive Loan Program. In developing and administering that program, the corporation may:

* * *

(h) Establish, by rule, the procedure for evaluating, scoring, and competitively ranking all applications based on the criteria set forth in s. 420.5087(6)(c); determining actual loan amounts; making and servicing loans; and exercising the powers authorized in this subsection.

* * *

(24) To do any and all things necessary or convenient to carry out the purposes of and exercise the powers given and granted in this part.

63. Also, in Section 420.508, Florida Statutes, the following additional rulemaking authority is found:

(3) The corporation shall have the special power to:

* * *

(c) Adopt and from time to time modify or repeal rules for governing the making of and participation in loans to sponsors for projects to implement the powers authorized, and to achieve the purposes set forth, in this part.

64. It is clear that Florida Housing has the requisite legislative authority to enact rules relating to the process whereby Florida Housing distributes funds for building affordable housing projects. The Universal Cycle process is, in fact, amended almost annually. However, these are somewhat general grants of rulemaking authority. Courts have held that some general grants of authority may not be sufficient.

65. In Department of Business and Professional Regulation v. Calder Race Course, 724 So. 2d 100 (Fla. 1st DCA 1998), the court invalidated rules of the Division of Pari-Mutuel Wagering allowing searches and seizures within racing facilities, even though the Division had general rulemaking authority to "adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks," and had authority to conduct investigations in enforcing the statutes. Id. at 102.

66. In Bd. of Trustees of Internal Improvement Trust Fund v. Day Cruise Ass'n, 794 So. 2d 696, 700 (Fla. 1st DCA 2001), the Trustee's authority to regulate the use of state-owned submerged lands did not include the authority to prohibit anchoring or mooring by vessels engaged in gambling activities outside of Florida's territorial waters.

> Although framed as a regulation of anchoring or mooring, the proposed rule does not regulate the mode of or manner of mooring . . . Instead it deliberately and dramatically interferes with certain kinds of commerce solely on account of activities that occur many leagues from the dock.

Id. at 702. In the absence of a specific power or duty enabling or requiring the Trustees to regulate cruises to nowhere, to regulate gambling, or to regulate on the basis of activities occurring aboard vessels after they leave sovereignty submerged lands and adjacent waters, the Trustees' proposed rule exceeded the Trustees' rulemaking authority and was an invalid exercise of delegated legislative authority. Id. at 704.

67. In State Department of Children and Family Services v. I.B. and D.B., 891 So. 2d 1168 (Fla. 1st DCA 2005), the court invalidated as lacking specific authority a Department of Children and Family Services ("DCFS") rule that deprived adoption applicants of a hearing to contest DCFS' placement determination for an adoptive child. Although statutes provided the Department with broad authority to "conduct, supervise, and administer a program for dependent children and their families," with goals including "the permanent placement of children who cannot be reunited with their families," the Department lacked authority to dispense with hearings in the interest of achieving a statutory goal of expediting the adoption process. Id. at 1171.

68. In Smith v. Department of Corrections, 920 So. 2d 638 (Fla. 1st DCA 2005), the court considered a rule of the Department of Corrections which allowed the Department to charge inmates for copying services and found it to be invalid for lack of a specific grant of authority. The cited rule authority merely sets forth the general rulemaking authority of the Department with regard to, among other things, "[t]he rights of inmates" and "[t]he operation and management of the correctional institution or facility and its personnel and functions," and was found inadequate. Id. at 642. Notably, the wisdom in adopting the rule--to deter inmates from seeking unlimited free copies--based on past experience and lack of arbitrariness, was held not sufficient authority for the rule. Id. at 641.

69. The general rulemaking authority relied upon by Florida Housing to promulgate the proposed changes to its rules are specific as to Florida Housing's right to create rules regarding the application process. The question is whether the general rules suffice in the instant rulemaking process. It is the finding of the undersigned ALJ that Florida Housing's ability to effectively review and approve requests for funding requires a broad range of approaches during the application process. The creation of devices such as the subject priority system would seem consistent with Florida Housing's general authority.

70. Assuming, arguendo, that the requisite rulemaking authority exists, there is also the question of whether the amendment proposed by Florida Housing "enlarges, modifies, or contravenes the specific provisions of law implemented" as set forth in Subsection 120.52(8)(b), Florida Statutes, or are arbitrary and capricious under Subsection 120.52(8)(e), Florida Statutes.

71. Petitioner logically argues that the authoritative language in Subsection 420.507(22)(h), Florida Statutes, refers to "all" applications. By limiting the number of applications that can be given priority consideration, Florida Housing's rule amendments may not effectively address all applications submitted. Rather, only Priority I applications are looked at for funding and, once all PI applications are addressed, then PII applications are considered. Failure to include all applications equally would be a modification or contravention of the underlying statute. Florida Housing demonstrated that all applications are being considered, but the priority system, just like the scoring system and the use of lottery numbers, categorizes the applications leaving some of them at the top of the list.

72. Considering again, arguendo, that the proposed changes do not modify or contravene the statute, the question still remains as to whether the changes are arbitrary and capricious,

in violation of Subsection 120.52(8)(e), Florida Statutes. If a proposed rule is "justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the [rule] is neither arbitrary nor capricious" within the meaning of Subsection 120.52(8), Florida Statutes. Dravo Basic Materials Company, Inc. v. State, Department of Transportation, 602 So. 2d 632, 634 (Fla. 2d DCA 1992).

73. Action taken by an agency that the Legislature has specifically authorized the agency to take is neither arbitrary nor capricious. See Florida Manufactured Housing Association, Inc. v. Department of Revenue, 642 So. 2d 626, 627 (Fla. 1st DCA 1994) (proposed rules that "add nothing whatsoever to the requirements of the law, but instead fit squarely within [the statute implemented]" are not arbitrary or capricious).

74. In the instant case, Florida Housing has created a rule which is intended to address a perceived flaw in existing rules. The new rule provisions, while arguably not the very best means of addressing the problem, fit squarely within the provisions of Subsection 420.507(22), Florida Statutes. Specifically, the rule amendments "establish, by rule, the procedure for evaluating, scoring, and competitively ranking all applications based on the criteria set forth in s. 420.5087(6)(c)."

75. The newly created provisions do limit the number of Priority I applications any one applicant may file. They do not, however, limit the total number of applications an entity may file, nor do they give any one applicant preference over another. Rather, the rule creates a system wherein all applications are encouraged to be complete and approvable. The potential for "gaming" the Universal Cycle process is greatly diminished by the new rule provisions.

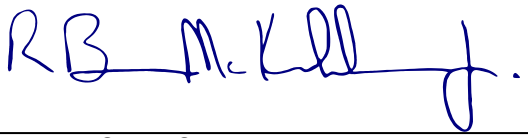
76. The proposed priority system certainly has an impact on some developers. Nonetheless, it is a clearly enunciated and logically-based system, all things taken into consideration. The rules, as amended, are within Florida Housing's delegated legislative authority, are not arbitrary and capricious, and do not contravene, expand or modify the underlying statute.

ORDER

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

ORDERED that Respondent, Florida Housing Finance Corporation's Proposed Rules 67-21.003 and 67-48.004, which propose to incorporate by reference the 2009 Universal Cycle Application Instructions, are not invalid exercises of delegated legislative authority.

DONE AND ORDERED this 14th day of July, 2009, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of July, 2009.

ENDNOTES

[1/] Verbatim from the parties' Joint Prehearing Stipulation.

[2/] Affordable housing is defined in Subsection 420.602(3), Florida Statutes, as:

> (a) With respect to a housing unit to be occupied by very-low-income persons, that monthly rents, or monthly mortgage payments including property taxes and insurance, do not exceed 30 percent of that amount which represents 50 percent of the median adjusted gross annual income for the households within the metropolitan statistical area (MSA) or, if not within an MSA, within the county in which the housing unit is located, divided by 12.
>
> (b) With respect to a housing unit to be occupied by low-income persons, that monthly rents, or monthly mortgage payments including taxes and insurance, do not exceed 30 percent of that amount which represents 80 percent of the median adjusted gross

annual income for the households within the metropolitan statistical area (MSA) or, if not within an MSA, within the county in which the housing unit is located, divided by 12.

(c) With respect to a housing unit to be occupied by moderate-income persons, that monthly rents, or monthly mortgage payments including taxes and insurance, do not exceed 30 percent of that amount which represents 120 percent of the median adjusted gross annual income for the households within the metropolitan statistical area (MSA) or, if not within an MSA, within the county in which the housing unit is located, divided by 12.

[3/] The developers euphemistically referred to themselves as "good application filler-outers" at that time.

[4/] SAUL is effectively one of the "tweaks" done by Florida Housing in a prior rule amendment process to address county groupings of applications. There is no specific statutory authority for creating a SAUL, but it is an accepted part of Florida Housing's review process.

[5/] The Florida Administrative Weekly notice concerning the rule amendments stated the following purpose and effect for the amendments: "[T]o encourage public-private partnerships to invest in residential housing; to stimulate the construction and rehabilitation of residential housing which in turn will stimulate the job market in the construction and related industries; and to increase and improve the supply of affordable housing in the State of Florida."

[6/] It is true that many applications did not meet threshold requirements, but that is not a definitive indicator of whether the ultimate application would be deficient.

[7/] To the extent allocation of funds relates to SAIL funds, those funds are not relevant in the current Universal Cycle and need not be considered as part of this Order.

[8/] Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2008 version.

COPIES FURNISHED:

F. Scott Boyd, Executive Director
and General Counsel
Joint Administrative Procedures Committee
120 Holland Building
Tallahassee, Florida 32399-1300

Liz Cloud, Program Administrator
Bureau of Administrative Code
Department of State
R.A. Gray Building, Suite 101
Tallahassee, Florida 32399-0250

Wellington Meffert, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

Sherry Green, Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole &
Bryant, P.A.
301 South Bronough Street, Fifth Floor
Post Office Box 1110
Tallahassee, Florida 32302-1110

Shaw P. Stiller, General Counsel
Department of Community Affairs
2555 Shumard Oak Boulevard
Tallahassee, Florida 32399-2100

Hugh R. Brown, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

J. Stephen Menton, Esquire
Rutledge, Ecenia, & Purnell, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32302

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

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 Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.