

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMAZING NEW HOME SHOW)
PRODUCTIONS, INC.,)
)
Petitioner,)
)
vs.) Case No. 05-2489
)
OFFICE OF THE GOVERNOR, OFFICE)
OF FILM AND ENTERTAINMENT,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on August 17 and 18, 2005, in Tallahassee, Florida, before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: S. Elysha Luken, Esquire
Smith, Currie & Hancock, LLP
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Tallahassee, Florida 32301

For Respondent: Tom Barnhart, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent should have qualified Petitioner's proposed television production for Florida's 2005/2006 Entertainment Industry Financial Incentive pursuant to the requirements of Section 288.1254, Florida Statutes (2005).

PRELIMINARY STATEMENT

On June 13, 2005, Petitioner Amazing New Home Show Productions, Inc. (Petitioner) filed an application seeking to qualify for reimbursement of \$2,000,000 in expenditures that Petitioner proposed to incur for filming 13 episodes of a 30-minute television program called the Amazing New Home Show. That same day, Respondent Office of the Governor, Office of Film and Entertainment (Respondent), issued a letter denying the application for the following two reasons: (a) the application was postmarked prior to June 13, 2005; and (b) the application did not contain documents demonstrating proof of financing. The denial letter advised Petitioner that it could resubmit the application with the missing information in order to be considered for future qualification in the incentive program or request an administrative hearing.

On or about June 16, 2005, Petitioner submitted a Petition of Written Statement of Disputed Material Fact. Petitioner requested an administrative hearing if the parties were unable to resolve the disputed facts.

On or about June 17, 2005, Petitioner provided Respondent with additional documents relative to its proof of financing.

On June 24, 2005, Respondent issued a letter denying Petitioner's application for the second time. According to the letter, Petitioner's application was denied for the following reasons: (a) Petitioner's proposed budget did not distinguish production costs as defined in Section 288.1254(2)(b), Florida Statutes (2005); (b) Petitioner's proposed budget did not contain an adequate breakout of the estimated Florida expenditures as opposed to overall project expenditure; (c) Petitioner's application states that all funds must be paid to a third party instead of the applicant; and (d) Petitioner's application contains inadequate evidence that Petitioner submitted it via Federal Express or U.S. Certified Mail. On or about June 27, 2005, Petitioner submitted a Petition of Written Statement of Disputed Material Facts in response to the June 24, 2005, letter.

On July 14, 2005, Respondent referred both of Petitioner's requests for a formal hearing to the Division of Administrative Hearings. A Notice of Hearing dated July 25, 2005, scheduled the case for hearing on August 17 and 18, 2005.

During the hearing the parties offered one joint exhibit. Petitioner presented the testimony of four witnesses and offered Exhibit Nos. P1-P3, P5-P11, P21, P25, and P27-P30, which were

accepted as evidence. Respondent presented the testimony of one witness and offered Exhibits Nos. R1-R3, which were accepted as evidence.

On September 2, 2005, the court reporter filed a transcript of the proceeding. The parties filed their Proposed Recommended Orders on September 12, 2005.

FINDINGS OF FACT

1. In 2003, the Legislature created Respondent within the Office of the Governor, Office of Tourism, Trade and Economic Development (OTTED). Since that time, Respondent has administered an entertainment industry financial incentive program (the incentive program) subject to specific appropriation.

2. The purpose of the program in part is to encourage the use of Florida as a site for filming and providing production services for motion pictures, made-for-television movies, commercials, and television programs.

3. For fiscal year 2004/2005, the Legislature appropriated \$2.45 million for the incentive program. The Legislature set aside \$10 million for the incentive program in fiscal year 2005/2006.

4. Petitioner is a Delaware corporation, which is based in Weddington, North Carolina. The corporation has no assets.

5. Ban Mandell is Petitioner's president and only identified corporate officer. Mr. Mandell does not know if the corporation has issued any shares of stock.

6. Since 1996, Petitioner has been the production company for the "The New Home Show" (show/series), which has aired several series on the Public Broadcasting System (PBS) through its sponsor television station, PBS Station WTVI, in Charlotte, North Carolina. The concept of the show is to begin with a vacant lot, to film the construction of a house by licensed builders and tradesmen, and to complete the project with a fully furnished home.

7. In addition to Station WTVI, other sponsors have provided products to Petitioner to use in the construction of houses for prior shows. For example, Owens Corning underwrote a series in Tennessee for an 8,000 square-foot Owens Corning Systems Thinking Home. Additionally PBS underwriters have provided funds to produce shows in the past.

8. Each show or series is a unique production. The filming does not take place on a traditional set, studio, or backlot. Instead, Petitioner films all scenes on location at the construction site. If the project demonstrates how to tile a bathroom, filming takes place during the actual performance of the work by tradesmen, providing the viewer with an understanding of the whole process.

9. It takes longer to film a series than traditional television programs. Filming cannot take place every day because it is ongoing throughout the construction process. It took Petitioner 18 months to film its most recent project.

10. Petitioner's first show was in 1996. The show consisted of 18 episodes about the construction of one home, the "Wedge Plantation," in North Carolina. Mr. Mandell personally advanced some of the money to finance the construction of the house. He and his family now live in the home.

11. In 1997, Petitioner filmed eight episodes in Tennessee about the construction of a home for Owens Corning. This house was sold after its completion.

12. In 1999 and 2000, Petitioner videotaped the construction of two houses in Lake Park, North Carolina. Petitioner filmed 18 episodes about a Victorian home called South Port, and eight episodes about a home called the Empty Nester.

13. In 2004 and 2005, Petitioner filmed eight episodes about the construction of a golf course house in North Carolina. The series about the golf course house is complete except for editing.

14. Excluding the series about the golf course house, Station WTVI has aired the first three series of completed projects. PBS makes each completed series available for

distribution nationally by other PBS-member stations that want to include the shows in their programming.

15. Pursuant to a contract between Station WTVI and Petitioner, Station WTVI must be identified as a co-producer on all shows that it sponsors. Station WTVI also requires that all monies from any source that are used to pay for the projects be paid directly to the station. Station WTVI receives and disperses all funds and ensures that all contributors receive the appropriate acknowledgement.

16. Sometime in early June 2005, Respondent notified interested filmmakers regarding policies and procedures that OTTED adopted for the 2005/2006 incentive program. A letter dated June 1, 2005, stated as follows in relevant part:

. . . Before you submit the appropriate application, . . . there are a few important things about the process that you must be aware of.

1. The policies and procedures in the following document are the only official policies adopted by the State of Florida pertaining to the Entertainment Industry Financial Incentive Program. There are NO other persons, agents, organizations, financial institutions or businesses who in any way represent the policies of the State of Florida regarding the details of the Entertainment Industry Financial Incentive Program.

2. In an effort to adhere to the new laws pertaining to this incentive and application process, we will only accept completed applications via Federal Express

or U.S. Certified Mail. Any other form of delivery will not be accepted and your application will be returned.

3. No applications will be accepted if they are postmarked before June 13, 2005. Applications received before this time and date will be returned.

* * *

5. These policies and procedures, along with the application process, are contingent upon House Bill 1129 being signed into law by the Governor.

17. Respondent's 2005 policies and procedures include the following pertinent provisions:

I. POLICIES AND PROCEDURES

A. Definitions:

* * *

Principal Photography--The phase in production in which all of the moving images are photographed and recorded according to the instructions of the screenplay in preparation for later editorial cutting and assembly.

Production Costs--The costs of real, tangible, and intangible property used and services performed in the production, including preproduction and postproduction, of qualified filmed entertainment. Production costs generally include, but are not limited to:

1. Wages, salaries, or other compensation for technical and production crews, directors, producers, and performers who are residents of this state.

2. Expenditures for sound stages, backlots, production editing, digital effects, sound recordings, sets, and set construction.

3. Expenditures for rental equipment, including, but not limited to, cameras and grip or electrical equipment.

4. Expenditures for meals, travel, accommodations, and goods used in producing filmed entertainment that is located and doing business in this state.

Qualified Expenditures--Production costs for goods purchased or leased or services purchased, leased, or employed from a resident of this state or a vendor or supplier who is located and doing business in this state, but excluding wages, salaries, or other compensation paid to the two highest-paid employees.

Qualified Production-- . . . [A] production is not a qualified production if it is determined that the first day of principal photography in this state occurred prior to certification by the Office of Tourism, Trade, and Economic Development (OTTED).

* * *

C. The Application Procedure:

1. Qualified Production: Any company engaged in this state in producing filmed entertainment may submit an application to the OFE for the purpose of determining qualification for receipt of reimbursement. The Office of Tourism, Trade and Economic Development (OTTED) shall make the final determination for actual reimbursement through a certification process.

a. Applications received between June 13, 2005, and June 24, 2005 (the "Principal Photography Application Period"), will be placed into one of two queues (defined below), according to principal photography start date. If more than one project in a queue has the same principal photography start date, those projects with the same principal photography start date will also

be placed in the queue on a first-come, first-served basis.

b. Applications received between June 27, 2005, and January 31, 2006, will be placed into one of the two queues on a first-come, first-served basis.

c. On February 1, 2006, the remaining funds within both queues will be combined into a single queue and distributed based on a project's principal photography start date.

* * *

D. The Decision-Making Process:

1. The decision-making process for designating filmed entertainment as a qualified production will follow the following sequential steps.

a. Completed General Project Overview and Application is received in the OFE and reviewed to ensure all necessary documentation is attached. If the application is not complete, or documents are missing, the OFE will fax a letter to the production company listing the missing information and documents and the application will not be considered for qualification.

b. Project review by the OFE to determine if the production is a qualified production

c. After the production has been qualified by the OFE, the OFE will notify the OTTED of the applicant's qualification and the amount of reimbursement.

d. After the OTTED has certified the amount of funds for the production, the OFE will notify the applicant of its determination . . . Expenditures made prior to certification by the OTTED will not be considered for reimbursement.

e. A written contract between the production company and the State of Florida will be drafted and fully executed.

* * *

E. OFE Evaluation of the General Project Overview and Application:

1. For a qualified production, the OFE will consider the following questions, among others, when making a determination if the production is qualified:

a. The Application:

i. Is it completely filled out, signed and dated?

ii. Are there further questions that must be asked and answered?

iii. Are all of the necessary documents included?

* * *

c. The Budget:

i. Does the production have the necessary financing in place to begin production on the designated start date?

ii. Will the production spend a minimum of \$850,000 on qualified expenditures in this state?

* * *

e. A Completion Bond:

i. Will there be a completion bond in place with an industry recognized completion bond company before principal photography begins? If not, does the production company have the necessary financing in place to complete the shooting?

* * *

G. Availability of Funds:

1. Annual funding for the Entertainment Industry Financial Incentive Program is subject to legislative appropriation. The State of Florida's performance and obligation to pay under the contract is contingent upon an annual appropriation by the legislature. If and when, the legislature makes funds available, the OFE will consider each project until all

of the funds are committed, or June 20, 2006, whichever comes first.

2. If an application is received and is qualified, but no funds are available, the OFE will notify the company in writing within five days. If the qualified company wishes to remain in the queue in the event funds become available in that fiscal year, it must inform the OFE in writing within five days.

H. Disqualification:

1. A qualified production will cease to be qualified if the OFE determines:

a. The principal photography start date:

i. Occurred before funds had been certified by the OTTED to the production company; or

ii. Does not start on the day indicated in the Project Overview on applications received between June 13, 2005, and June 24, 2005, for any reason other than an act of God

18. Mr. Mandell became interested in producing a series of the show in Florida a few years ago. He particularly was interested in telling the story of the vacation home concept as it has been developing in central Florida. Vacation homes are well-known among European tourists who visit central Florida. The concept is not well-known to many Americans.

19. There are approximately 50,000 vacation homes available in the vicinity of Orlando, Florida. Tourists rent the homes on a weekly basis. Instead of staying in one or two hotel rooms, a family can stay in a vacation home with multiple bedrooms, baths, pool, and other amenities. The vacation homes

generate tax revenue for Florida because they are subject to hotel tax.

20. In anticipation of potentially coming to Florida, Mr. Mandell signed up for Respondent's periodic e-mail service. Through these e-mails, Mr. Mandell learned about the financial incentive program. He understood from the beginning that there was some uncertainty as to whether the program would go forward.

21. On or about June 8, 2005, Petitioner applied for a Florida sales tax exemption for the entertainment industry. The sales tax exemption application erroneously stated that PBS Station WTVI was its parent company. Asserting that its first day of principal photography would be August 1, 2005, Petitioner asserted that it intended to build four or five homes in Lake County, Florida, for a PBS do-it-yourself show.

22. The sales tax exemption was valid for only 90 days. However, Mr. Mandell believed that building more than one home at a time would make the filming go faster, speeding up the production process by shooting more than once or twice a week.

23. Following Petitioner's submission of the application for the 90-day sales tax exemption, a member of Respondent's staff, Niki Welge, advised Mr. Mandell that the incentive program was going forward. Ms. Welge referred Mr. Mandell to Respondent's website for details. Ms. Welge also informed Mr. Mandell that Respondent would rank applications received

during the "Principal Photography Application Period" (between June 13, 2005, and June 24, 2005) based on the "Principal Photography" start date.

24. Based on Mr. Mandell's conversation with Ms. Welge and existing contacts for Florida crew members, Mr. Mandell decided to move Petitioner's "Principal Photography" start date from August 1, 2005, to July 1, 2005. Mr. Mandell also decided to go forward with a much larger project than originally planned.

25. Mr. Mandell decided to build a neighborhood consisting of 395 or 396 vacation homes in Lake County, Florida, with Platinum Properties of Central Florida, Inc. (Platinum Properties), Clermont, Florida, as the builder/developer. The 395 homes were in addition to the four homes in Lake County, Florida, that Petitioner intended to build with Better Built Homes, Inc., Melbourne, Florida, as the contractor.

26. Prior to submission of Petitioner's application, Mr. Mandell reviewed Respondent's Policies and Procedures and Section 288.1254, Florida Statutes (2004), the version of the statute that was available on MyFlorida.com. Mr. Mandell then filled out the application on June 9 and 10, 2005.

27. Petitioner's application indicates that Petitioner intends to film at least 13 episodes in Florida for The New Home Show (500 Series). The application also indicates that Petitioner has already begun preproduction at vacation homes in

Polk County, Florida. According to the application, Petitioner intends to film for approximately 52 days, between July 1, 2005, and June 30, 2006, in three Florida counties: Lake, Polk, and Orange.

28. Paragraph 9 of the application requires the applicant to describe its Florida qualified expenditures and to include a total production budget with a breakout of the estimated Florida expenditures. Paragraph 9 of Petitioner's application states as follows in relevant part:

- a) Estimated total expenditure on Florida resident wages (excluding the salaries for the two highest paid Florida resident employers): \$500,000
- b) Estimated expenditures on Florida lodging: \$20,000
 - i. Name of hotel(s): Private Vacation Homes
 - ii. Total number of room nights: 200
- [the application skips subsection c]
- d) Estimated expenditures on Florida set construction: \$10,500,000
- e) Estimated expenditures on purchase or rent for real and personal property: \$17,000,000
- f) Estimated expenditures on other services rendered by Florida companies: \$100,000
 - Please list the other services: Misc. Construction Services

* * *

h) Total estimated qualified Florida expenditures: \$28,120,000

29. According to the application, Petitioner intended to spend \$500,000 on Florida resident wages. Mr. Mandell based this figure on building just 50 homes and spending at least \$10,000 in labor for each home.

30. Petitioner projected that it would spend \$20,000 on Florida lodging. This figure covered 200 nights in hotels and vacation homes.

31. Petitioner anticipates spending \$10,500,000 on set construction. Mr. Mandell based this figure on the cost of constructing 50 houses.

32. A set is traditionally a temporary structure. Petitioner will not have a set. Instead, Petitioner is proposing to build over 300 homes to be sold as permanent, fixed structures.

33. Petitioner estimates that it will spend \$17,000,000 for the purchase or rent of real or personal property. According to Mr. Mandell, this figure represents the cost of the acreage at the "Platinum" site, plus the cost of the infrastructure. However, the purchase of real estate and the construction of infrastructure are not related to the television episodes that Petitioner proposes to film. In any event, all of

the lots are already sold and the buyers have contracted for the construction of homes.

34. The last estimate was \$100,000 for other services rendered by Florida companies. However, Mr. Mandell did not have anything specific in mind.

35. The general project overview and application included the following admonition:

IMPORTANT NOTE: If the following documents are not submitted with your application your application will not be considered complete:

1. Script
2. Budget
3. Production/Shooting Schedule
4. Proof of Financing

Your application will not be considered for qualification and will be returned if the requested documents are not attached.

36. Mr. Mandell attached a proposed budget to Petitioner's application. The proposed budget was written in narrative form and states as follows in pertinent part:

The New Home Show will be responsible for over \$20,000,000 in expenditures within in Florida from July 01, 2005, through June 30, 2006.

Construction of homes and neighborhoods is always our biggest expense representing over 80% of the total expenditures.

. . . We will start with four homes built by Better Built Homes, Inc. The budget for these four homes will be over \$1,000,000. The homes will be built in an established neighborhood that the producer has located four vacant lots in.

These homes will be finished during December 2005.

In September 2005, we will start working with our 2nd builder/developer, which is Platinum Properties, Inc. We are in the process of contracting for several homes with Platinum. The expenditures for these homes will be over \$15,000,000.

* * *

In the past, our funding comes from five different areas for these projects. Those areas are:

1. Producer's advance
2. PBS underwriters
3. Builder
4. Developer
5. State Incentives

The PBS Underwriter funds and the State Incentive are important funds for The New Home Show because they do not require repayment. All of the other categories are loans that are repaid from the proceeds from the sale of the homes that we build.

Our PBS presenting station is WTVI in Charlotte. All funds for underwriters as well as state incentives must be paid to PBS station WTVI. The producer cannot receive these funds.

WTVI is the co-producer of The New Home Show on PBS and approves all budgets and disburses all funds regulated by PBS.

PBS has very strict rules and regulations regarding the funding of all PBS shows including The New Home Show and we adhere to those rules and regulations.

37. In addition to the budget, Mr. Mandell prepared a production/shooting schedule to be attached to the application, along with the following: (a) an undated letter from the Director of PBS PLUS and PBS SELECT describing PBS's distribution process and the importance of PBS's underwriting guidelines in very general terms; (b) an undated letter from an

advertising agency; (c) a copy of a script from a prior show; and (d) seven pages of PBS's promotional material for the show's 2005 project about the golf course home.

38. In the very early morning hours of June 10, 2005, Mr. Mandell realized that the package of material was in excess of 13 ounces, and that it would not fit in a regular envelope. He decided to send it to Respondent by U.S. Certified Mail, no return receipt requested, in a heavy-duty priority mail envelope.

39. Mr. Mandell uses an Internet postage service, which is the equivalent of having a postage meter. At 3:31 a.m. on June 10, 2005, Mr. Mandel purchased on-line postage in the amount of \$6.15 for priority mail, flat-rate delivery, certified, with a ship date of June 13, 2005, on the shipping label. He did not request or pay an additional fee for a "green card" return receipt.

40. The Internet postage service provided Mr. Mandell with a Customer Online Label Record, showing that the label was printed on June 10, 2005, with a June 13, 2005, ship date. The instructions from the Internet postage service contain the following request, "Please use this shipping label on the 'ship date.'" During the hearing, Mr. Mandell stated that he could have printed the shipping label with any date between June 10, 2005, and June 17, 2005.

41. Respondent's policies and procedures clearly require Respondent's staff to determine whether an applicant has the necessary financing in place to begin production on the designated start date and to complete shooting. The policies and procedures do not explain what documents will meet the "proof of financing" requirement. To answer his questions in this regard, Mr. Mandell called Ms. Welge.

42. On June 10, 2005, Mr. Mandell advised Ms. Welge that the show would be financed through construction loans. He explained that Petitioner could not provide Respondent with a bank statement showing a sum of money in a bank account because construction loans do not operate in that manner. A borrower does not retrieve construction loan funds from the lender until the builder needs them. Financial institutions loaning construction funds do not escrow the entire sum, but provide funds on a drawdown basis, based on percentage of completion.

43. After speaking to Ms. Welge, Mr. Mandell sent her an e-mail on Friday, June 10, 2005, at 4:06 p.m. The e-mail inquired whether a letter from the real estate company that was financing the show would satisfy the "proof of financing" requirement.

44. Petitioner's June 10, 2005, e-mail included a draft of a letter allegedly from Platinum Properties, identified only as

a Florida real estate developer. The proposed letter stated as follows in relevant part:

. . . Subject to timing and construction issues, we look forward to working with The New Home Show on this project.

The New Homes Show's project is the creation of an entire vacation home neighborhood in central Florida.

If we are able to go forward with The New Home Show on this project, it will be funded with a combination of bank and trade lines, which Platinum Properties utilizes on a regular basis. We have assured the producers of The New Home Show that we have adequate credit lines to cover any and all construction on this project.

We expect the cost of this project will be \$_____ of which \$_____ is expected to be spent between 07/01/05 and 06/30/06.

45. Upon receiving Mr. Mandell's e-mail, Ms. Welge shared the proposed letter with others on Respondent's staff. First, she sent it to Scott Fennell, OTTED's Deputy Director, who was providing administrative leadership to Respondent's staff during a vacancy in the position of Film Commissioner. Ms. Welge sent the e-mail to Mr. Fennell on Friday, June 10, 2005, at 4:11 p.m. Mr. Fennell did not immediately respond to Ms. Welge's inquiry about the proposed "proof of financing" letter.

46. On June 10, 2005, Ms. Welge also discussed Petitioner's proposed letter regarding "proof of financing" from Platinum Properties with Susan Simms, Respondent's Los Angeles Liaison. Ms. Welge then contacted Mr. Mandell, advising him

that the proposed letter was not sufficient because it contained contingencies.

47. Later in the evening on June 10, 2005, Mr. Mandell contacted Danial Lambdin from Better Built Homes, Inc. During a telephone conversation, Mr. Mandell and Mr. Lambdin, drafted the unsigned, undated "proof of financing" letter that Petitioner ultimately submitted with its application. The letter states as follows in pertinent part:

This letter confirms that you have contracted for the construction of four (4) single family vacation homes in Lake County, Florida. I am pleased to be involved with The New Home Show and am excited about working with you.

I can confirm that I have an adequate line of credit to complete these homes for you. My Bank is Riverside National Bank at 417 First Ave., Indialantic, FL 32903. My primary contact is Monica Silveria. Their phone number is 321-725-7200.

Mr. Mandell typed the letter addressed to himself in Weddington, North Carolina, with the address of Better Built Homes, Inc., Melbourne, Florida, as the letterhead.

48. Very late on Friday, June 10, 2005, or very early on Saturday, June 11, 2005, Mr. Mandell completed the application form and the preparation of all attachments. He placed all of the documents in the priority mail envelope and attached the prepaid certified mail shipping label with the predated ship

date. Mr. Mandell then dropped the envelop in an outgoing "mail tote" at his home.

49. Mr. Mandell does not know when the U.S. Post Office received the application and its attachments. Someone at his home takes the mail tote to the post office in Charlotte, North Carolina, every day.

50. The U.S. Post Office delivered the application and its attachments to the state's off-site mail-screening facility on Monday, June 13, 2005, at 3:43 a.m.

51. On Monday, June 13, 2005, at 6:18 a.m., Mr. Fennell answered Ms. Welge's inquiry about the sufficiency of Petitioner's proposed letter regarding "proof of financing" from Platinum Properties. Mr. Fennell responded that "[t]his seems a bit light, but I don't know what typically passes for 'proof of financing' in the film world."

52. On Monday, June 13, 2005, at 9:43 a.m., Ms. Simms responded by e-mail to Mr. Fennell regarding Petitioner's proposed letter regarding "proof of financing" from Platinum Properties. Ms. Simms stated that the contingencies in the proposed letter were potential deal-killers, and that Ms. Welge was able to let Petitioner know on Friday that this was not acceptable as proof of financing.

53. Respondent received the application on Monday, June 13, 2005, at 3:29 p.m. Later that day at 6:21 p.m.,

Respondent faxed Petitioner a letter, notifying Mr. Mandell that Petitioner did not qualify for the incentive program for the following two reasons: (a) The application was postmarked on June 11, 2005; and (b) The application did not contain any documents containing proof of financing. Respondent sent this letter without contacting Better Built Homes, Inc., or its financial institution.

54. Following receipt of Respondent's June 13, 2005, denial letter, Mr. Mandell contacted Raquel Cisneros, another member of Respondent's staff. Ms. Cisneros and Ms. Welge were the only staff members involved in reviewing Petitioner's application on June 13, 2005. Mr. Fennell signed the June 13, 2005, denial letter but did not review the application.

55. Mr. Mandell explained to Ms. Cisneros that the application was not postmarked on June 11, 2005. Ms. Cisneros admitted during the hearing that the denial letter did not have a postmark of June 11, 2005.

56. Mr. Mandell also inquired of Ms. Cisneros why the June 13, 2005, denial letter stated that the application contained no documents to demonstrate "proof of financing," when the Better Built Homes, Inc., letter had been attached to the application. Ms. Cisneros advised Mr. Mandell that the Better Built Homes, Inc. letter was deficient because it did not contain an amount of financing.

57. Mr. Mandell was unable to obtain an extension of time for Petitioner to serve an "election of rights." Therefore, Mr. Mandell filed an "election of rights" form with Respondent on June 16, 2005.

58. Respondent's June 13, 2005, denial letter provided Petitioner with the opportunity to provide Respondent with additional documents. On June 17, 2005, Petitioner took advantage of that opportunity by submitting a letter dated June 17, 2005, from Platinum Properties. The letter states as follows in pertinent part:

We are looking forward to this venture of together building 395 Vacation homes in Lake County with the support, cooperation and abilities that "The New Home Show" brings to the project.

Attached you will find the Lender Commitment to get started on the Millbrook Manor Project from AmBanc Commercial Lending Services.

Lawrence M. Maloney signed the June 17, 2005, "proof of financing" letter as president of Platinum Properties. Attached to Mr. Maloney's letter was the first page of a Conditional Commitment from AmBanc Commercial Lending Services (AmBanc), Saint Charles, Missouri.

59. The AmBanc Conditional Commitment states that Millbrook Manor/Larry Maloney (Borrower) has executed the document and requested financing in connection with a project described therein. The Conditional Commitment also states that

the project has been conditionally approved to receive financing in the maximum principal amount of \$15,000,000. The single-page Conditional Commitment does not contain a description of Millbrook Manor.

60. Petitioner did not hear further from Respondent until Petitioner received a second denial letter on June 24, 2005, the last day of the initial two-week window for applications. Respondent based its second denial of Petitioner's application on the following reasons:

(a) The submitted budget does not distinguish the production costs as defined in Section 288.1254(2)(b) of the Florida Statutes.

(b) The submitted budget does not contain an adequate breakout of the estimated Florida expenditures as opposed to overall project expenditures as described on page five of the General Project Overview and Application.

(c) Designated recipients of state incentives must be party to the application and subsequent contractual agreements. Your application states, 'All funds for underwriters as well as state incentives must be paid to PBS station WTVI. The producer cannot receive these funds.'

(d) There is inadequate evidence that the application was sent via FedEx or U.S. Certified mail as required on page one (1) of the Entertainment Industry Financial Incentive Policies and Procedures. 'Any other form of delivery will not be accepted and your application will be returned.'

61. On June 27, 2005, Petitioner submitted its second "election of rights" form. Petitioner also provided Respondent with its second statement of disputed facts.

62. Respondent anticipated that it would receive some applications on June 13, 2005, by Federal Express or Certified U.S. Mail by overnight or same-day delivery service. Respondent's staff included the requirements that no applications would be accepted if they were postmarked before June 13, 2005, and only then if they were sent by Federal Express or U.S. Certified Mail in an effort to ensure a fairer process for evaluating the applications received during the critical first two-week principal photography application period. However, the policies and procedures do not require that the applications be mailed on or after June 13, 2005. In the instant application process, Respondent approved at least one other application that Respondent received on June 13, 2005.

63. As to the requirement for "proof of financing," at least one other approved applicant (Britt Allcroft Productions/Britt Allcroft) contained an unsigned letter from a third party, which contained a contingent intent to "assist" in obtaining financing for the production if it was able to obtain \$2 million from the incentive program. For this application, Respondent's staff engaged in a telephone conference call with the applicant, obtaining verbal assurances that the letter from

the third party constituted a promise to provide financing for the remainder of the production not covered by the other more specific non-contingent promises of financing and licensing agreements.

64. Additionally, the Britt Allcroft application indicated that a completion bond was in place to cover any shortfall in financing, guaranteeing that the production would be completed. Petitioner's application did not contain a completion bond.

65. Another approved applicant (Rolling Films Company) provided Respondent with two contingent letters from third parties, indicating their intent to provide partial financing for the production only if the remaining funds were obtained by a date certain. That application also included a letter from the applicant, indicating the applicant's intent to finance the production for any amount not covered by the third parties.

66. Petitioner's application refers to the funding of prior shows as including producer's advance and PBS underwriters. It does not state that Petitioner agreed in this case to fund the show over and above the amount to be financed by Better Built Homes, Inc., in the amount of \$1,000,000 for four homes or the \$15,000,000 that Platinum Properties promised to provide for the construction of 395 homes. Additionally, there is no persuasive evidence that Mr. Mandell gave Respondent verbal assurances that Petitioner or PBS intended to fund any

shortfall in funds to complete the show, which has projected total production costs in excess of \$28,000,000. The letter from PBS Plus & PBS Select agrees to assist in Petitioner's effort to fund the show but does not say how much funding Petitioner could anticipate from PBS underwriters.

67. It is obvious that Respondent's staff is confused about the "proof of financing" requirement. For example, Ms. Cisneros testified in deposition that an applicant only needed to show financing in place for one-half of its total production costs. During the hearing, Ms. Cisneros testified that an application had to show "proof of financing" all of its production costs. Ms. Welge testified in deposition that an applicant had to demonstrate "proof of financing" for its Florida expenditures. Ms. Simms testified that an applicant had to establish "proof of financing" for the entire production budget. Mr. Fennell freely admits that he does not know what constitutes "proof of financing" for an entertainment production.

CONCLUSIONS OF LAW

68. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to Sections 120.569 and 129.57(1), Florida Statutes (2005).

69. Petitioner has the burden of proving by a preponderance of the evidence that Respondent improperly denied its application for a financial incentive. See Young v. Department of Community Affairs, 627 So. 2d 831 (Fla. 1993); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Petitioner has not met its burden.

70. The first question is whether Section 288.1254, Florida Statutes (2004), or Section 288.1254, Florida Statutes (2005), applies to Petitioner's application. The former statute was in effect when Petitioner filed its application on June 13, 2005. It is undisputed that Respondent denied Petitioner's application on June 13, 2005, and again on June 24, 2005, before the latter statute's effective date on July 1, 2005. There are relevant substantive differences in the two statutes.

71. Section 288.1254, Florida Statutes (2004), states as follows in relevant part:

(2) DEFINITIONS.--As used in this section, the term:

* * *

(b) "Production costs" means the total cost of producing filmed entertainment.

(c) "Qualified expenditures" means goods purchased or leased or services purchased, leased, or employed from a resident of this state or a vendor or supplier who is located and doing business in this state.

(d) "Qualified production" means filmed entertainment that makes expenditures in this state for the total or partial production of a motion picture, made-for-television movie with a running time of 90 minutes or more, commercial, music video, industrial and educational film, television series pilot, or television episode. Productions that are deemed by the Office of Film and Entertainment to contain obscene content, as defined by the United States Supreme Court, shall not be considered qualified productions.

* * *

(3) APPLICATION PROCEDURE; APPROVAL PROCESS.--

(a) Any company engaged in this state in producing filmed entertainment may submit an application to the Office of Film and Entertainment for the purpose of determining qualification for receipt of reimbursement provided in this section. The office must be provided information required to determine if the production is a qualified production and to determine the qualified expenditures, production costs, and other information necessary for the office to determine both eligibility for and level of reimbursement.

* * *

(d)1. The Office of Film and Entertainment shall establish a process by which an application is accepted and reviewed and reimbursement eligibility and reimbursement amount are determined. . . .

2. Upon determination that all criteria are met for qualification for reimbursement, the office shall notify the applicant of such approval. The office shall also notify the Office of Tourism, Trade, and Economic Development of the applicant approval and amount of reimbursement required. The Office of

Tourism, Trade, and Economic Development shall make final determination for actual reimbursement.

3. The Office of Film and Entertainment shall deny an application if it determines that:

a. The application is not complete or does not meet the requirements of this section; or

b. The reimbursement sought does not meet the requirements of this section for such reimbursement.

(e) The Office of Film and Entertainment shall develop a standardized application form for use in approving a qualified production . . . The application form must include, but is not limited to, production-related information on employment, proposed total production budgets, planned expenditures in this state which are intended for use exclusively as an integral part of preproduction, production, or postproduction activities engaged in primarily in this state, and a signed affirmation from the Office of Film and Entertainment that the information on the application form has been verified and is correct. . . .

(f) The office of Film and Entertainment must complete its review of each application within 5 days after receipt of the completed application, including all required information, and it must notify the applicant of its determination within 10 business days after receipt of the completed application and required information.

(4) REIMBURSEMENT ELIGIBILITY;
SUBMISSION OF REQUIRED DOCUMENTATION;
RECOMMENDATIONS FOR PAYMENT.--

(a) A qualified production that is certified by the Office of Film and Entertainment is eligible for the following financial incentives from the state:

1. A reimbursement of up to 15 percent of its qualifying expenses in this state on that . . . television episode that demonstrates a minimum of \$850,000 in total

qualified expenditures. However . . . the maximum reimbursement that may be made with respect to any single television series pilot or television episode is \$150,000 All noted reimbursements are subject to appropriation. Payments under this section in a fiscal year shall be made on a first-come, first-served basis until the appropriation for that fiscal year is exhausted. Subject to subsequent appropriations, the eligibility of qualified productions shall carry over from year to year. The Office of Film and Entertainment shall develop a procedure to ensure that qualified productions continue on a reasonable schedule until completion. If a qualified production is not continued according to a reasonable schedule, the office shall withdraw its eligibility and reallocate the funds to other qualified productions.

2. Qualified expenditures for which reimbursement shall be made include salaries and employment benefits paid for services rendered in this state; rents for real and personal property used in the production; payments for preproduction, production, postproduction . . . and cost of set construction. Reimbursement may not be authorized for salaries of the two highest-paid actors. Salaries of other actors are reimbursable.

* * *

(e) The Office of Film and Entertainment shall notify the Office of Tourism, Trade, and Economic Development whether an applicant meets that criteria for reimbursement and shall recommend the reimbursement amount. The Office of Tourism, Trade, and Economic Development shall make the final determination for actual reimbursement.

(5) POLICIES AND PROCEDURES.--The Office of Tourism, Trade, and Economic Development shall adopt policies and

procedures to implement this section, including, but not limited to, requirements for the application and approval process, records required for submission for substantiation for reimbursement, and determination of and qualification for reimbursement.

72. Section 288.1254, Florida Statutes (2005), states as follows in pertinent part:

(2) DEFINITIONS.--As used in this section, the term:

* * *

(b) "Production costs" means the costs of real, tangible, and intangible property used and services performed in the production, including preproduction and postproduction, of qualified filmed entertainment. Production costs generally include, but are not limited to:

1. Wages, salaries, or other compensation for technical and production crews, directors, producers, and performers who are residents of this state.

2. Expenditures for sound stages, backlots, production editing, digital effects, sound recordings, sets, and set construction.

3. Expenditures for rental equipment, including, but not limited to, cameras and grip or electrical equipment.

4. Expenditures for meals, travel, accommodations, and goods used in producing filmed entertainment that is located and doing business in this state.

(c) "Qualified expenditures" means production costs for goods purchased or leased or services purchased, leased, or employed from a resident of this state or a vendor or supplier who is located and doing business in this state, but excluding wages, salaries, or other compensation paid to the two highest-paid employees.

(d) "Qualified production" means filmed entertainment that makes expenditure in this state for the total or partial production of filmed entertainment . . . [A] production is not a qualified production if it is determined that the first day of principal photography in this state occurred on or before the date of submitting its application to the Office of Film and Entertainment or prior to certification by the Office of Tourism, Trade, and Economic Development.

* * *

(3) APPLICATION PROCEDURE; APPROVAL PROCESS.--

(a) Any company engaged in this state in producing filmed entertainment may submit an application to the Office of Film and Entertainment for the purpose of determining qualification for receipt of reimbursement provided in this section. The office must be provided information required to determine if the production is a qualified production and to determine the qualified expenditures, production costs, and other information necessary for the office to determine both eligibility for and level of reimbursement.

* * *

(d)1. The Office of Film and Entertainment shall establish a process by which an application is accepted and reviewed and reimbursement eligibility and reimbursement amount are determined. The Office of Film and Entertainment may request assistance from a duly appointed local film commission in determining qualifications for reimbursement and compliance.

2. The Office of Film and Entertainment shall develop a standardized application form for use in approving a qualified production The application form must include, but need not be limited

to, production-related information on employment, proposed total production budgets, planned expenditures in this state which are intended for use exclusively as an integral part of preproduction, production, or postproduction activities engaged primarily in this state, and a signed affirmation from the Office of Film and Entertainment that the information on the application form has been verified and is correct. The application shall be distributed to applicants by the Office of Film and Entertainment or local film commissions.

3. The Office of Film and Entertainment must complete its review of each application within 5 days after receipt of the completed application, including all required information, and it must notify the applicant of its determination within 10 business days after receipt of the completed application and required information.

4. Upon determination that all criteria are met for qualification for reimbursement, the Office of Film and Entertainment shall notify the applicant of such approval. The office shall also notify the Office of Tourism, Trade, and Economic Development of the applicant approval and amount of reimbursement required. The Office of Tourism, Trade, and Economic Development shall make the final determination for actual reimbursement.

5. The office of Film and Entertainment shall deny an application if it determines that:

a. The application is not complete or does not meet the requirements of this section; or

b. The reimbursement sought does not meet the requirements of this section for reimbursement.

(4) REIMBURSEMENT ELIGIBILITY;
SUBMISSION OF REQUIRED DOCUMENTATION;
RECOMMENDATIONS FOR PAYMENT.--

(a) A production that is qualified by the Office of Film and Entertainment and is

certified by the Office of Tourism, Trade, and Economic Development is eligible for a reimbursement of up to 15 percent of its qualifying expenditures in this state on a filmed entertainment program that demonstrates a minimum of \$850,000 in total qualified expenditures for the entire run of the project, versus the budget on a single episode, within the fiscal year from July 1 to June 30. However, the maximum reimbursement that may be made with respect to any filmed entertainment program is \$2 million. All reimbursements under this section are subject to appropriation. Payments made under this section in a fiscal year shall be made to qualified productions according to a production's principal photography start date, for those qualified productions having entered into the first queue as cited in subparagraph 1. or the second queue cited in subparagraph 2. within the first 2 weeks after the queue's opening. All other qualified productions entering into either queue after the initial 2-week openings shall be on a first-come, first-served basis until the appropriation for that fiscal year is exhausted. On February 1, of each year, the remaining funds within both queues shall be combined into a single queue and distributed based on a project's principal photography start date. The eligibility of qualified productions may not carry over from year to year, but such productions may reapply for eligibility under the guidelines established for doing so. The Office of Film and Entertainment shall develop a procedure to ensure that qualified productions continue on a reasonable schedule until completion. If a qualified production is not continued according to a reasonable schedule, the office shall withdraw its eligibility and reallocate the funds to the next qualified productions already in the queue that have yet to receive their full maximum or 15-percent financial reimbursement, if they

have not started principal photography by the time the funds become available.

* * *

(d) A qualified production . . . applying for a payment under this section must submit documentation or claimed qualified expenditures to the Office of Film and Entertainment.

(e) The Office of Film and Entertainment shall notify the Office of Tourism, Trade, and Economic Development whether an applicant meets the criteria for reimbursement and shall recommend the reimbursement amount. The Office of Tourism, Trade, and Economic Development shall make the final determination for actual reimbursement.

(5) POLICIES AND PROCEDURES.--The Office of Tourism, Trade, and Economic Development shall adopt policies and procedures to implement this section, including, but not limited to, requirements for the application and approval process, records required for submission for substantiation for reimbursement, and determination of and qualification for reimbursement.

73. The 2005 incentive program's policies and procedures do not specifically reference either the 2004 or the 2005 statutes. However, Respondent's June 1, 2005, letter clearly refers to the applicability of "new laws" and House Bill 1120, which became Chapter 2005-233, Laws of Florida, with an effective date of July 1, 2005. Both statutes and the policies and procedures leave no doubt that the incentive program is contingent on a specific appropriation for each fiscal year, running July 1 through June 30. Petitioner knew or should have

known that the 2005 statutes applied and was not deprived of due process when Respondent applied them in evaluating the application at issue here.

74. More important, the 2005 statutes apply as a matter of law. In Lavernia, M.D. v. Department of Professional Regulation, Board of Medicine, 616 So. 2d 53, 53-54 (Fla. 1st DCA 1993), the court stated as follows:

Florida follows the general rule that a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted. See e.g., Bruner v. Board of Real Estate, Department of Professional Regulation, 399 So. 2d 4 (Fla. 5th DCA 1981); See also 51 Am. Jur. 2d, Licenses and Permits, Section 46 (1970) and Ziffrin, Inc. v. United States, 318 U.S. 73, 78, 63 S.Ct. 465, 469, 87 L.Ed. 621, 625 (1943). In Ziffrin, the United States Supreme Court reasoned that just as a change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law, so, by like token, a change of law pending an administrative hearing or act must be followed in relation to a permit for the doing of a future act. Otherwise, said the court, the administrative body would be issuing a permit contrary to existing legislation.

75. Here as in Lavernia, Petitioner's application was filed and preliminarily denied while the 2004 statute was effective. After Petitioner requested a formal de novo

administrative hearing and pending a final order in this case, the 2005 law became effective and applicable. Respondent has no authority to approve a 2005 financial incentive subject to any law other than the one in effect when the 2005 specific appropriation became available.

76. The second question is whether the 2005 incentive program policies and procedures that Respondent applied to deny Petitioner's application are agency statements of general applicability, which have not been adopted as rules. If so, the third question becomes whether those policies and procedures meet the requirements of Section 120.57(1)(e), Florida Statutes (2005). The final question is whether Respondent properly applied its valid policies and procedures, if any, under the facts of this case. These questions are answered below as to the two reasons for denial in Respondent's June 13, 2005, letter and the four reasons for denial in Respondent's June 24, 2005, letter.

77. Section 120.52(15), Florida Statutes (2005), defines a rule as follows in pertinent part:

(15) "Rule" means agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirement 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.

78. Section 120.54 (1)(a), Florida Statutes (2005), states as follows in relevant part:

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

79. Section 120.57(1)(e), Florida Statutes (2005), states as follows in pertinent part:

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provision of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not 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;

e. Is not being applied to the substantially affected party without due process;

f. Is supported by competent and substantial evidence; and

g. Does not impose excessive regulatory costs on the regulated person, county or city.

80. OTTED does not have general authority to adopt rules regarding the incentive program. OTTED only has authority to adopt rules related to travel and entertainment expenses of certain individuals, including Respondent's staff. See Sections 288.1253(2) and 288.1253(4), Florida Statutes (2005).

I. No applications will be accepted if they are postmarked before June 13, 2005.

81. Respondent's policies prohibit the acceptance of an application postmarked before June 13, 2005. This policy implements and interprets Section 288.1254, Florida Statutes (2005), in a manner not specifically authorized by statute. It clearly describes Respondent's procedure for receiving applications. Therefore, the policy is a rule as defined by Section 120.52(15), Florida Statutes (2005).

82. The postmark requirement fails the test of Section 120.57(1)(e), Florida Statutes (2005), in two respects. First, the imposition of a postmark requirement is not within the powers delegated to Respondent by the Legislature in violation of Section 120.57(1)(e)2.a., Florida Statutes (2005), because Respondent has no rulemaking authority and the 2005 statute does not refer to a postmark requirement or the Legislature's intent to deny any application mailed or received before any date. Second, the imposition of a postmark requirement enlarges

Section 288.1253, Florida Statutes (2005), contrary to Section 120.57(1)(e)2.b., Florida Statutes (2005).

83. Because the postmark requirement is not valid, Respondent may not rely upon it to deny Petitioner's application. In any event, Respondent misapplied the postmark requirement under the facts of this case because the only postmark on Petitioner's application was June 13, 2005.

II. The application did not contain any documents containing proof of financing.

84. Respondent denied Petitioner's application due to a failure to include adequate documentation showing "proof of financing." Respondent imposed the "proof of financing" requirement based on its interpretation of the 2005 law. In so doing, Respondent attempts to implement the 2005 law by soliciting information not specifically required by statute. The "proof of financing" requirement is a rule as defined by Section 120.52(15), Florida Statutes (2005).

85. The "proof of financing" requirement violates Section 120.57(1)(e), Florida Statutes (2005), in four respects. First, Respondent has no rulemaking authority to implement the 2005 law, which does not refer to "proof of financing" or an applicant's need to have sufficient financial support to complete a project before it applies for the financial incentive. Therefore, the financial requirement violates

Section 120.57(1)(e)2.a., Florida Statutes (2005). Second, the financial requirement violates Section 120.57(1)(e)2.b., Florida Statutes (2005), because it enlarges the provisions of the law implemented. Third, the financial requirement violates Section 120.57(1)(e)2.c., Florida Statutes (2005), because it is vague, establishes inadequate standards for agency decisions, and vests unbridled discretion in the agency. Respondent's policies do not provide any guidance regarding the type of documents that Respondent considers adequate "proof of financing" or the substance of those documents. Fourth, the financial requirement violates Section 120.57(1)(e)2.d., Florida Statutes (2005), because it appears that Respondent imposed the requirement without thought or reason. The confusion about the requirement on the part of Respondent's staff is persuasive evidence of this violation.

86. Petitioner's application did not contain proof that it had financing in place to cover its total production costs or even its alleged estimated total qualified Florida expenditures in the amount of \$28,120,000. Even so, Respondent cannot rely on its invalid "proof of financing" requirement to deny Petitioner's application.

III. The submitted budget does not distinguish the production costs as defined in Section 288.1254(2)(b), Florida Statutes (2005).

87. The requirement that an applicant's budget distinguish production costs is not a rule as defined by Section 120.52(15), Florida Statutes (2005). The requirement does not impose any requirement or solicit any information not specifically required by statute.

88. Section 288.1254(2)(c), Florida Statutes (2005), defines "qualified expenditures" as production costs arising from certain expenditures in Florida. Section 288.1254(3)(a), Florida Statutes (2005), gives Respondent the authority to require applicants to provide information relative to production costs. Section 288.1254(3)(d)2., Florida Statutes (2005), allows Respondent to create an application form that inquires about a broad range of production-related costs and activities, including proposed total production budgets.

89. Respondent's policies include the statutory definitions of production costs and qualified expenditures. In discussing the decision-making process, Respondent's policies state that the agency will review applications to determine, among other things, the total cost of production. In describing the evaluation of the general project overview and application, Respondent's policies require it to review an applicant's budget

to determine whether the applicant will spend the minimum amount on qualified expenditures in this state.

90. Respondent's application form states that "[a] breakout of the estimated Florida expenditures must accompany your total production budget with this overview." The form then inquires about certain Florida qualified expenditures and the amount of the non-Florida production budget. The form also highlights the importance of including a separate budget with the application.

91. Reading the relevant statutes, policies, and portions of the application form, all of which provide applicants with instructions, it is clear that Respondent is acting consistently with the statutory scheme set forth in Section 288.1254, Florida Statutes (2005), when it requires applicants to provide a budget that distinguishes statutorily-defined production costs. The requirement is not a rule but a policy authorized by Section 288.1254(5), Florida Statutes (2005).

92. In this case, Petitioner included a budget in narrative form. Petitioner's budget states only that it will spend \$20,000,000 in Florida expenditures, including \$1,000,000 in constructing four homes, and \$15,000,000 in constructing a neighborhood of homes. Because the policy is valid and because Petitioner's budget did not distinguish production costs as statutorily defined, Respondent properly denied the application.

IV. The submitted budget does not contain an adequate breakout of the estimated Florida expenditures.

93. Respondent's application form requires applicants to submit a separate total production budget that contains a breakout of Florida expenditures. This policy is not a rule as defined by Section 120.52(15), Florida Statutes (2005), because it does not impose any requirement or solicits any information not specifically required by statute.

94. Section 288.1254(2)(c), Florida Statutes (2005), defines qualified expenditures as certain Florida production costs. Section 288.1254(2)(d), Florida Statutes (2005), defines a qualified production as filmed entertainment that makes expenditures in Florida. Section 288.1254(3)(a), Florida Statutes (2005), requires applicants to provide Respondent with sufficient information to determine the qualified expenditures. Section 288.1254(3)(d)2., Florida Statutes (2005), allows Respondent to create a form that inquires about planned Florida expenditures. Section 288.1254(4)(a), Florida Statutes (2005), sets forth the maximum and minimum amounts that are reimbursable for qualified expenditures.

95. Respondent's policies include the statutory definitions of qualified expenditures and qualified productions both of which refer to Florida costs or expenses. Respondent's policies discuss the need to review qualified expenditures as

part of the decision-making process. The policies explain that Respondent will review an applicant's budget to determine whether the production will spend the minimum amount on qualified expenditures in Florida.

96. The application form requires an applicant to list certain Florida qualified expenditures. It also requires an applicant to include a breakout of Florida expenditures in a separate total production budget. The application highlights the importance of including a budget.

97. Reading the statutes, policies, and portions of the application form together, it is clear that Respondent has authority to require applicants to include a breakout of Florida expenditures in their budget. In so doing, Respondent is acting consistently with the statutory scheme set forth in Section 288.1254, Florida Statutes. The requirement is not a rule but a policy authorized by Section 288.1254(5), Florida Statutes.

98. In this case, Petitioner did not include a breakout of Florida expenditures in its budget. Respondent properly denied Petitioner's application based on this valid policy.

V. Designated recipients of state incentives must be a party to the application and subsequent contractual agreements.

99. Respondent's requirement for designated recipients of state incentives to be a party to the application and subsequent contractual agreements interprets and implements Section

288.1254, Florida Statutes (2005), in a manner not specifically authorized by statute. The requirement is therefore a rule as defined by Section 120.52(15), Florida Statutes (2005).

100. One must consider Section 288.1254, Florida Statutes (2005), to determine whether the policy requiring designated recipients of state incentives to be a party to the application and subsequent contractual agreements meets the requirements of Section 120.57(1)(e), Florida Statutes (2005). Section 288.1254, Florida Statutes (2005), does not define designated recipients or prohibit the payment of financial incentives to individuals who are not a party to the application or subsequent contractual agreements. The statute does not refer to contractual agreements between Respondent and applicants in any respect.

101. Section 288.1254(3)(a), Florida Statutes (2005), authorizes any company engaged in a Florida film production to submit an application to receive reimbursement through the incentive program. Section 288.1254(3)4., Florida Statutes (2005), requires Respondent to notify applicants of their qualification for reimbursement and to notify OTTED of the applicants' approval and amount of reimbursement. Section 288.1254(4)(a), Florida Statutes (2005), addresses the eligibility of qualified productions to receive reimbursement for qualified expenditures.

102. Respondent's policies do not specifically state that a recipient of funds must be a party to the application. Additionally, Respondent's policies state that a written contract will be drafted and executed between the production company and the agency. However, as of the date of the hearing, Respondent had not drafted any such contract. There is no evidence regarding the substance of the contracts.

103. Tracking the 2005 statute, Respondent's policies also state that any company engaged in a Florida film production may submit an application to receive fund under the incentive program. According to Respondent's policies, Respondent must notify applicants of their qualification for reimbursement and notify OTTED of the applicants' approval and amounts of reimbursement. The policies address the eligibility of qualified productions to receive reimbursement for qualified expenditures. The policies do not describe the substance of the contracts.

104. In the absence of statutory authority for Respondent to restrict reimbursement payments to applicants and to require recipients to enter into contractual agreements, the policy violates Section 120.57(1)(e), Florida Statutes (2005), for the following reasons: (a) the policy is not within Respondent's statutory powers and duties in violation of Section 120.57(1)(e)2.a., Florida Statutes (2005); (b) the policy

enlarges the law implemented contrary to Section 120.57(1)(e)2.b., Florida Statutes (2005); (c) the policy is vague in violation of Section 120.57(1)(e)2.c., Florida Statutes (2005), in that it provides no information regarding the content of contractual agreements; (d) the policy is arbitrary and capricious contrary to Section 120.57(1)(e)2.d., Florida Statutes (2005), because there is no record evidence to show that it is supported by logic or facts or that it was adopted with thought or reason; and (e) Respondent has applied the policy without due process in violation of Section 120.57(1)(e)2.e., Florida Statutes (2005), because nothing in the statutes or policies provide applicants notice that all producers and co-producers must be a party to the application and subsequent contracts.

105. Petitioner's application clearly revealed that Station WTVI was a co-producer, who had to receive and disburse all funds and approve all budgets. An undated letter from the Director of PBS Plus and PBS Select emphasized the importance of abiding by PBS's rules and regulations regarding the funding of PBS shows. Under the facts of this case, Respondent improperly denied Petitioner's application by imposing the invalid requirement that designated recipients must be a party to the application and subsequent contractual agreements.

VI. There is inadequate evidence that the application was sent via Federal Express or Certified Mail.

106. Respondent's policies prohibit the acceptance of an application unless the applicant sends it by Federal Express or U.S. Certified Mail. This policy implements and interprets Section 288.1254, Florida Statutes (2005), in a manner not authorized by statute. It clearly describes Respondent's procedure for receiving applications. Therefore, the policy is a rule as defined by Section 120.52(15), Florida Statutes (2005).

107. As an unadopted rule, the "method of delivery" requirement fails the test of Section 120.57(1)(e), Florida Statutes (2005), in three respects. First, the policy is not within the powers delegated to Respondent by the Legislature in violation of Section 120.57(1)(e)2.a., Florida Statutes (2005). Respondent does not have rulemaking authority to implement the 2005 statute, which does not address the method of delivering applications in any respect. Second, the policy enlarges Section 288.1253, Florida Statutes (2005), contrary to Section 120.57(1)(e)2.b., Florida Statutes (2005). Third, the policy violates Section 120.57(1)(e)2.f., Florida Statutes (2005) because it imposes excessive regulatory costs on applicants, who must pay additional postage to send the application by Federal

Express or U.S. Certified Mail as opposed to less expensive delivery methods.

108. Because the "method of delivery" requirement is not valid, Respondent may not rely upon it to deny Petitioner's application. In any event, Respondent misapplied its policy under the facts of this case because Petitioner's application was sent by U.S. Certified Mail.

RECOMMENDATION

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

RECOMMENDED:

That Respondent enter a final order denying Petitioner's application.

DONE AND ENTERED this 10th day of October, 2005, in Tallahassee, Leon County, Florida.



SUZANNE F. HOOD
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Filed with the Clerk of the
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this 10th day of October, 2005.

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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.