STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LATINO GRANDE, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-0495
	)	
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	
	)	
Respondent.	)	
	)	
BIG PIG, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 08-0496
	)	08-0497
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO,	)	08-0498
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the final hearing of these cases for the Division of Administrative Hearings (DOAH) on April 3, 2008, in Orlando, Florida.

APPEARANCES

For Petitioner: Jed Burman, Esquire
Infantino and Burman
Post Office Drawer 30
Winter Park, Florida 32790

For Respondent: Joshua B. Moye, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

STATEMENT OF THE ISSUE

The issue is whether Respondent should exclude four entries in quota drawings for alcohol beverage licenses (license quota drawings) pursuant to Subsection 561.19(2)(d), Florida Statutes (2007),[1] and Florida Administrative Code Rules 61A-1.006(8) and 61A-5.0105(8).[2]

PRELIMINARY STATEMENT

By letters dated November 1, 2007, Respondent proposes to reject four applications for entries into license quota drawings. The petitioners timely requested an administrative hearing to challenge each of the four proposed rejections, and Respondent referred the matter to DOAH to conduct the hearing. DOAH consolidated the proceedings pursuant to the joint request of the parties.

At the hearing, the petitioners and Respondent each presented the testimony of one witness. The petitioners and Respondent submitted, respectively, nine and six exhibits for admission into evidence. Respondent submitted one impeachment exhibit. The identity of the witnesses and exhibits and any attendant rulings are reported in the one-volume Transcript of the hearing filed with DOAH on April 28, 2008.

At the conclusion of the hearing, the ALJ granted the parties' joint request to file their proposed recommended orders (PROs) 30 days after the Transcript would be filed with DOAH. The parties timely filed their respective PROs on May 27, 2008.

FINDINGS OF FACT

1. Respondent is the agency responsible for regulating alcoholic beverage licenses (beverage licenses) in the state. Each year, on or after October 1, 2000, Subsection 561.20(1) authorizes Respondent to issue an additional beverage license for each population increase of 7,500 persons in each county in the state.

2. Applicants typically outnumber available beverage licenses. A beverage license that becomes available by reason of a population increase is a so-called "full liquor license." A full liquor license entitles the licensee to sell alcoholic beverages on the premises and as a package store. Full liquor licenses are highly valued in the industry.

3. When applicants outnumber available beverage licenses, Subsection 561.19(2) authorizes Respondent to advertise the availability of a beverage license and to conduct a license quota drawing. The statute requires the drawing to be public and to be a "double random selection drawing." The statute requires that the "double random selection drawing" shall:

> [A]llow each applicant whose application is complete and does not disclose on its face any matter rendering the applicant ineligible an equal opportunity of obtaining an available license. After all applications are filed with the director, the director shall then determine by random selection drawing the order in which each applicant's name shall be matched with a number selected by random drawing, and the number shall determine the order in which the applicant will be considered for a license. . . .

§ 561.19(2)(a).

4. A license quota drawing determines only the order in which Respondent will consider applications for a beverage license. An applicant selected in the drawing does not automatically receive a beverage license. The qualifications of a selected applicant must be vetted in the same manner as any other applicant before the selected applicant can obtain a beverage license.

5. In 2007, Respondent scheduled a license quota drawing for beverage licenses that became available by reason of population increases in Lake, Orange, and Polk Counties. The precise date of the drawing in each county is not clear in the record.

6. On October 1, 2007, Mr. Sam C. Meiner, Esquire, filed separate entries for the quota license drawings in Lake, Orange, and Polk Counties. Respondent accepted Mr. Meiner's three entries.

7. Petitioner, Latino Grande, Inc. (Latino), submitted an entry for the drawing in Orange County. Petitioner, Big Pig, Inc. (Big Pig), submitted separate applications for the drawings in Orange, Polk, and Lake Counties.

8. By letter dated November 7, 2007, entitled "Notice of Disapproval," Respondent rejected the entry from Latino. The ground stated in the Notice of Disapproval is "[B]ecause you have filed more than one application" for Orange County.

9. In three separate Notices of Disapproval, each of which is dated November 7, 2007, Respondent rejected the entries from Big Pig for the drawings in Lake, Orange, and Polk Counties. The ground stated in each Notice of Disapproval is "[B]ecause you have filed more than one application" in each county.

10. Latino and Big Pig each filed a petition for an administrative hearing, pursuant to Subsection 120.57(1), to challenge each of the four Notices of Disapproval. Latino's request for hearing became DOAH Case No. 08-0495. Big Pig's request for hearing in the drawings for Orange, Polk, and Lake Counties became DOAH Case Nos. 08-0496, 08-0497, and 08-0498, respectively. Pursuant to the parties' joint request, DOAH consolidated the four cases into DOAH Case No. 08-0495.

11. Latino and Big Pig are closely held Florida corporations. Mr. Meiner is the sole shareholder, director, and officer of each corporation.[3]

12. Subsection 561.19(2)(d) prohibits Respondent from considering "more than one application from any one person, firm, or corporation"[4] in a drawing for one county. Chapter 561 does not define "more than one application from the same person, firm, or corporation" and does not define the term "person."

13. Some insight into the meaning of the term "person" can be gleaned from Florida Administrative Code Rule 61A-1.006(8).

> The term "person" shall not mean a corporation that owns part or all of the stock of an applicant corporation or licensed corporation; however, it does include officers, directors, and shareholders of each shareholder corporation.

14. The definition of a "person" in Rule 61A-1.006(8) does not reach the facts in this case. This case does not involve a shareholder corporation. Latino is not a shareholder of Big Pig, and Big Pig is not a shareholder of Latino. Nor does this case involve an officer, director, or shareholder in a shareholder corporation. Mr. Meiner is not an officer, director, or shareholder of a corporation that is a shareholder of either Latino or Big Pig.[5]

15. Latino, Big Pig, and Mr. Meiner are each a person within the meaning of Subsection 1.01(3). Latino and Big Pig are corporations, and Mr. Meiner is an individual.

16. Latino, Big Pig, and Mr. Meiner comprise a "group or combination" that is a "person" defined in Subsection 1.01(3).

Mr. Meiner owns all of the stock of each corporation, and the three persons form a "group" or "combination" that is statutorily defined as a "person" in Subsection 1.01(3).

17. Respondent is statutorily prohibited from accepting more than one application from any one person. Respondent correctly accepted the application of Mr. Meiner and correctly rejected the applications of the other members of the "group" or "combination" defined as one "person" in Subsection 1.01(3).

18. Apart from Subsection 1.01(3), Respondent correctly applied Florida Administrative Code Rule 61A-5.0105(8) to reject the applications from Latino and Big Pig. Florida Administrative Code Rule 61A-5.0105(8) provides:

> For the purposes of this section, "more than one applicant" shall mean that an applicant may have a direct or indirect interest in only one application in each county or city for which a license is available, but may file separate entry forms for licenses in different counties or cities for an opportunity to obtain an available license.[6]

19. Neither Florida Administrative Code Rule 61A-5.0105 nor Chapter 561 defines the phrase "direct or indirect interest." Neither party explicated any reasons in the record that require agency expertise to define a "direct or indirect interest." The issue of whether Mr. Meiner's 100 percent stock ownership of Latino and Big Pig is a "direct or indirect interest" in the corporate applications is an issue of fact to

be determined by the fact-finder. The fact-finder finds that complete ownership and control of an applicant corporation is a direct or indirect interest within the meaning of Respondent's adopted rule.

20. Mr. Meiner has a "direct or indirect interest" in the application submitted by Latino for the license quota drawing in Orange County. Mr. Meiner owns all of the stock of the applicant corporation. Respondent correctly rejected the application of Latino, in which Mr. Meiner has a direct or indirect interest, as more than one application from Mr. Meiner.

21. Mr. Meiner has a "direct or indirect interest" in the applications submitted by Big Pig for the license quota drawings in Lake, Polk, and Orange Counties. Mr. Meiner owns all of the stock of the applicant corporation. Respondent correctly rejected the applications of Big Pig, in which Mr. Meiner has a direct or indirect interest, as more than one application from Mr. Meiner.

22. Latino and Big Pig assert two final arguments, each of which involves mixed issues of fact and law. During the hearing, counsel for Latino and Big Pig referred to the two arguments as rule challenges, but counsel did not file a separate rule-challenge petition pursuant to Subsection 120.56 (a 120.56 proceeding), and Respondent has not objected to the consideration of the rule challenges in this proceeding, which

is conducted pursuant to Subsection 120.57(1) (a 120.57 proceeding).[7] The complete arguments concerning the two rule challenges appear in pages 10 through 12 of the PRO filed by Latino and Big Pig. The first argument, in substance, challenges as an unadopted rule an agency statement in a printed provision on the back of each entry form from Latino and Big Pig. The substance of the second argument challenges an adopted rule in Florida Administrative Code Rule 61A-5.0105(8). The factual aspects of the two arguments are addressed in the remaining findings.

23. The alleged unadopted rule is stated in a provision common to each entry form submitted by Latino and Big Pig. In relevant part, the provision states:

> The name of each individual entrant, corporate officer, directly interested person, etc. is required to be entered in Part B [labeled "List All Interested Persons"]. A person "interested" in the license or licensed business includes, but is not limited to, a person who agrees to do any of the following: enter into any financial arrangement through joint funds, investing funds, cosigning or guaranteeing a note or lease, or any action that creates funds for a transaction or the ability of the business to operate [hereinafter, "financial interest"]. This may include Spouse, Officer(s), Director(s), Stockholder(s), Chief Executive, Limited and General Partners(s), Corporation(s), or any other entity connected with the business . . . .

24. It is undisputed that neither Mr. Meiner, Latino nor Big Pig has any financial interest in the other except Mr. Meiner's 100 percent stock ownership of each corporation.[8] However, a "financial interest" is not the factual ground alleged in the Notices of Denial issued to Latino and Big Pig. Rather, the Notices of Denial state that the ground for denial is "[B]ecause you have filed more than one (1) application for the above referenced county." The pertinent provision common to the back of each entry form is not a stated ground for rejecting the entries of Latino and Big Pig, the challenge to that provision is not material to this proceeding, and the challenge is deemed to be moot because it does not affect the substantial interests of Latino and Big Pig in this proceeding.

25. Latino and Big Pig challenge an adopted rule in Florida Administrative Code Rule 61A-5.0105(8) (the challenged rule). The substance of the challenge may be fairly summarized as alleging that legislative changes in 2000 deprive the challenged rule of any statutory authority and that the challenged rule conflicts with the terms of the current statute.

26. Latino and Big Pig begin their collective argument with former Subsection 561.01(14), Florida Statutes (1981). That statute defined the terms "licensee," "applicant" or "person" to mean:

> [A]n individual, corporation, firm, partnership . . . or any such entity having a financial interest, directly or indirectly, in another such entity. (Emphasis supplied)

27. Latino and Big Pig acknowledge that the decision in Peterson v. Department of Business Regulation, 451 So. 2d 983 (Fla. 1st DCA 1984), supports Respondent's proposed rejection of the applications of Latino and Big Pig. In relevant part, the court construed Subsections 561.19(2) and 561.01(14), Florida Statutes (1981), by reading the two statutes together and holding that it was improper to include in a drawing pool separate applications of persons who, directly or indirectly, are financially interested in other applications. Peterson, 451 So. 2d at 985.

28. Latino and Big Pig argue that legislative authority for the challenged rule has been repealed. The adopted rule was last amended in 1998, and Subsection 561.01(14), Florida Statutes (2000), deleted any definition of the terms "applicant" or "person," deleted any reference to a "financial interest," and deleted any reference to a "direct or indirect interest." The statute now reads:

> "Licensee" means a legal or business entity, person, or persons that hold a license issued by the division and meet the qualifications set forth in s. 561.15.

29. Petitioner's rule challenge is rejected for two factual reasons. First, the legislative changes in 2000 do not affect either the law implemented in the challenged rule or the specific authority for the challenged rule. Second, the facts at issue in Peterson are different from those at issue in this proceeding.

30. The challenged rule implements Section 561.19 pursuant to the specific authority in Section 561.11. Although the decision in Peterson relied on Subsection 561.01(14), Florida Statutes (1981), to guide the court's interpretation of Subsection 561.19(2), the changes in Subsection 561.01(14), Florida Statutes (2000), affected neither the law implemented in the challenged rule nor the specific authority for the rule.

31. Deletion of the definition of a "person" from Subsection 561.01(14) leaves only the general definition of a "person" in Subsection 1.01(3). Reliance in the challenged rule on a "direct or indirect interest" in an application is consistent with the statutory definition in Subsection 1.01(3) of a "person" to include a "group" or "combination."

32. The decision in Peterson did not resolve the issue of whether a 100 percent shareholder and his wholly-owned corporation are the same person within the meaning of Subsection 561.19(2)(d). Rather, Peterson dealt with the factual issue of whether certain individuals, each of whom was clearly a person,

had a financial interest in the applications of other individuals.

CONCLUSIONS OF LAW

33. DOAH has jurisdiction over the parties and the subject matter of Subsection 561.19(2). §§ 120.569 and 120.57(1). The jurisdiction of DOAH to resolve the rule challenges in this proceeding is discussed later in this Recommended Order.

34. The burden of proof varies with the matter at issue in this proceeding. Latino and Big Pig have the initial burden of proving by a preponderance of the evidence that their separate applications were accurate and complete when submitted and were submitted in a timely manner. See M.H. and A.H. v. Department of Children and Family Services, 977 So. 2d 755, 759 (Fla. 2d DCA 2008)(applicant for license has initial burden of demonstrating fitness to be licensed)(citing Osborne Stern & Co. v. Department of Banking and Finance, 647 So. 2d 245, 248 (Fla. 1st DCA 1994)(Osborne Stern I), approved in part and quashed in part by 670 So. 2d 932 (Fla. 1996) (Osborne Stern II).

35. Latino and Big Pig satisfied their burden of proof concerning their entries into the relevant drawings. It is undisputed that the relevant applications were accurate and complete when submitted and were submitted in a timely manner.

36. Respondent has the burden of proving the specific facts alleged in the Notices of Denial as the grounds for

rejecting the entries of Latino and Big Pig. Respondent must show by a preponderance of the evidence that the applications from Latino and Big Pig constitute more than one application from the same person, firm, or corporation.

37. Respondent asserts the affirmative of factual allegations that the applications from Latino and Big Pig represent more than one application from the same person and that Mr. Meiner has a direct or indirect interest in Latino and Big Pig. The party asserting the affirmative of the issue generally bears the burden of proof. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Heath and Rehabilitation Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Cf. M.H., 977 So. 2d at 760-761 (applicant does not have the burden of disproving a charge of specific misconduct)(citing Osborne Stern II, 670 So. 2d at 934; Mayes v. Department of Children & Family Services, 801 So. 2d 980 (Fla. 1st DCA 2001).[9]

38. Respondent satisfied its burden of proof. For reasons stated in the Findings of Fact and not repeated here, Respondent showed by a preponderance of the evidence that Mr. Meiner has a direct or indirect interest in Latino and Big Pig, within in the meaning of Florida Administrative Code Rule 61A-5.0105(8), and that the applications from Latino and Big Pig constitute more than one application from Mr. Meiner. Respondent correctly

rejected the applications from Latino and Big Pig as applications prohibited by Subsection 561.19(2)(d).

39. The remaining conclusions address arguments by Latino and Big Pig that, in substance, challenge an alleged unadopted rule and an adopted rule in Florida Administrative Code Rule 61A-5.0105(8). The issue of whether DOAH has jurisdiction to resolve the disputes requires a separate legal analysis for each argument.

40. DOAH has jurisdiction in a 120.57 proceeding to resolve the dispute pertaining to an alleged unadopted rule. Agency action that determines the substantial interests of Latino and Big Pig and that is based on an unadopted rule is subject to de novo review in this proceeding. § 120.57(1)(e). Assuming arguendo that the challenged provision on the back of the entry forms submitted by Latino and Big Pig is an unadopted rule, the proposed agency action that affects the substantial interests of Latino and Big Pig is not based on the challenged provision, and the challenged provision is not subject to de novo review in this proceeding.[10]

41. The remaining jurisdictional issue is whether DOAH has jurisdiction to resolve the challenges of Latino and Big Pig to an adopted rule. The ALJ concludes that DOAH does have jurisdiction to resolve this aspect of the dispute between the parties.

42. The legal analysis of the remaining jurisdictional issue begins with Subsection 120.56(1)(e). In relevant part, the statute provides that, "Failure to proceed under this section shall not constitute failure to exhaust administrative remedies." The quoted statutory language means that the power of direct review in Article V, Subsection 4(b)(2), Florida Constitution (2007),[11] allows a reviewing court to consider a challenge to an adopted rule for the first time on appeal even though the rule was not challenged in the lower tribunal.

> [I]t is open to a reviewing court to adjudicate an administrative rule at odds with the statute it purports to implement, even when there has been no administrative rule challenge proceeding below. See State ex rel. Dep't of Gen. Servs. v. Willis, 344 So. 2d 580, 592 (Fla. 1st DCA 1977) ("[P]rovisions [now codified at section 120.56(1)(e)] are addressed . . . to district courts of appeal, which might otherwise rebuff rule challenges by petitions to 120.57 proceedings because petitioner did not 'exhaust' the rule challenge remedies of 120.54 and .56"). . . .

Clemons v. State Risk Management Trust Fund, 870 So. 2d 881, 884 (Fla. 1st DCA 2004)(Benton, J., concurring).

43. The decision in Willis does not limit the meaning of the relevant statutory language now codified in Subsection 120.56(1)(e) to the power of direct review. The court also interpreted the statutory language to avoid any appearance of requiring a duplicative 120.56 proceeding if a substantially

affected party presents his or her rule challenge with other grievances in a 120.57 proceeding.

> The legislative purpose is simply to avoid any appearance of requiring a substantially affected party to initiate duplicative 120.54 or .56 proceedings if his rule challenge is regularly presented with other grievances under 120.57. . . .

State ex rel. Department of General Services v. Willis, 344 So. 2d 580, 591-592 (Fla. 1st DCA 1977).

44. A rule challenge that is regularly presented with other grievances under 120.57 in the lower tribunal would not require a reviewing court to consider the rule challenge for the first time on appeal pursuant to the power of direct review. The rule challenge would have been presented initially with other grievances in a 120.57 proceeding.

45. Rather than interpreting the absence of a 120.56 proceeding to mean issue preclusion in a 120.57 proceeding, the decision in Willis construed the relevant statutory language now codified in Subsection 120.56(1)(e) as enhancing the remedies available to a substantially affected party. The court interpreted legislative policy as allowing a substantially affected party to challenge a rule in a 120.56 proceeding, a 120.57 proceeding, both proceedings, or for the first time on appeal pursuant to the power of direct review. The court specifically acknowledged that the purpose of a 120.57

proceeding is not limited to an adjudicatory proceeding but is legislatively intended to be mechanism for challenging agency policy, which may be stated as an adopted rule, an unadopted rule, or nonrule policy.

> There is yet a question whether traditional judicial deference to administrative remedies is lessened by certain language in subsections 120.54 and 120.56. Those sections authorize proceedings for the invalidation of agency rules, be they regularly adopted or merely proposed, which invalidly exercise delegated legislative authority. [Citations omitted] Subsections 120.54 . . . and [120].56 . . . provide that "failure to proceed under [those sections] shall not constitute failure to exhaust administrative remedies." If the quoted provisions are to be construed as qualifying the exclusivity of the entire [Chapter 120, Administrative Procedure] Act or its most fundamental remedies, they surprisingly tend to dissolve the judiciary's self imposed restriction on intervention by extraordinary writ even as the Act makes such intervention less necessary and desirable.
>
> The double entry of those provisions in the rulemaking and rule-challenge sections and their conspicuous omission elsewhere make clear that the Act intends no general cession of concurrent jurisdiction to the courts. There is no comparable language in 120.57, the core section which both provides the mechanism for rule challenges and is the Act's wider point of entry for those with more varied or general complaints concerning agency action: those against whom the agency has instituted adjudicatory proceedings, those whose impending injury is not wholly and precisely traceable to a rule invalidly exercising delegated legislative authority, those whose substantial interests are threatened by several agency causes or

> simply by agency action which is proceeding arbitrarily, imperiously, or obliviously.
>
> We are accustomed to think that the principal use of hearings is to develop records for "adjudicatory" or "quasi-judicial" decisions. [Citations omitted] That was the limited role of administrative hearings in years past, when the "universe of administrative law was hierarchical, with the judiciary at its apex." [Footnote omitted] Current understanding of the administrative process . . . recognizes that a hearing independently serves the public interest by providing a forum to expose, inform and challenge agency policy and discretion. Section 120.57 is central to the Act's purpose. . . .
>
> An understanding of 120.57's centrality makes clear that the [statutory language]--"Failure to proceed under [120.56] shall not exhaust administrative remedies"--enhances remedies available under the Act rather than encourage circuit court intrusion into the administrative process. The quoted provisions are addressed not to circuit courts but to district courts of appeal, which might otherwise rebuff rule challenges by petitions to review 120.57 proceedings because petitioner did not "exhaust" the rule challenge remedies of 120.54 and .56. [Citations omitted] The legislative purpose is simply to avoid any appearance of requiring a substantially affected party to initiate duplicative 120.54 or .56 proceedings if his rule challenge is regularly presented with other grievances under 120.57, resulting in final agency action and a petition for judicial review.[12] (Emphasis supplied)

Willis, 344 So. 2d at 591-592.

46. The foregoing interpretation of the decision in Willis is consistent with several legislatively intended purposes for

the APA.[13] In relevant part, the APA creates a point of entry for a person to challenge proposed agency action that affects his or her substantial interests. The APA also creates a mechanism for intra-branch dispute resolution within the executive branch of government.[14] Finally, the APA creates a mechanism to check dispute-resolution in the executive branch that goes beyond the powers, functions, and duties legislatively delegated in the terms of the statute implemented.[15]

47. Dispute-resolution that goes beyond the statute implemented exercises legislative power within the executive branch in a manner that is repugnant to the separation of powers act. Art. II, § 3, Fla. Const. The separation of powers act encompasses two prohibitions. No branch of government may encroach upon the powers of another, and no branch may delegate its power to another. Chiles v. Children A, B, C, D, E, and F, 589 So. 2d 260, 264-266 (Fla. 1991).

48. Mandatory enforcement of an adopted rule that goes beyond the statute implemented (an illicit adopted rule) in a 120.57 proceeding, for the sole reason that a substantially affected party did not file a duplicative 120.56 proceeding, would deny the executive branch an opportunity to formulate a dispute-resolution without exercising legislative power and without the need for an inter-branch judicial review. Mandatory enforcement of an illicit adopted rule would require executive

exercise of legislative power in a statutory mechanism legislatively intended to check executive exercise of legislative power. It is axiomatic that a statutory mechanism for dispute-resolution within the executive estate is powerless to circumvent the separation of powers act.

49. Rulemaking requirements are not intended as a substitute for, or modification of, the separation of powers act in a dispute-resolution within the executive estate. Statutory rulemaking is authorized in furtherance of, not in opposition to legislative policy. Willette v. Airproducts and Bassett and Department of Labor and Employment Security, Division of Workers' Compensation, 700 So. 2d 397, 399 (Fla. 1st DCA 1997). Accord One Beacon Insurance v. Agency for Health Care Administration, 958 So. 2d 1127, 1129 (Fla. 1st DCA 2007); Zimmerman v. Florida Windstorm Underwriting Association, 873 So. 2d 411, 415 (Fla. 1st DCA 2004); Broward Children's Center, Inc. v. Hall, 859 So. 2d 623, 627 (Fla. 1st DCA 2003); Department of Children and Family Services v. L.G., 801 So. 2d 1047, 1053 (Fla. 1st DCA 2001).

50. The concurring opinion in Clemons observed, in relevant part, that an ALJ "presiding in [a 120.57 proceeding] will deem controlling [an adopted rule] never challenged [in a 120.56 proceeding]." Clemons, 870 So. 2d at 884 (Benton, J., concurring)(Emphasis supplied). Similarly, the decision in

Willette held, in relevant part, that "a presumptively valid adopted rule must give way in judicial proceedings to any contradictory statute that applies." Willette, 700 So. 2d at 399 (Emphasis supplied).

51. The emphasized language in Clemons and Willette is not inconsistent with the ALJ's interpretation of the decision in Willis, 344 So. 2d at 591-592 (construing legislative intent as avoiding any requirement for filing a duplicative 120.56 proceeding if the rule challenge of a substantially affected party is presented in a 120.57 proceeding). First, neither the concurring opinion in Clemons nor the decision in Willette considered the application of the separation of powers act to a rule challenge in a 120.57 proceeding. Second, the term "will," as it is used in Clemons, is not synonymous with "must." The term "will" also means likelihood, willingness, intention, probability, expectation, and customary or habitual action. American Heritage Dictionary of the English Language, at 1968 (Houghton Mifflin Company 4th ed. 2000). Mandatory enforcement of an illicit adopted rule in a 120.57 proceeding, in the absence of judicial review, would require executive exercise of legislative power in a statutory mechanism that is legislatively intended to check executive exercise of legislative power. Such an interpretation is best left to the courts in an inter-branch judicial review.

52. Rulemaking requirements are legislatively intended to create transparency by closing the gap between what an agency and a member of the staff knows about the agency's law and policy and what a regulated party can know. McDonald v. Department of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977). A principal goal of the APA is the abolition of "unwritten rules" by which agency employees can act with unrestrained discretion to adopt, change, and enforce legislative policy. Straughn v. O'Riordan, 338 So. 2d 832, 834 n.3 (Fla. 1976).[16]

53. Having recognized the jurisdiction of DOAH to resolve the dispute based on an argument challenging an adopted rule, the Recommended Order turns to the burden of proof. By analogy to Subsection 120.56(4)(b), the ALJ concludes that the burden of proof is on Latino and Big Pig to prove that the challenged rule in Florida Administrative Code Rule 61A-5.0105(8) goes beyond the statute implemented.

54. Latino and Big Pig rely on Subsection 561.01(14), Florida Statutes (2000), which deleted the definition of the term "person" as well as any reference to a financial interest and any reference to a direct or indirect interest. Latino and Big Pig argue that references in the challenged rule to a "direct or indirect interest" lack statutory authority after the legislative changes in 2000. However, the adopted rule does not

implement Subsection 561.01, and that statute is not specific authority for the rule. The legislative changes in 2000 may have eliminated statutory language on which courts previously relied to interpret Subsection 561.19(2), but the statute implemented in the adopted rule is unaffected by the legislative changes.

55. Prior to 2000, the specific definition of a "person" in Subsection 561.01(14) controlled the general definition in Subsection 1.01(3). See, e.g., Zorc v. City of Vero Beach, 722 So. 2d 891, 899 (Fla. 4th DCA 1998)(specific statute covering a particular subject controls a statute covering the same subject in more general terms). Beginning in 2000, and in this proceeding, Chapter 561 contains no specific definition of the term "person." The more general definition in Subsection 1.01(3) is now the controlling definition.

56. In construing the definition of a "person" in Subsection 1.01(3), the singular includes the plural, and vice versa, whenever the context permits. § 1.01(1); PNR, Inc. v. Beacon Property Management, Inc., 842 So. 2d 773, 775 (Fla. 2003); Canida v. Canida, 751 So. 2d 647, 649 (Fla. 3d DCA 1999). The 100 percent ownership interest of two corporate applicants by one individual applicant is a factual context that permits Respondent's definition of Latino, Big Pig, and Mr. Meiner to be the same "person," "group" or "combination" within the meaning

of Subsection 1.01. The 100 percent ownership of two corporate applicants by the same individual applicant is also a "direct or indirect interest" within the meaning of the challenged rule.

57. The remedies available in a 120.56 proceeding and a 120.57 proceeding are distinct, and, as previously discussed, the election of those remedies is legislatively left to a substantially affected party. The statutory purpose for filing a 120.56 proceeding is to "seek an administrative determination of the invalidity of a rule." § 120.56(1). In contrast, the purpose of initiating a 120.57 proceeding is to challenge proposed agency action. If the proposed agency action were based on an illicit adopted rule, the recommended order of the presiding ALJ would not need to "invalidate" the adopted rule because that is not the purpose of a 120.57 proceeding. The recommended order would merely conform any ambiguity in the adopted rule to the statute implemented to preserve the validity of the rule, thereby avoiding the need to invalidate the rule. Even a literal conflict between an adopted rule and a statute can be conformed to the statute as though a court were construing the statutory term "and" to mean "or" in order to preserve the constitutional validity of the statute.[17]

RECOMMENDATION

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

RECOMMENDED that Respondent enter a final order excluding the entries of Latino and Big Pig and finding the adopted rule to be a valid exercise of delegated legislative authority.

DONE AND ENTERED this 3rd day of July, 2008, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of July, 2008.

ENDNOTES

[1/] References to subsections, sections, and chapters are to Florida Statutes (2007).

[2/] References to rules are to rules promulgated in the Florida Administrative Code in effect in 2007, unless otherwise stated.

[3/] Mr. Meiner incorporated Latino on December 21, 2006, and he incorporated Big Pig on December 22, 1994.

[4/] Subsection 561.19(2)(d), in its entirety, provides:

> The director shall not include more than one application from any one person, firm, or corporation in the random selection process, nor may she or he consider more than one application for any one person, firm, or corporation when there are fewer applications than available licenses.

Counsel for the parties stipulated during a post-hearing telephone conference with the undersigned that the statute is properly construed to prohibit more than one application from any one person, firm, or corporation when, as in this case, the number of applications exceeds the number of available licenses. The random selection process referred to in the statute is used only when applications exceed available licenses.

[5/] Stock attribution rules in the federal tax law would make Latino and Big Pig constructive owners of each other because Mr. Meiner owns 50 percent or more of each corporation. In relevant part, 26 U.S.C. (IRC) Subsection 318(a)(3)(C) provides:

> If 50 percent or more . . . of the stock in a corporation is owned, directly or indirectly, by . . . any person, such corporation shall be considered as owning the stock owned by . . . such person.

Neither party cited any legal authority for applying the stock attribution rules for constructive ownership under federal tax law in this proceeding. The undersigned expressly avoids the use of stock attribution rules to determine whether Latino, Big Pig, and Mr. Meiner are one person. If stock attribution rules were used to find that Latino and Big Pig were shareholder corporations of each other, neither would be a person under Florida Administrative Code Rule 61A-1.006(8). It is unclear whether a finding that Latino and Big Pig are not persons would preclude either corporation from filing an application for entry into a license quota drawing. Neither Chapter 561 nor Florida Administrative Code Rule 61A-1.006 defines the terms "person" and "applicant." Both the statute and the rule tend to use the terms "applicant" and "person" synonymously but without explanation. An inference that the two terms are synonyms may support a finding that the stock attribution rules would preclude Latino and Big Pig from being defined as a person and

would preclude both from submitting an application for entry into a license quota drawing.

[6/] The undersigned interprets the reference in Florida Administrative Code Rule 61A-5.0105(8) to "this section" to be a reference to "Section" 561.09(2)(d). The reference in the rule to "this section" is followed by a reference to "more than one applicant." The latter reference does not appear elsewhere in the rule. Although Subsection 561.09(2) uses the phrase "more than one application," rather than the reference in the rule to "more than one applicant," the reference in the rule is the agency's attempt to explain relevant statutory phrases.

[7/] Latino and Big Pig may not have filed a separate 120.56 proceeding because Subsection 561.19(4), which is the specific statutory authority for challenging a proposed exclusion of entries from a license quota drawing, limits administrative remedies to those authorized in Subsections 120.569 and 120.57(1). Counsel for the parties may have construed Subsection 561.19(4) to preclude a challenge in a separate 120.56 proceeding. If that were the case, such an interpretation would have been consistent with the general rule of statutory construction that a specific statute covering a particular subject controls a statute covering the same subject in more general terms. Zorc v. City of Vero Beach, 722 So. 2d 891, 899 (Fla. 4th DCA 1998). In addition, the factual issues inherent in the two rule challenges suggest that such a statutory construction by the parties would have been consistent with Subsection 120.569(1)(providing, in relevant part, that Subsection 120.57(1) applies whenever a proceeding involves a disputed issue of material fact). However, the ALJ expressly refrains from a determination of whether Subsection 561.19(4) should be construed literally to preclude a separate 120.56 proceeding.

[8/] The principal business purpose of Latino is the development of a chain of Latin food restaurants. Latino is not, and has never been, engaged in the active conduct of a trade or business. The sole assets of Latino are limited to assets identified in the record as restaurant equipment.
The principal business purpose of Big Pig is to earn revenue as a license holder for a restaurant named Bubbalou's Bodacious Bar-B-Que in Central Florida and as a management company for various other restaurants in central Florida. Big Pig has been, and is, engaged in the conduct of a trade or business and maintains its principal place of business at 1302 Orange Avenue,

Winter Park, Florida 32789. Big Pig generates funds through one or more licensing agreements with other restaurants. Mr. Meiner is the only employee of Big Pig.

[9/] The grounds for proposed rejection do not allege a specific act of misconduct. By analogy, however, the grounds for proposed rejection do allege specific facts. Respondent alleges that the entries from Latino and Big Pig are more than one application from Mr. Meiner and that Latino, Big Pig, and Mr. Meiner have a direct or indirect interest in each other within the meaning of Florida Administrative Code Rule 61A-5.0105(8).

[10/] If the undersigned were to reach the merits of the first rule challenge, the burden of proof would be on Respondent. Compare § 120.57(1)(e)2. (the agency must demonstrate an unadopted rule is within delegated legislative authority) with § 120.56(4)(b) (requiring a petitioner to prove the allegations in the petition challenging an unadopted rule and limiting the agency's burden to a showing that rulemaking is not feasible and practicable).

[11/] References to the Florida Constitution are to Florida Constitution (2007), unless otherwise stated.

[12/] If a substantially affected party's rule challenge involves a disputed issue of material fact, he or she would be required to assert the rule challenge in a 120.57 proceeding. See § 120.569(1)(unless waived by all parties, Subsection 120.57(1) applies whenever the proceeding involves a disputed issue of material fact). A substantially affected party "may" also file a 120.56 proceeding if the party elects to pursue the additional remedies available in that statute. See § 120.56(1)(a)(any substantially affected person "may" file a 120.56 proceeding to determine the invalidity of a rule).

[13/] Patricia Dore, Access to Florida to Florida Administrative Proceedings, 13 FLA.ST.U.L.REV., 965, 967, 970, 1017 (winter 1986).

[14/] In a 120.57 proceeding, for example, an independent executive agency, DOAH, assigns an ALJ to conduct a hearing and recommend final agency action in a dispute between a sister executive agency and a substantially affected party. The sister agency issues a final order that is final agency action. In a 120.56 proceeding, the ALJ issues a final order that is final agency action. Both the final order in a 120.57 proceeding and

the final order in a 120.56 proceeding are subject to an inter-branch review by the judicial branch of government. All agency action, on appropriate challenge, matures into an agency order impressed with the characteristics of Subsection 120.57(1). McDonald v. Department of Banking and Finance, 346 So. 569, 577 (Fla. 1st DCA 1977).

[15/] Subsection 120.52(8)(introductory paragraph).

[16/] Rulemaking disposes of proof and debate of agency policy in a 120.57 proceeding. McDonald, 346 So. 2d at 583. The jurisdictional analysis in this Recommended Order is limited to the argument of Latino and Big Pig that the challenged rule goes beyond the statute that exists after the legislative changes in 2000. The analysis does not reach proof and debate of agency policy on other grounds. Statutory rulemaking requirements are powerless to displace the separation of powers act in a 120.57 proceeding.

[17/] A recommended order invalidating an adopted rule would present several perplexing issues under the remand provisions in Subsection 120.68(7). Remand is mandatory when agency action conflicts with a statute or constitutional provision and when agency action conflicts with an adopted rule. Compare §§ 120.68(7)(e)4. (remand if agency action conflicts with a statutory or constitutional provision) and 120.68(7)(e)2. (remand for agency action that conflicts with an adopted rule). If an adopted rule were to conflict with a statute and the presiding ALJ were unable to conform the rule to the statute, the ALJ would be required to recommend agency action that conforms to the statute implemented even though the recommended agency action would deviate from the illicit adopted rule. Similarly, the final order of the agency would necessarily deviate from the illicit adopted rule and conform to the statute. Differences in the statutory remedies available in a 120.56 proceeding and a 120.57 proceeding would also make a recommended order invalidating an adopted rule problematic. Unlike a final order invalidating an adopted rule in a 120.56 proceeding, a recommended order invalidating a rule in a 120.57 proceeding would not require the agency to publish a notice of invalidity. The recommended order would be subject to modification in the final order of the agency, would be limited to the parties and facts of record, and would not preclude the agency from relying on the rule in other cases, except to the extent the doctrine of stare decisis may preclude reliance on the rule in cases involving similar facts and law. See Gessler v. Department of Business and Professional Regulation, 627 So.

2d 501, 504 (Fla. 4th DCA 1993)(agency is bound by administrative stare decisis to follow its final orders in like cases involving similar facts). A determination of invalidity in a 120.56 proceeding is a final order which an agency does not have statutory authority to modify, and the final order is binding on the agency in other administrative hearings. The final orders in a 120.56 proceeding and a 120.57 proceeding are subject to inter-branch judicial review. However, the problems associated with a recommended order invalidating an adopted rule would be similar to those attendant to a recommended order invalidating an unadopted rule pursuant to Subsection 120.57(1)(e).

COPIES FURNISHED:

Jed Berman, Esquire
Infantino and Berman
Post Office Drawer 30
Winter Park, Florida 32790

Joshua B. Moye, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399-2202

Ned Luczynski, General Counsel
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

Cynthia Hill, Director
Division of Alcoholic Beverages
and Tobacco
Department of Business and
Professional Regulation
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-0792

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.