STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PASCO CWHIP PARTNERS, LLC, Petitioner, vs. FLORIDA HOUSING FINANCE CORPORATION, Respondent.	)	Case No. 09-3330
LEGACY POINTE, INC., Petitioner, vs. FLORIDA HOUSING FINANCE CORPORATION, Respondent.	)	Case No. 09-3332
VILLA CAPRI, INC., Petitioner, vs. FLORIDA HOUSING FINANCE CORPORATION, Respondent.	)	Case No. 09-3333
PRIME HOMEBUILDERS, Petitioner, vs. FLORIDA HOUSING FINANCE CORPORATION, Respondent.	)	Case Nos. 09-3334 09-3335 09-3336

MDG CAPITAL CORPORATION,	)	
Petitioner,	)	Case No. 09-4031
vs.	)	
FLORIDA HOUSING FINANCE CORPORATION,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on October 13-14, 2009, in Tallahassee, Florida.

APPEARANCES

For Petitioner Pasco CWHIP Partners, LLC:

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For Petitioners Legacy Pointe, Inc., Villa Capri, Inc., Prime Homebuilders, and MDG Capital Corp.:

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For Respondent: Hugh R. Brown, Deputy General Counsel
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STATEMENT OF THE ISSUES

The threshold issue in this case is whether the decisions giving rise to the dispute, which concern the allocation and disbursement of funds appropriated to Respondent by the legislature and thus involve the preparation or modification of the agency's budget, are subject to quasi-judicial adjudication under the Administrative Procedure Act. If the Division of Administrative Hearings were possessed of subject matter jurisdiction, then the issues would be whether Respondent is estopped from implementing its intended decisions to "de-obligate" itself from preliminary commitments to provide low-interest loans to several projects approved for funding under the Community Workforce Housing Innovation Pilot Program; and whether such intended decisions would constitute breaches of contract or otherwise be erroneous, arbitrary, capricious, or abuses of the agency's discretion.

PRELIMINARY STATEMENT

On December 31, 2007, Respondent Florida Housing Finance Corporation solicited applications from developers of low-cost housing who might be interested in obtaining low-interest loans through the Community Workforce Housing Innovation Program, which provides financial assistance to businesses that, through construction or rehabilitation, expand the stock of affordable housing. In response, Petitioners Pasco CWHIP Partners, LLC;

Legacy Pointe, Inc.; Villa Capri, Inc.; Prime Homebuilders; and MDG Capital Corporation, submitted applications for financing. Petitioners each had a project that, in due course, was selected for potential funding, and, on or about November 12, 2008, each of them received a preliminary commitment letter from Respondent.

In January 2009, the Florida Legislature de-appropriated $190 million from the funds previously allocated to Respondent, directing Respondent to return this sum to the state treasury on or before June 1, 2009. Respondent, in turn, modified its budget to account for this deep cut, which significantly reduced the amount of money that Respondent could disburse through the various programs it administers; in the process, Respondent decided that Petitioners' respective projects could not be funded. On April 24, 2009, Respondent notified each of the Petitioners that its project had been "de-obligated"——meaning that Respondent would have no further obligations under the preliminary commitments that had been given regarding financing for their projects.

Petitioners timely requested hearings. On June 17, 2009, Respondent forwarded the several cases to the Division of Administrative Hearings, where the undersigned consolidated them for further proceedings pursuant to Sections 120.569 and 120.57, Florida Statutes.

The final hearing took place on October 13-14, 2009. At the outset, the parties submitted a Pre-hearing Stipulation. Seven Joint Exhibits, numbered 1-7, were offered and received as well.

Petitioner Pasco CWHIP Partners, LLC, presented the testimony of its principal, Thomas E. Smith, and offered Exhibits 1–3, each of which was received into evidence without objection.

Petitioners Legacy Pointe, Inc., and Villa Capri, Inc., called Leon J. Wolfe as a witness. Mr. Wolfe was both a fact witness and an expert witness, offering opinions relating to affordable housing development in the State of Florida. In addition, these two Petitioners introduced six Exhibits apiece, numbered 1-6, all 12 of which were admitted without objection.

James Dupre, an employee of Prime Homebuilders, testified for this Petitioner, which also offered a total of 17 exhibits (numbered 1-7 for Village of Portofino Meadows, 1-5 for The Reserve at the Falls of Portofino, and 1-5 for Park Royale Residences at Portofino Springs, each of which is a separate housing development), all of them being received without objection.

Petitioner MDG Capital Corporation presented the testimony of its president, William J. Klohn, and moved its Exhibits 1-9 into evidence without objection.

In addition to the foregoing evidence, Petitioners called Jeffrey Sharkey, Ph.D., as an expert in the areas of affordable housing and funding of such housing under the Community Workforce Housing Innovation Program. Dr. Sharkey's hearing testimony was supplemented with the transcript of his deposition, which had been taken on October 8, 2009.

Respondent's Executive Director, Stephen Auger, testified on the agency's behalf. Respondent's Exhibits 1-9 were admitted into evidence as well.

The two-volume final hearing transcript was filed on October 29, 2009. The initial deadline for the parties to file Proposed Recommended Orders was November 18, 2009. That deadline was extended until December 3, 2009, on Petitioners' unopposed motion. On November 30, 2009, Petitioners filed a motion to abate this proceeding pending the outcome of a separate, but related, rule challenge. The undersigned declined to place the case in abeyance but further enlarged the deadline for the parties to file their respective Proposed Recommended Orders, to January 5, 2010. The parties timely filed their Proposed Recommended Orders, each of which was duly considered in the preparation of this Recommended Order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACT

1. Petitioners Pasco CWHIP Partners, LLC ("Pasco Partners"); Legacy Pointe, Inc. ("Legacy"); Villa Capri, Inc. ("Villa Capri"); Prime Homebuilders ("Prime"); and MDG Capital Corporation ("MDG") (collectively, "Petitioners"), are Florida corporations authorized to do business in Florida. Each is a developer whose business activities include building affordable housing.

2. The Florida Housing Finance Corporation ("FHFC") is a public corporation organized under Chapter 420, Florida Statutes, to implement and administer various affordable housing programs, including the Community Workforce Housing Innovation Pilot Program ("CWHIP").

3. The Florida Legislature created CWHIP in 2006 to subsidize the cost of housing for lower income workers performing "essential services." Under CWHIP, FHFC is authorized to lend up to $5 million to a developer for the construction or rehabilitation of housing in an eligible area for essential services personnel. Because construction costs for workforce housing developments typically exceed $5 million, developers usually must obtain additional funding from sources other than CWHIP to cover their remaining development costs.

4. In 2007, the legislature appropriated $62.4 million for CWHIP and authorized FHFC to allocate these funds on a

competitive basis to "public-private" partnerships seeking to build affordable housing for essential services personnel.[1]

5. On December 31, 2007, FHFC began soliciting applications for participation in CWHIP. Petitioners submitted their respective applications to FHFC on or around January 29, 2008. FHFC reviewed the applications and graded each of them on a point scale under which a maximum of 200 points per application were available; preliminary scores and comments were released on March 4, 2008. FHFC thereafter provided applicants the opportunity to cure any deficiencies in their applications and thereby improve their scores. Petitioners submitted revised applications on or around April 18, 2008.

6. FHFC evaluated the revised applications and determined each applicant's final score. The applications were then ranked, from highest to lowest score. The top-ranked applicant was first in line to be offered the chance to take out a CWHIP loan, followed by the others in descending order to the extent of available funds. Applicants who ranked below the cut-off for potential funding were placed on a wait list. If, as sometimes happens, an applicant in line for funding were to withdraw from CWHIP or fail for some other reason to complete the process leading to the disbursement of loan proceeds, the highest-ranked applicant on the wait list would "move up" to the "funded list."

7. FHFC issued the final scores and ranking of applicants in early May 2006. Petitioners each had a project that made the cut for potential CWHIP funding.[2]

8. Some developers challenged the scoring of applications, and the ensuing administrative proceedings slowed the award process. This administrative litigation ended on or around November 6, 2008, after the parties agreed upon a settlement of the dispute.

9. On or about November 12, 2008, FHFC issued preliminary commitment letters offering low-interest CWHIP loans to Pasco Partners, Legacy, Villa Capri, Prime (for its Village at Portofino Meadows project), and MDG. Each preliminary commitment was contingent upon:

> 1. Borrower and Development meeting all requirements of Rule Chapter 67-58, FAC, and all other applicable state and FHFC requirements; and
>
> 2. A positive credit underwriting recommendation; and
>
> 3. Final approval of the credit underwriting report by the Florida Housing Board of Directors.

10. These commitment letters constituted the necessary approval for each of the Petitioners to move forward in credit underwriting, which is the process whereby underwriters whom FHFC retains under contract verify the accuracy of the information contained in an applicant's application and examine

such materials as market studies, engineering reports, business records, and pro forma financial statements to determine the project's likelihood of success.

11. Once a credit underwriter completes his analysis of an applicant's project, the underwriter submits a draft report and recommendation to FHFC, which, in turn, forwards a copy of the draft report and recommendation to the applicant. Both the applicant and FHFC then have an opportunity to submit comments regarding the draft report and recommendation to the credit underwriter. After that, the credit underwriter revises the draft if he is so inclined and issues a final report and recommendation to FHFC. Upon receipt of the credit underwriter's final report and recommendation, FHFC forwards the document to its Board of Directors for approval.

12. Of the approximately 1,200 projects that have undergone credit underwriting for the purpose of receiving funding through FHFC, all but a few have received a favorable recommendation from the underwriter and ultimately been approved for funding. Occasionally a developer will withdraw its application if problems arise during underwriting, but even this is, historically speaking, a relatively uncommon outcome. Thus, upon receiving their respective preliminary commitment letters, Petitioners could reasonably anticipate, based on FHFC's past performance, that their projects, in the end, would receive

CWHIP financing, notwithstanding the contingencies that remained to be satisfied.

13. There is no persuasive evidence, however, that FHFC promised Petitioners, as they allege, either that the credit underwriting process would never be interrupted, or that CWHIP financing would necessarily be available for those developers whose projects successfully completed underwriting. While Petitioners, respectively, expended money and time as credit underwriting proceeded, the reasonable inference, which the undersigned draws, is that they incurred such costs, not in reliance upon any false promises or material misrepresentations allegedly made by FHFC, but rather because a favorable credit underwriting recommendation was a necessary (though not sufficient) condition of being awarded a firm loan commitment.

14. On January 15, 2009, the Florida Legislature, meeting in Special Session, enacted legislation designed to close a revenue shortfall in the budget for the 2008-2009 fiscal year. Among the cuts that the legislature made to balance the budget was the following:

> The unexpended balance of funds appropriated by the Legislature to the Florida Housing Finance Corporation in the amount of $190,000,000 shall be returned to the State treasury for deposit into the General Revenue Fund before June 1, 2009.
>
> In order to implement this section, and to the maximum extent feasible, the Florida

> Housing Finance Corporation shall first reduce unexpended funds allocated by the corporation that increase new housing construction.

2009 Fla. Laws ch. 2009-1 § 47. Because the legislature chose not to make targeted cuts affecting specific programs, it fell to FHFC would to decide which individual projects would lose funding, and which would not.

15. The legislative mandate created a constant-sum situation concerning FHFC's budget, meaning that, regardless of how FHFC decided to reallocate the funds which remained at its disposal, all of the cuts to individual programs needed to total $190 million in the aggregate. Thus, deeper cuts to Program A would leave more money for other programs, while sparing Program B would require greater losses for other programs. In light of this situation, FHFC could not make a decision regarding one program, such as CWHIP, without considering the effect of that decision on all the other programs in FHFC's portfolio: a cut (or not) here affected what could be done there. The legislative de-appropriation of funds then in FHFC's hands required, in short, that FHFC modify its entire budget to account for the loss.

16. To enable FHFC to return $190 million to the state treasury, the legislature directed that FHFC adopt emergency rules pursuant to the following grant of authority:

> In order to ensure that the funds transferred by [special appropriations legislation] are available, the Florida Housing Finance Corporation shall adopt emergency rules pursuant to s. 120.54, Florida Statutes. The Legislature finds that emergency rules adopted pursuant to this section meet the health, safety, and welfare requirements of s. 120.54(4), Florida Statutes. The Legislature finds that such emergency rulemaking power is necessitated by the immediate danger to the preservation of the rights and welfare of the people and is immediately necessary in order to implement the action of the Legislature to address the revenue shortfall of the 2008-2009 fiscal year. Therefore, in adopting such emergency rules, the corporation need not publish the facts, reasons, and findings required by s. 120.54(4)(a)3., Florida Statutes. Emergency rules adopted under this section are exempt from s. 120.54(4)(c), Florida Statutes, and shall remain in effect for 180 days.

2009 Fla. Laws ch. 2009-2 § 12.

17. The governor signed the special appropriations bills into law on January 27, 2009. At that time, FHFC began the process of promulgating emergency rules. FHFC also informed its underwriters that FHFC's board would not consider any credit underwriting reports at its March 2009 board meeting. Although FHFC did not instruct the underwriters to stop evaluating Petitioners' projects, the looming reductions in allocations, coupled with the board's decision to suspend the review of credit reports, effectively (and not surprisingly) brought credit underwriting to a standstill.

18. Petitioners contend that FHFC deliberately intervened in the credit underwriting process for the purpose of preventing Petitioners from satisfying the conditions of their preliminary commitment letters, so that their projects, lacking firm loan commitments, would be low-hanging fruit when the time came for picking the deals that would not receive funding due to FHFC's obligation to return $190 million to the state treasury. The evidence, however, does not support a finding to this effect. The decision of FHFC's board to postpone the review of new credit underwriting reports while emergency rules for drastically reducing allocations were being drafted was not intended, the undersigned infers, to prejudice Petitioners, but to preserve the status quo ante pending the modification of FHFC's budget in accordance with the legislative mandate. Indeed, given that FHFC faced the imminent prospect of involuntarily relinquishing approximately 40 percent of the funds then available for allocation to the various programs under FHFC's jurisdiction, it would have been imprudent to proceed at full speed with credit underwriting for projects in the pipeline, as if nothing had changed.

19. At its March 13, 2009, meeting, FHFC's board adopted Emergency Rules 67ER09-1 through 67ER09-5, Florida Administrative Code (the "Emergency Rules"), whose stated purpose was "to establish procedures by which [FHFC would] de-

obligate the unexpended balance of funds [previously] appropriated by the Legislature . . . ."

20. As used in the Emergency Rules, the term "unexpended" referred, among other things, to funds previously awarded that, "as of January 27, 2009, [had] not been previously withdrawn or de-obligated . . . and [for which] the Applicant [did] not have a Valid Firm Commitment and loan closing [had] not yet occurred." See Fla. Admin. Code R. 67ER09-2(29).

21. The term "Valid Firm Commitment" was defined in the Emergency Rules to mean:

> a commitment issued by the [FHFC] to an Applicant following the Board's approval of the credit underwriting report for the Applicant's proposed Development which has been accepted by the Applicant and subsequent to such acceptance there have been no material, adverse changes in the financing, condition, structure or ownership of the Applicant or the proposed Development, or in any information provided to the [FHFC] or its Credit Underwriter with respect to the Applicant or the proposed Development.

See Fla. Admin. Code R. 67ER09-2(33).

22. There is no dispute concerning that fact that, as of January 27, 2009, none of the Petitioners had received a valid firm commitment or closed a loan transaction. There is, accordingly, no dispute regarding the fact that the funds which FHFC had committed preliminarily to lend Petitioners in connection with their respective developments constituted

"unexpended" funds under the pertinent (and undisputed) provisions of the Emergency Rules, which were quoted above.

23. In the Emergency Rules, FHFC set forth its decisions regarding the reallocation of funds at its disposal. Pertinent to this case are the following provisions:

> To facilitate the transfer and return of the appropriated funding, as required by [the special appropriations bills], the [FHFC] shall:
>
> * * *
>
> (5) Return $190,000,000 to the Treasury of the State of Florida, as required by [law]. . . . The [FHFC] shall de-obligate Unexpended Funding from the following Corporation programs, in the following order, until such dollar amount is reached:
>
> a) All Developments awarded CWHIP Program funding, except for [a few projects not at issue here.]
>
> * * *

See Fla. Admin. Code R. 67ER09-3.

24. On April 24, 2009, FHFC gave written notice to each of the Petitioners that FHFC was "de-obligating" itself from the preliminary commitments that had been made concerning their respective CWHIP developments.

25. On or about June 1, 2009, FHFC returned the de-appropriated funds, a sum of $190 million, to the state treasury. As a result of the required modification of FHFC's budget, 47 deals lost funding, including 16 CWHIP developments

to which $83.6 million had been preliminarily committed for new housing construction.

CONCLUSIONS OF LAW

26. Petitioners seek a final order directing that their projects be funded or, alternatively, that FHFC reconsider, pursuant to a to different methodology from that set forth in the Emergency Rules, whether to deprive the CWHIP program of funds that were preliminarily committed to it——directing, in other words, that FHFC modify its budget (again). Such a remedy is not available under the Florida Administrative Procedure Act ("APA"). For the reasons that follow, FHFC's budgetary decisions do not constitute "agency action." The Division of Administrative Hearings ("DOAH") therefore lacks subject matter jurisdiction in this proceeding.

27. The rationale behind the foregoing conclusion starts with some fundamental principles of administrative law. A formal administrative hearing must be offered when an agency intends to determine the substantial interests of a party. See § 120.569(1), Fla. Stat. Such a proceeding concludes when the agency issues a "final order." See § 120.57(1)(l), Fla. Stat. The final order constitutes final "agency action" and is judicially reviewable. See § 120.68(1), Fla. Stat.

28. The term "agency action" is defined in the APA to mean "the whole or part of a rule or order, or the equivalent

[thereof]." § 120.52(2), Fla. Stat. That which is neither a rule nor an order is, accordingly, something *other than* an agency action.

29. As used in the APA, the term "final order" means

> a written final decision which results from a proceeding under s. 120.56, s.120.565, s. 120.569, s. 120.57, s. 120.573, or s. 120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form.

§ 120.52(7), Fla. Stat. (emphasis added). Thus, a rule is not an order, and neither is a decision that falls within an exception to the definition of a rule. A decision that is categorically excluded from the definition of a rule is, for that very reason, neither a rule nor an order[3] and thus is not an agency action under the APA (unlike a rule, which is). Such a decision will hereafter be called an *exempt decision*, which, to be clear, is not a term used in the APA.

30. Section 120.52(16), Florida Statutes, provides as follows:

> "Rule" means each 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. The term does not include:
> (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
> (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
> (c) The preparation or modification of:
> 1. Agency budgets.
> 2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
> 3. Contractual provisions reached as a result of collective bargaining.
> 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

(Emphasis added.) Under the plain language of this statute, a decision respecting the preparation or modification of an agency's budget falls within a categorical exception to the definition of the term "rule." Such a decision therefore is an exempt decision.

31. The purpose of a proceeding under Sections 120.569 and 120.57 is to "formulate final agency action, not to review action taken earlier and preliminarily." McDonald v. Department of Banking & Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). Final agency action ultimately must take the form of a final

order. Mitchell v. Leon County School Bd., 591 So. 2d 1032, 1033 (Fla. 1st DCA 1991)("[A]n agency decision which determines the substantial interests of a party must be made through the provisions of section 120.57, Florida Statutes, and culminate in a final order."); McDonald, 346 So. 2d at 577 ("[A]ll agency action, on appropriate challenge, will mature into an order impressed with characteristics of the APA's Section 120.57."). Because an exempt decision never ripens into a final order, there is no administrative remedy to be had under the APA by a person who claims that the exempt decision determines his substantial interests.

32. In this instance, the decisions that FHFC made in response to the de-appropriation of $190 million from its funds, including the decisions relating to the de-obligation of Petitioners' projects, involved the modification of the agency's budget. Petitioners do not have an administrative remedy under Sections 120.569 and 120.57 concerning these exempt decisions: there is simply no agency action to be formulated here. Cf. Hill v. Monroe County, 581 So. 2d 225, 226 (Fla. 3d DCA 1991)(The APA "only applies where a challenge is made to a State agency action.").[4]

33. The conclusion that FHFC's budgetary decisions are not subject to quasi-judicial adjudication is consistent with, if not compelled by, the holding in Palm Beach County Classroom

Teachers Ass'n v. School Board of Palm Beach County, 406 So. 2d 1208 (Fla. 4th DCA 1981). In that case, the legislature recently had appropriated to various county school boards additional funds pursuant to a Supplemental Appropriations Act ("SAA"). A proviso in the SAA instructed that priority was to be given, when deciding how to spend the funds, to increasing salaries for teachers. No doubt encouraged by this, the teachers' union in one county sought to renegotiate teachers' pay with the local school board. The school board, however, refused to bargain. The union then requested a hearing under Section 120.57 to determine the priority for allocation of the funds appropriated under the SAA. The school board entered a final order denying the union's request for hearing. Id. at 1209.

34. The court affirmed the order. Its decision comprised two pertinent sentences:

> [W]e hold that the allocation and disbursement of the funds received through the SAA involves the modification of the agency's budget which entails neither rule making nor an order within the meaning of those terms as set forth in Section 120.52, Florida Statutes (1980). There was, therefore, no necessity for the Board to provide [the union] with a hearing required by Section 120.57.

Id. at 1210.

35. This case is, in some respects, the mirror image of Classroom Teachers. Here, the legislative act that got the ball rolling was a special *de*-appropriation, rather than a supplemental appropriation as in Classroom Teachers, and Petitioners seek to establish their priority in the allocation of the *limited funds remaining* to the agency, whereas the union had sought priority in the allocation of *additional funds recently received* by the agency. In each case, however, the agency decision that was alleged to be determinative of the substantial interests of persons who sought to obtain a financial benefit from the agency entailed the allocation and disbursement of funds committed to the agency for expenditure. In each case, the subject decision necessarily involved the modification of the agency's budget——a decision that was neither a rule nor an order in APA terms. In this case, therefore, just as in Classroom Teachers, Sections 120.569 and 120.57, Florida Statutes, do not afford a remedy.

36. Because the school board had denied the union's request for hearing, the court in Classroom Teachers needed only to decide whether the school board was *required* to provide a Section 120.57 hearing. In contrast, FHFC granted Petitioners' requests for hearing. Thus, it is necessary here to decide whether FHFC is *authorized* to provide Petitioners a Section 120.57 hearing. While the Classroom Teachers court stopped

short of ruling explicitly that the school board was without jurisdiction to afford a hearing, such a conclusion, as will be explained, follows logically from the court's ruling that there was no necessity for the school board to provide the hearing that Section 120.57 requires when an agency determines a party's substantial interests.

37. In thinking about where Classroom Teachers logically leads, a good place to start is with this observation: the school board was not obligated to provide a Section 120.57 hearing because modifying its budget did not entail the issuance of a final order, which means that it was likewise under no duty——as agencies determining substantial interests pursuant to the APA otherwise are *even when a hearing is not required*——to take final agency action in the form of a final order. See United Water Fla., Inc. v. Public Serv. Comm'n, 728 So. 2d 1250, 1250-51 (Fla. 1st DCA 1999)(agency must issue final order to effectuate agency action determining substantial interests, even where no hearing was requested). Necessarily implicit in the court's holding that the school board did not need to give the union a Section 120.57 hearing, therefore, was the notion that the board's non-rule, non-order determinations regarding the allocation and disbursement of funds were *already final and effective*——and that they had attained such finality without the board's ever having had to expose them to an adversarial

adjudicative process. In other words, the school board had the *power to take effective, final action* on its budget, regardless of whether it had offered anyone whose substantial interests might be determined by the budget an opportunity for a hearing under Section 120.57.

38. This would not have been true if the school board were determining, in a quasi-judicial capacity, the substantial interests of persons having a stake in the allocation of the school board's funds. See Mitchell v. Leon County School Bd., 591 So. 2d 1032, 1033 (Fla. 1st DCA 1991)(student whom school board had voted to expel would not be expelled, and thus could still attend classes, until school board properly rendered a final order). About such determinations, the law is that "[u]ntil proceedings are had satisfying section 120.57, or an opportunity for them is clearly offered and waived, there can be no agency action affecting the substantial interests of a person." Florida League of Cities, Inc. v. State of Florida, Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). Indeed, an agency must give any person whose substantial interests are being determined a clear point of entry into the administrative process, and thereafter provide such person a Section 120.57 hearing if he timely requests one, or else "the agency is without power to act." Id. at 415; Capeletti Bros., Inc. v. State, Department of Transportation, 362 So. 2d 346, 349

(Fla. 1st DCA 1978), cert. den., State, Department of Transportation v. Capeletti Bros., Inc., 368 So. 2d 1374 (Fla. 1979). Thus, because in Classroom Teachers the school board was found to be *not* required to provide a hearing——and therefore also under no duty to give a clear point of entry——the conclusion is inescapable that the power being exercised there was not quasi-judicial in nature.

39. This conclusion is implicitly behind the decision in Classroom Teachers, and is, in any event, amply supported by the plain language of the APA. By excluding decisions involving the preparation or modification of agency budgets from the definitions of the terms "rule" and "order" and defining "agency action" as rules and orders (and their respective equivalents)[5], the legislature deliberately removed such decisions from the quasi-judicial administrative processes established in the APA. Plainly, the legislature intended that budgetary decisions *not* be the subject of quasi-judicial adjudication under Sections 120.569 and 120.57, Florida Statutes. Based on the statutory language and the Classroom Teachers decision, the undersigned concludes that an agency, in making decisions involving its budget, is authorized to act in a quasi-legislative capacity,[6] rendering determinations that not only (a) have immediate finality, i.e. are not preceded by preliminary or proposed agency action; but also (b) are not judicially reviewable

(unlike final agency action) pursuant to Section 120.68, Florida Statutes.[7]

40. But, one might still ask, could not an agency afford a Section 120.57 hearing to a disappointed seeker of the agency's favor in regard to the disbursement of funds, not because a hearing was *necessary*, and notwithstanding the absence of "agency action," but simply because the agency felt that an adjudicative process would be beneficial? The answer, the undersigned concludes, is *no*. This is because an agency, being a creature of statute, can do only what the legislature has authorized it to do. E.g., Ocampo v. Dep't of Health, 806 So. 2d 633, 634 (Fla. 1st DCA 2002). The legislature has authorized and required agencies to conduct Section 120.57 proceedings when they exercise quasi-judicial power in determining substantial interests.[8] The legislature has not required or authorized agencies to conduct Section 120.57 proceedings in connection with the exercise of other powers. In removing budgetary decisions from the APA's adjudicative processes, the legislature gave agencies greater freedom to act in a quasi-legislative capacity in this particular area; at the same time, however, the legislature took away the agencies' power to *adjudicate* budgetary matters.[9] Lacking such quasi-judicial authority over this particular subject, an agency cannot voluntarily accede to administrative litigation, however laudable its intentions,

where the dispute stems from the preparation or modification of its budget.[10]

41. Here is another way to look at this issue: If an agency, on its own authority, were to provide a Section 120.57 hearing in connection with a decision that is not within the range of agency actions subject to administrative adjudication under the APA, then that agency would be expanding its quasi-judicial jurisdiction and creating a new administrative remedy. This is impermissible, as the Florida Supreme Court held in Redford v. Department of Revenue, 478 So. 2d 808 (Fla. 1985). There, a county property appraisal adjustment board, acting on its own volition, held hearings to determine whether certain properties were entitled to tax exemptions, after the appraiser had denied such exemptions. Id. at 810. Following the hearings, the board determined, contrary to the appraiser's decisions, that the properties were exempt. Id.

42. The Supreme Court held that the board had acted without authority. It explained:

> Under [one statute], the board may hear appeals from taxpayers on exemptions which the appraiser has denied and, under [another statute], may review on its own volition or the motion of the appraiser any exemptions which have been granted. However, there is no provision in law for the board on its own volition to review decisions of the appraiser *not* to grant exemptions.

Id. The board, in sum, did not have jurisdiction to exercise quasi-judicial power over an appraiser's decision to deny an exemption unless the taxpayer complained, which had not happened in that case. By electing to adjudicate a matter over which the law gave the board no authority, the board unlawfully had enlarged its own jurisdiction. Id.

43. For the reasons set forth above, the undersigned concludes that FHFC does not have jurisdiction to adjudicate the instant dispute, which is not hearable in a Section 120.57 proceeding, and therefore DOAH lacks jurisdiction as well. See South County Mental Health Center v. Department of Health & Rehabilitative Services, DOAH Case No. 89-6088, 1990 Fla. Div. Adm. Hear. LEXIS 6252, *23 (Recommended Order Mar. 28, 1990)(DOAH "lacks jurisdiction over this dispute. The preparation, modification or allocation of agency budgets are [sic] not reviewable in Section 120.57(1) substantial interests proceedings. The legislative definitions of the terms 'rule' and 'order', when read together, exempt the budgeting issues [presented here] from administrative challenge.").

44. In reaching the foregoing conclusion, the undersigned has not forgotten that the legislature empowered and directed FHFC to promulgate emergency rules as a means of ensuring that the de-appropriated funds would be available for return to the state treasury, and that FHFC complied, adopting the Emergency

Rules. This factual wrinkle distinguishes the case at hand from Classroom Teachers and South County Mental Health Center. It does not, however, make a difference.

45. The legislative directive to make emergency rules had the effect of requiring FHFC to adopt in rule form decisions respecting the modification of its budget that otherwise would *not* have been the proper subject of a rule. See § 120.52(16)(c), Fla. Stat. Thus, the Emergency Rules, which involved or governed the preparation or modification of an agency's budget, were *not* "excepted" from the definition of a rule only because of the specific enactment authorizing and requiring their adoption; the Emergency Rules were *within* the definition of a rule, however, only as far as they went.

46. In creating this singular exception to the exception for budgetary decisions that otherwise would have excluded FHFC's budgetary decisions from the definition of a rule, the legislature——perhaps as an unintended consequence——gave persons substantially affected by the emergency rules an administrative remedy, namely a rule challenge. See § 120.56(5), Fla. Stat.[11] A rule challenge was, however, the *only* administrative remedy available to persons whose interests were affected by the modification of FHFC's budget in consequence of the $190 million de-appropriation.[12]

47. This is because, to the extent FHFC's decisions concerning the modification of its budget were set forth in the Emergency Rules, such decisions were, obviously, *rules* and thus not orders, as rules and orders are mutually exclusive items. See § 120.52(7), Fla. Stat. The administrative remedies associated with rules, on the one hand, and orders, on the other, are different. A "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." See § 120.56(1)(a), Fla. Stat. In contrast, proceedings under Sections 120.569 and 120.57 are available when an agency, by order, determines a party's substantial interests. The object of the proceeding is not to determine the validity of a rule, as in a proceeding brought under Section 120.56, but to adjudicate that party's substantial interests, based on the application of law to a specific set of facts.

48. Rule challenges, in short, are not proceedings to determine substantial interests under Sections 120.569 and 120.57, Florida Statutes, although they are conducted in like fashion, and substantial interests proceedings are not rule challenges. There is no question that a person substantially affected by the Emergency Rules could have sought an administrative determination that the Emergency Rules, or some

provisions thereof, were invalid. That he could bring such a rule challenge, however, does not mean that he was also entitled to have his substantial interests determined in a Section 120.57 proceeding.

49. In this instance, to the extent FHFC's decisions concerning the modification of its budget were *not* set forth in the Emergency Rules, or were made *pursuant to* the rules, such decisions were *not* rules (because they fell within an exception to the definition of a rule), and they were not orders either (because they fell within an exception to the definition of a final order). Nothing in the legislation authorizing the adoption of the Emergency Rules suggests that the legislature enabled (or intended for) FHFC to issue a final order on its budget or on any part thereof.

50. In sum, to the extent FHFC's budgetary decisions were expressed in the Emergency Rules, such decisions constituted an exercise of quasi-legislative authority subject to administrative review only pursuant to Section 120.56, Florida Statutes. To the extent FHFC's budgetary decisions were not expressed in the Emergency Rules, such decisions constitute exempt decisions and do not give rise to proceedings under Sections 120.569 and 120.57, Florida Statutes, for the reasons discussed at length above.

51. Although it is arguably improper to do so in light of the conclusion that DOAH has no jurisdiction over this proceeding, the undersigned will briefly summarize the conclusions he would have reached on the merits of the principal issues, not as alternative grounds for the disposition of this case, but out of respect for parties, who might reasonably be interested to know how the undersigned responded to their respective arguments, which were ably presented on all sides.

52. In challenging FHFC's decisions to eliminate funding for their CWHIP projects, Petitioners have not alleged that FHFC failed to follow the Emergency Rules or misapplied them based on, for example, a misunderstanding about the material facts. Petitioners effectively concede, in other words, that the Emergency Rules required FHFC to de-obligate itself from offering financing for their CWHIP projects. Petitioners' position is that FHFC cannot rely upon the Emergency Rules in taking final agency action in this proceeding because the Emergency Rules have expired.

53. The limited lifespan of the Emergency Rules does indeed provide room for argument concerning the applicable law. Under the enabling statute, the Emergency Rules remained in effect for 180 days——from March 13, 2009, until September 9, 2009.[13] For purposes of this case, then, time can be divided into three relevant periods: the period before the Emergency

Rules came into being ("Period 1"); the period during which the Emergency Rules were effective ("Period 2"); and the period after the Emergency Rules expired ("Period 3"). Events underlying the instant litigation plainly took place in Periods 1 and 2 and arguably occurred (or might occur later) during Period 3.

54. Given this state of affairs, the question which arises is: What event triggers the reallocation procedures under the Emergency Rules? Cf. Hemmerle v. Bramalea, Inc., 574 So. 2d 203, 204 (Fla. 4th DCA 1989)(operative event which triggers statutory remedy occurs when respective rights and duties of the parties are aligned according to the statutory requirements). If the operative event were within Period 2, then the Emergency Rules would govern FHFC's decision not to fund Petitioners' projects, even though such rules have since expired.[14] On the other hand, if the operative event were within Period 1 or Period 3, then the Emergency Rules would be inapplicable because they can neither be given retrospective application (to an operative event in Period 1) nor be applied beyond their expiration date (to an operative event in Period 3).

55. Petitioners maintain that final agency action is the operative event; that is, that the law in effect at the time the final order is entered will control the decision to de-obligate Petitioners' projects. Because final agency action presumably

would take place in Period 3, Petitioners argue that the Emergency Rules, having expired, cannot be applicable, and that, consequently, FHFC must look elsewhere for authority to de-obligate the CWHIP projects at issue.

56. FHFC agrees that Petitioners have a point and even concedes that Petitioners would be correct in most cases——just not in this one, which FHFC believes is "unique," "unusual," and "unprecedented" and merits special consideration. FHFC contends that the operative event occurred on or about April 24, 2009, in Period 2, when FHFC notified Petitioners of its preliminary or intended decisions to de-obligate their respective projects, giving each of the Petitioners a clear point of entry into formal administrative proceedings. If the putative preliminary agency actions constituted the operative event, then the Emergency Rules would apply here.

57. The undersigned invited the parties to explore, in their Proposed Recommended Orders, another possibility, namely that the operative event was FHFC's return of $190 million to the state treasury, which occurred on June 1, 2009, during Period 2. The parties unanimously rejected this alternative on the grounds that FHFC's return of the money in obedience to the legislature's command was not an "agency action" uniquely affecting Petitioners' substantial interests, but rather a ministerial act unrelated to a particular person or entity.

58. Though seemingly exclusive, the three alternatives, ironically, merge to inform what the undersigned believes is the correct view of the operative event. FHFC is correct that this case is unusual, though the undersigned would not call it unique or unprecedented. The case is unusual because the dispute arises from agency decisions that are exempt from the APA's adjudicative processes. Thus, as in Classroom Teachers and South County Mental Health Center, the agency here was authorized to take effective, *final* action on its budget without giving a clear point of entry or providing a Section 120.57 hearing to persons whose substantial interests would be determined by the constituent decisions regarding which programs to fund, and which to cut.

59. Because FHFC's decisions comprising the modification of its budget were final when taken, the law governing those decisions was the law in effect when they were made. This is consistent with Petitioners' position (with which FHFC is in general agreement) that the applicable law ordinarily should be the law in effect at the time of the final decision. Although Petitioners took this position on the mistaken premise that the decisions would not be final until the entry of a final order, the fundamental principle involved is correct. See Agency for Health Care Administration v. Mount Sinai Medical Center of Greater Miami, 690 So. 2d 689, 692-93 (Fla. 1st DCA

1997)(general rule is that an agency deciding how to allocate, between competing applicants, a pool of limited resources at its disposal must apply the law in effect at time of final decision).

60. As far as when, exactly, FHFC's budget was modified, that is arguably open to interpretation. The undersigned, however, is convinced, based on the evidence, that FHFC did not modify its budget *before* the Emergency Rules went into effect, and that the modified budget was in place *no later* than June 1, 2009, when FHFC returned the de-appropriated funds to the state treasury. No matter what, therefore, the operative event occurred during Period 2, when the Emergency Rules were in effect.

61. Consequently, the undersigned would conclude, if DOAH had jurisdiction in this matter, that the Emergency Rules controlled FHFC's constituent decisions regarding the modification of its budget in response to the de-appropriation for fiscal year 2008-2009. Because FHFC acted in accordance with the Emergency Rules in de-obligating Petitioners' projects, the undersigned would conclude that FHFC did not err or otherwise act contrary to law in making the decisions under challenge. None of the evidence presented, moreover, would persuade the undersigned to recommend that FHFC revisit its

budget and reconsider whether to restore funding to the CWHIP projects in question.

62. The remaining issues can be dealt with in summary fashion. Petitioners assert that FHFC is equitably estopped from de-obligating itself from the CWHIP loans for which Petitioners received preliminary commitment letters. This is a difficult claim to establish. "As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances." State Dep't of Revenue v. Anderson, 403 So. 2d 397, 400 (Fla. 1981). As one court explained,

> [t]he cases in which this doctrine [of equitable estoppel] has been applied against a government agency involve potentially severe economic consequences to the person who relied on a government agent's misstatement of fact, or situations in which the conduct of the government was unbearably egregious -- "a classic example of bureaucratic ineptitude and indifference" coupled with a supremely adverse affect on an innocent citizen.

Sutron Corp. v. Lake County Water Auth., 870 So. 2d 930, 933-34 (Fla. 5th DCA 2004)(footnotes omitted).

63. In addition to exceptional circumstances, the following elements must be proved to estop the state from contradicting a prior position:

> 1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that

> representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon.

Anderson, 403 So. 2d at 400.

64. The undersigned would conclude that Petitioners failed to demonstrate that FHFC ever made any representation of material fact that is contrary to its current position in regard to the de-obligation of the CWHIP projects. He would, in fact, go farther: FHFC never changed its position regarding these projects. Rather, the legislature changed its mind regarding the amount of revenue FHFC should have at its disposal. Faced with an unforeseen change in material circumstances, which was beyond its control, FHFC did the best it could both to comply with the legislature's directives and to adapt to the new fiscal reality of a depleted budget.

65. There is, moreover, nothing exceptional about this situation. To the contrary, what has happened here is increasingly commonplace as governments, including the State of Florida, struggle with the economic downturn that was underway at the time the legislature de-appropriated $190 million from FHFC and subsists as of this writing. While the de-obligation no doubt has caused Petitioners economic hardship, they join the swelling ranks of those whom the state, due to the declining balance in the fisc, can no longer afford to pay as before.

66. It would be concluded, therefore, that FHFC is not estopped from de-obligating Petitioners' projects.

67. Finally, Petitioners allege that FHFC has breached its contracts with them. It is axiomatic that the only subjects which "an agency may hear and determine [are those] within the framework of the powers conferred upon the agency." Vincent J. Fasano, Inc. v. School Bd. of Palm Beach, County, Fla., 436 So. 2d 201, 203 (Fla. 4th DCA 1983). In Fasano, the court, observing that contractual disputes are traditionally resolved in actions at law, held that a claim for "breach of contract is ordinarily a matter for judicial rather than administrative or quasi-judicial consideration." Id. at 202-03. The court found further that the agency in question, a district school board, possessed no authority to adjudicate claims arising under contracts for goods or services to which it was a party. Id. at 203. Thus, the court held that the final order under review——in which the school board had refused to award damages to a contractor seeking recovery on a construction contract——was a "nullity" and "of no force and effect," leaving the contractor "at liberty to pursue his cause of action in the appropriate judicial forum." Id.; cf. Fleischman v. Department of Professional Regulation, 441 So. 2d 1121, 1122-23 (Fla. 3d DCA 1983)("It is well-settled . . . that, absent clear legislative

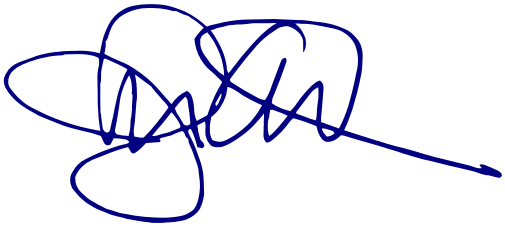
authorization to the contrary, violations of mere contractual rights are concerns only of the courts . . . .").

68. The undersigned would conclude that Petitioners' claims for breach of contract must be brought in the appropriate judicial forum; they are not cognizable here.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that FHFC enter a Final Order dismissing these consolidated cases for lack of jurisdiction.

DONE AND ENTERED this 18th day of February, 2010, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 18th day of February, 2010.

ENDNOTES

[1]/ In this context, a "public-private" partnership is a business venture in which a private sector entity, such as a developer, joins forces with a public body such as a city, county, or school board, for purposes of planning, promoting, and constructing an affordable housing project.

[2]/ Two of Prime's proposed developments were not given preliminary commitments but instead were placed on the wait list, namely The Reserve at the Falls of Portofino and Park Royale Residences at Portofino Springs.

[3]/ The definitional requirement that a decision, to be an order, must be "not excepted from the definition of a rule" means that the exceptions to the definition of a rule are also exceptions to the definition of a final order.

[4]/ To be sure, FHFC's modification of its budget was an action of the agency; it was not, however, "agency action" as the APA defines the term.

[5]/ Because budgetary decisions are expressly excluded both from the definition of a rule and from the definition of an order; and because, therefore, such decisions are, by definition, *not* rules or orders, the undersigned concludes that a decision involving the preparation or modification of an agency's budget cannot be considered the "equivalent" of a rule or order, for that would seriously undermine, if not nullify, the clear statutory exception.

[6]/ The power to appropriate state funds is quintessentially a legislative function, as is the power to reduce appropriations. Chiles v. Children, 589 So. 2d 260, 265 (Fla. 1991).

[7]/ If, in Classroom Teachers, the school board's budget had constituted final agency action, the union, which claimed to be adversely affected thereby, would have been entitled to take an appeal from the agency's budget pursuant to § 120.68(1), Fla. Stat. Had the court believed that the agency's budget was directly appealable as final agency action, it likely (though not necessarily) would have mentioned that option; notably, it did not. In any event, the undersigned wants to make clear he is not suggesting that judicial review of an exempt decision would never be available. There are, of course, other vehicles besides § 120.68, Fla. Stat., for obtaining appellate review of state action, e.g. common law writs. Moreover, because there

are no administrative remedies to exhaust, a party aggrieved by an exempt decision could, the undersigned supposes, immediately bring a civil complaint in a court of competent jurisdiction, assuming such person were able to state a cause of action.

[8]/ The legislature also has authorized agencies to issue declaratory statements, a function which involves the exercise of quasi-judicial power, pursuant to § 120.565, Fla. Stat.

[9]/ It is interesting to note that with regard to rules, the making of which, like preparing or modifying a budget directing the disbursement of public funds, is a quasi-legislative function, the legislature likewise took away the agencies' power of quasi-judicial adjudication, giving DOAH exclusive administrative jurisdiction to determine the validity of rules. See generally § 120.56, Fla. Stat. The legislature has not, however, similarly invested DOAH with jurisdiction to adjudicate disputes arising out of the preparation or modification of an agency's budget.

[10]/ Not to belabor the point, but the legislature obviously had its reasons for choosing to place decisions involving agency budgets outside of the APA's adjudicative processes. It is easy to imagine at least some of those reasons. For example, if every person whose substantial interests were determined by the level of funding made available in an agency's budget for one purpose or another was entitled to a Section 120.57 hearing, then the preparation of agency budgets likely would soon become bogged down in a quagmire of administrative litigation; ever present would be the threat of an adverse order tugging a thread from a carefully crafted budget comprising numerous interwoven decisions, causing the whole thing to unravel. Whatever prompted the legislature to act as it did, however, the bottom line is that an agency is not free to disregard the legislative intent that budgetary matters not be subject to administrative adjudication, even if, in a particular case, the agency believes adjudication would do more good than harm; the statutory scheme must be followed in all cases.

[11]/ Several of the Petitioners did, in fact, attempt to challenge the Emergency Rules, initiating DOAH Case Nos. 09-5115RX, 09-5116RX, 09-5117RX, and 09-5118RX. They waited too long to avail themselves of this remedy, however, filing their petitions with DOAH on September 18, 2009, by which time the Emergency Rules had expired (or were about to expire). Once the Emergency Rules ceased to exist by operation of law, the rule

challenge proceedings became moot, and DOAH lost jurisdiction. See Department of Revenue v. Sheraton Bal Harbour Ass'n, Ltd., 864 So. 2d 454 (Fla. 1st DCA 2003)(DOAH does not have jurisdiction to hear a rule challenge to a rule that no longer exists). The rule challenges were dismissed on that basis. The final orders dismissing the rule challenge petitions were appealed; as of this writing, the appeals remain pending.

[12]/ This remedy was, moreover, available only during the existence of the Emergency Rules, which rules lasted just 180 days; then the remedy was gone. As a practical matter, given that a challenge to an emergency rule takes about one month from the filing of the petition to the issuance of the final order; and because rules can be invalidated only on a prospective basis, see, e.g., State Bd. of Optometry v. Florida Soc. of Ophthalmology, 538 So. 2d 878, 889 (Fla. 1st DCA 1989); and since FHFC needed to finalize its modified budget no later than June 1, 2009, when the money was due back in the state treasury; and recognizing that the Emergency Rules took effect on or about March 16, 2009, the actual window of opportunity for filing a challenge to the Emergency Rules was open for only about 30 days.

[13]/ The parties disagree about the exact starting and ending dates of the Emergency Rules' period of operation, but a few days' difference at either end of the range does not affect the analysis or the outcome of this case.

[14]/ Put another way, if the operative event occurred during the period when the Emergency Rules were in effect, then applying such rules in the instant case would not contravene the prohibition against retroactive rules. See § 120.54(1)(f), Fla. Stat.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.