STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELMWOOD TERRACE LIMITED PARTNERSHIP,	)	
Petitioner,	)	
vs.	)	Case No. 10-2799RX
FLORIDA HOUSING FINANCE CORPORATION,	)	
Respondent.	)	

FINAL ORDER

On June 14 through 16 and 22, 2010, a formal administrative hearing was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Stephen Menton, Esquire
Rutledge, Ecenia, & Purnell, P.A.
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For Respondent: Hugh R. Brown, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
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STATEMENT OF THE ISSUE

The issue in this case is whether a portion of Florida Administrative Code Rule 67-48.0072 is an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

In 2007, Elmwood Terrace Limited Partnership (Petitioner) first proposed to develop an affordable housing apartment complex in Ft. Myers, Florida. After completion of an evaluation and approval process, Florida Housing and Finance Corporation (Respondent) awarded federal tax credits to the Petitioner. The Petitioner intended to sell the tax credits for cash, but there were no buyers, and the tax credits were of little value to the Petitioner. Other affordable housing developers found themselves in similar circumstances.

In 2009, the federal government provided an alternative affordable housing funding mechanism that permitted the exchange of the unmarketable tax credits for cash at a discounted rate. The Respondent returned federal tax credits initially granted to Petitioner, as well as credits granted to other developers, to the federal government in exchange for the discounted cash.

The Respondent subsequently issued a Request for Proposal to allocate the cash, and, after the resolution of related litigation addressed herein, the Petitioner participated in the allocation process. Ultimately, the Respondent denied the Petitioner's funding request based on a second analysis of the Petitioner's development proposal.

By Petition for Hearing dated March 29, 2010, the Petitioner challenged the denial. The Respondent forwarded the

Petition for Hearing to the Division of Administrative Hearings, where it was designated as DOAH Case No. 10-1975. The challenge to the denial of the funding application is addressed by a separate Recommended Order issued contemporaneously with this Final Order.

On May 21, 2010, the Petitioner filed a Petition for Administrative Determination of Invalidity of Existing Rule that is addressed in this Final Order.

The Petitioner asserts that a portion of text (referred to by the parties as the "Impact Rule") that is contained within Florida Administrative Code Rule 67-48.0072 (the "Credit Underwriting Rule") is an invalid exercise of delegated legislative authority.

On June 10, 2010, the parties filed a Joint Pre-hearing Stipulation that included a statement of stipulated facts. The stipulated facts have been incorporated as necessary into this Final Order and are otherwise adopted in their entirety.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 3 through 5, 7 through 13, 15, 16, 18, 19, 22, 23, 25 through 28, 31 through 36, 39, 42 through 44, 53 through 55, 58, 59, 61, 63, and 70 through 72 admitted into evidence. The Respondent presented the testimony of three witnesses and had two exhibits admitted into evidence.

Joint Exhibits 1, 2 and 4 through 12 were also admitted into evidence.

The six-volume Transcript of the hearing was filed on June 29, 2010. The final volume of the Transcript (the rebuttal testimony of Robert Vogt) was filed on July 8, 2010.

All parties filed Proposed Final Orders that have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Petitioner is a limited partnership and developer of affordable housing in Florida. The Petitioner is seeking to construct a 116-unit affordable housing family apartment complex ("Elmwood Terrace") in Fort Myers, Lee County, Florida. The Petitioner has standing to initiate and participate in this proceeding.

2. The Respondent is a public corporation organized under Chapter 420, Florida Statutes (2010), to administer state programs that provide financial support to developers seeking to construct affordable housing. Such support is provided through a variety of mechanisms, including the use of federal tax credits.

3. The federal tax credit program was created in 1986 to promote the construction and operation of privately-developed affordable housing. The tax credits relevant to this proceeding

provide a dollar-for-dollar credit against federal tax liabilities for a period of ten years.

4. The Respondent is the designated Florida agency responsible for distribution of the federal tax credits. The tax credits are awarded pursuant to a "Qualified Allocation Plan" (QAP) that must be annually approved by the Governor and adopted as an administrative rule by the Respondent.

5. As a matter of course, developers receiving the federal tax credits sell them through syndicators for discounted cash. The sale of the tax credits generates debt-free cash equity for developers.

6. Developers seeking financial support to build affordable housing units submit applications to the Respondent during an annual competitive process known as the "Universal Cycle."

7. Every three years, the Respondent commissions a study (the "Shimberg Report"), which measures, within each Florida county, the number of "cost-burden" renters earning 60 percent or less of an area's median income (AMI) who pay more than 40 percent of their income in rent. The AMI is determined by the federal government. The cost-burden households are further classified into four groups: families, the elderly, farm workers, and commercial fishermen. The Shimberg Report also assesses needs related to homeless people in the state.

8. Developers seeking to obtain affordable housing financing are required to set aside a portion of the proposed units for income-limited residents. Access to affordable housing units is generally targeted towards persons receiving no more than 60 percent of the AMI.

9. The Universal Cycle process allows the Respondent to target specific housing deficiencies in terms of geographic availability and population demographics and to preserve the stock of existing affordable housing.

10. During the Universal Cycle process, the Respondent identifies areas where additional affordable housing is unnecessary, to discourage additional development in weak markets and to encourage development in those locations where there is a lack of access to affordable housing. The Respondent classifies areas where there is little need for additional affordable housing as "Location A" areas.

11. Each application filed during the Universal Cycle is evaluated, scored, and competitively ranked against other applications filed during the same Universal Cycle.

12. After the Respondent completes the competitive ranking of the applications submitted in the Universal Cycle, the applicants are provided with an opportunity to review and comment on the evaluation and scoring of the proposals. Applicants may also cure defects in their own proposals.

13. After the close of the review and comment period, the Respondent publishes a revised competitive ranking of the proposals. Developers may challenge the second ranking through an administrative hearing.

14. After the second ranking process is final, developers achieving an acceptable score receive preliminary funding commitments and proceed into a "credit underwriting" evaluation process.

15. The credit underwriting process is governed by Florida Administrative Code Rule 67-48.0072. The Respondent selects an independent credit underwriter who reviews each proposal according to requirements set forth by administrative rule (the "Credit Underwriting Rule"). The cost of the credit underwriting review is paid by the developer.

16. The credit underwriter considers all aspects of the proposed development, including financing sources, plans and specifications, cost analysis, zoning verification, site control, environmental reports, construction contracts, and engineering and architectural contracts. The responsibility for the market study is assigned by the credit underwriter to an independent market analyst.

17. The credit underwriter prepares a report for each applicant invited into the process. The reports are submitted to the Respondent's nine-member, statutorily-created Board of

Directors (Board). The Board approves or denies each application for financial support.

18. The Petitioner applied for funds for the Elmwood Terrace project during the 2007 Universal Cycle.

19. The Petitioner's application received a perfect score, maximum points, and was allocated tax credits in the amount of $1,498,680. The Petitioner thereafter entered the credit underwriting process.

20. The credit underwriting analysis was performed by Seltzer Management Group (SMG). SMG contracted with a market analyst, Vogt, Williams & Bowen Research, Inc. (VWB), to prepare the required market study.

21. The affordable units at Elmwood Terrace were initially intended for persons receiving incomes no more than 60 percent of the AMI. The VWB research indicated that the Elmwood Terrace project would adversely affect the existing affordable housing developments, if the Elmwood Terrace units were available to the 60 percent AMI population.

22. The existing affordable housing developments, also serving the 60 percent AMI population, included two developments that had participated in the Respondent's "Guarantee Fund" program, addressed elsewhere herein.

23. VWB determined that the impact of the Elmwood Terrace project on the existing developments could be ameliorated were

some of the Elmwood Terrace units targeted during "lease-up" to persons at income levels of not more than 50 percent of the AMI. The lease-up period is the time required for a new development to reach anticipated occupancy levels.

24. The issue was the subject of discussions between the Petitioner, VWB, and SMG. To resolve the anticipated negative impact on the existing affordable housing developments, the Petitioner agreed to target the 50 percent AMI population.

25. In September 2008, the credit underwriter issued his report and recommended that the Petitioner receive the previously-allocated tax credits. On September 22, 2008, the Respondent's Board accepted the credit underwriting report and followed the recommendation.

26. In the fall of 2008, after the Petitioner received the tax credits, the nation's economic environment deteriorated considerably. As a result, the syndicator with whom the Petitioner had been working to sell the tax credits advised that the sale would not occur. The Petitioner was unable to locate an alternate purchaser for the tax credits.

27. The Petitioner considered altering the target population of the project in an attempt to attract a buyer for the tax credits, and there were discussions with the Respondent about the option, but there was no credible evidence presented

that such an alteration would have resulted in the sale of the Petitioner's tax credits.

28. Lacking a buyer for the tax credits, the Petitioner was unable to convert the credits to cash, and they were of little value in providing funds for the project.

29. The Petitioner was not alone in its predicament, and many other developers who received tax credits in the 2007 and 2008 Universal Cycles found themselves unable to generate cash through the sale of their tax credits.

30. In early 2009, Congress adopted the American Recovery and Reinvestment Act of 2009 (PL 111-5), referred to herein as ARRA, which incorporated a broad range of economic stimulus activities.

31. Included within the ARRA was the "Tax Credit Exchange Program" that provided for the return by the appropriate state agency of a portion of the unused tax credits in exchange for a cash distribution of 85 percent of the tax credit value.

32. The State of Florida received $578,701,964 through the Tax Credit Exchange Program.

33. The ARRA also provided additional funds to state housing finance agencies through a "Tax Credit Assistance Program" intended to "resume funding of affordable housing projects across the nation while stimulating job creation in the hard-hat construction industry."

34. On July 31, 2009, the Respondent issued a Request for Proposals (RFP 2009-04) to facilitate the distribution of the ARRA funds.

35. The Respondent issued the RFP because the 2009 QAP specifically required the Respondent to allocate the relevant federal funds by means of a "competitive request for proposal or competitive application process as approved by the board." The 2009 QAP was adopted as part of the 2009 Universal Cycle rules.

36. Projects selected for funding through the RFP would be evaluated through the routine credit underwriting process.

37. Participation in the RFP process was limited to developers who held an "active award" of tax credits as of February 17, 2009, and who were unable to close on the sale of the credits.

38. The RFP included restrictions against proposals for development within areas designated as "Location A."

39. Although the location of the Elmwood Terrace project had not been within an area designated as "Location A" during the 2007 Universal Cycle process, the Respondent had subsequently designated the area as "Location A" by the time of the 2009 Universal Cycle.

40. The RFP also established occupancy standards for projects funded under the RFP that exceeded the standards established in the Universal Cycle instructions and an

evaluation process separate from the Universal Cycle requirements.

41. Although the restrictions in the RFP would have automatically precluded the Petitioner from being awarded funds, the Petitioner submitted a response to the RFP and then filed a successful challenge to the RFP specifications (DOAH Case No. 09-4682BID).

42. In a Recommended Order issued on November 12, 2009, the Administrative law Judge presiding over the RFP challenge determined that certain provisions of the RFP, including the automatic rejection of Location A projects, the increased occupancy standards, and the RFP evaluation criteria, were invalid.

43. The Respondent adopted the Recommended Order by a Final Order issued on December 4, 2009, and invited the Petitioner into the credit underwriting process by a letter dated December 9, 2009.

44. The credit underwriter assigned to analyze the Petitioner's project was SMG, the same credit underwriter that performed the original analysis of the Petitioner's project during the 2007 Universal Cycle.

45. SMG retained Meridian Appraisal Group, Inc. (Meridian), to prepare the required market study.

46. The Respondent was not consulted regarding the SMG decision to retain Meridian for the market analysis. The decision to retain Meridian for the market analysis was entirely that of SMG.

47. The Respondent did not direct SMG or Meridian in any manner regarding the assessment or evaluation of any negative impact of the proposed project on existing affordable housing developments.

48. Meridian completed the market study and forwarded it to SMG on January 26, 2010.

49. The Meridian market analysis included a review of the relevant data as well as consideration of the actual economic conditions experienced in Lee County, Florida, including the extremely poor performance of the existing housing stock, as well as significant job losses and considerable unemployment.

50. The Meridian market analysis determined that the Elmwood Terrace development would have a negative impact on two existing affordable housing apartment developments that were underwritten by the Respondent through a Guarantee Fund created at Section 420.5092, Florida Statutes, by the Florida Legislature in 1992.

51. The existing Guarantee Fund properties referenced in the SMG recommendation are "Bernwood Trace" and "Westwood," both

family-oriented apartment developments within five miles of the Elmwood Terrace location.

52. The Guarantee Fund essentially obligates the Respondent to satisfy mortgage debt with the proceeds of Florida's documentary stamp taxes, if an affordable housing development is unable to generate sufficient revenue to service the debt.

53. Because the Guarantee Fund program essentially serves to underwrite the repayment of mortgage debt for a "guaranteed" affordable housing development, the program increases the availability, and lowers the cost, of credit for developers.

54. The Guarantee Fund program has participated in the financing of more than 100 projects, most of which closed between 1999 and 2002.

55. Since 2005, the Respondent has not approved any additional Guarantee Fund participation in any affordable housing developments.

56. The Respondent's total risk exposure through the Guarantee Fund is approximately 750 million dollars.

57. Prior to October 2008, no claims were made against the Guarantee Fund. Since November 2008, there have been eight claims filed against the Guarantee Fund.

58. Affordable housing financing includes restrictions that mandate the inclusion of a specific number of affordable

housing units. Such restrictions are eliminated through foreclosure proceedings, and, accordingly, access to affordable housing units can be reduced if a development fails.

59. Presuming that the eight claims pending against the Guarantee Fund eventually proceeded through foreclosure, as many as 2,300 residential units could be deducted from the stock of affordable housing.

60. When there is a claim on the Guarantee Fund, the Respondent has to assume payment of the mortgage debt. The claims are paid from the Guarantee Fund capital, which is detrimental to the Respondent's risk-to-capital ratio. The risk-to-capital ratio is presently four to one. The maximum risk-to-capital ratio acceptable to rating agencies is five to one.

61. The eight claims against the Guarantee Fund have ranged between ten and 18 million dollars each. The Respondent's bond rating has declined because of the eight claims.

62. A continued decline in the Respondent's bond rating could result in documentary stamp tax receipts being used for payment of Guarantee Fund claims and directed away from the Respondent's programs that are intended to support the creation of affordable housing.

63. In an effort to prevent additional claims against the Guarantee Fund, the Respondent has created the "Subordinate Mortgage Initiative" to provide assistance in the form of two-year loans to troubled Guarantee Fund properties.

64. When preparing the 2010 market study, Meridian did not review the VWB market analysis performed as part of the 2007 application. Although the Petitioner has asserted that Meridian should have reviewed the 2007 VWB analysis, there is no evidence that Meridian's decision to conduct an independent market study without reference to the prior market review was inappropriate.

65. On February 8, 2010, SMG issued a recommendation that the Petitioner's funding request be denied "because of the proposed development's potential financial impacts on developments in the area previously funded by Florida Housing and an anticipated negative impact to the two Guarantee Fund properties located within five miles of the proposed development."

66. There is no evidence that the Meridian analysis was inadequate or improperly completed. There is no evidence that the SMG's reliance on the Meridian analysis was inappropriate. For purposes of this Order, the Meridian analysis and the SMG credit underwriting report have been accepted.

67. Elmwood Terrace, a newer development with newer amenities, would compete for residents with the Bernwood Trace and Westwood developments.

68. The financing for Bernwood Trace and Westwood was premised on projections that the affordable housing units would be leased to the 60 percent AMI population; however, the developments have been unable to maintain full occupancy levels, even though a number of units in the two properties are leased at reduced rates based on 50 percent AMI income levels.

69. A rent reduction implemented by an existing development, whether based on economic conditions or resulting from competition, constitutes a negative impact on the development.

70. There is no credible evidence that the occupancy rates are attributable to any difficulty in management of the two developments. It is reasonable to conclude that the leasing issues are related to economic conditions present in Lee County, Florida.

71. In January 2010, VWB conducted an alternative market analysis. The VWB analysis was not provided to SMG or to the Respondent at any time during the credit underwriting process.

72. Based on the 2010 VWB analysis, the Petitioner asserted that economic conditions in Lee County, Florida, have improved since the first credit underwriting report was

completed in 2008 and that the improvement is expected to continue.

73. There is no noteworthy evidence that economic conditions have improved or will significantly improve in the Lee County, Florida, market in the predictable future, and the VWB analysis is rejected.

74. The Petitioner offered to mitigate any negative impact on the Guarantee Fund properties by committing affordable units to 50 percent AMI income levels. Given the existing economic and rental market conditions in Lee County, Florida, the evidence fails to establish that the offer would actually alleviate the negative impact on the affected Guarantee Fund developments.

75. The 2010 VWB analysis states that there is substantial unmet demand for housing at 50 percent AMI and that there will be no impact on the Guarantee Fund units if the Elmwood Terrace units were set aside for such individuals. There is no credible evidence that there is a substantial and relevant unmet affordable housing demand in Lee County, Florida. The VWB analysis is rejected.

76. Following the completion of each annual Universal Cycle process, the Respondent actively solicits feedback from developers and the public and then amends the Universal Cycle requirements to address the issues raised, as well as to reflect

existing affordable housing needs and general concerns of the Board. The amendments are applicable for the following Universal Cycle.

77. In 2009, the Respondent amended subsection (10) of the Credit Underwriting Rule as part of the annual revisions to the Universal Cycle process.

78. The relevant amendment (referred to by the parties as the "Impact Rule") added this directive to the credit underwriter:

> The Credit Underwriter must review and determine whether there will be a negative impact to Guarantee Fund Developments within the primary market area or five miles of the proposed development, whichever is greater.

79. The amendment was prompted by the Respondent's experience in the fall of 2008 when considering two separate applications for affordable housing financing. The potential negative impact of a proposed development on an existing Guarantee Fund property was central to the Board's consideration of one application, and the Board ultimately denied the application. In the second case, the Board granted the application, despite the potential negative impact on a competing development that was not underwritten by the Guarantee Fund.

80. The intent of the language was to advise developers that the existence of Guarantee Fund properties within the

competitive market area would be part of the credit underwriting evaluation and the Board's consideration.

81. Notwithstanding the language added to the rule, the credit underwriter is charged with reviewing the need for additional affordable housing. Even in absence of the added language, consideration of any negative impact to competing developments based on inadequate need for additional affordable housing would be appropriate.

82. In rendering the 2010 credit underwriting report on Elmwood Terrace, the credit underwriter complied with the directive.

83. Prior to determining that the Petitioner's funding application should be denied, the Respondent's Board was clearly aware of the Petitioner's application, the credit underwriting report and market analysis, and the economic conditions in Lee County, Florida.

84. There is no credible evidence of any need for additional affordable housing in Lee County, Florida.

85. There is no credible evidence that the Lee County, Florida, market can sustain the addition of the units proposed by the Petitioner without adversely affecting the financial feasibility of the existing Guarantee Fund developments.

86. The Board was aware that the Elmwood Terrace development could attract residents from the nearby Guarantee

Fund properties and that local economic conditions threatened the financial viability of the properties.

87. Given current economic conditions, approval of the application at issue in this proceeding would reasonably be expected to result in a negative impact to existing affordable housing developments.

88. The protection of Guarantee Fund developments is necessary to safeguard the resources used to support the creation and availability of affordable housing in the state.

CONCLUSIONS OF LAW

89. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.56, 120.569, and 120.57(1), Fla. Stat. (2009).

90. The Petitioner has asserted that a portion of text, referred to by the parties as the "Impact Rule" and set forth within Florida Administrative Code Rule 67-48.0072 (the "Credit Underwriting Rule"), is an invalid exercise of delegated legislative authority.

91. The evidence fails to establish that the challenged language meets the definition of "rule." Subsection 120.52(16), Florida Statutes (2009), defines a "rule" as follows:

> (16) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or

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

92. The fact that the parties refer to the challenged language as the "Impact Rule" does not make it a rule. The fact that the Respondent adopted the language through the rulemaking

process set forth in Chapter 120, Florida Statutes (2009), does not make it a "rule."

93. The challenged language does not "implement, interpret or prescribe law or policy or describe the procedure or practice requirements of the agency." The challenged language does no more than direct the credit underwriter to review specific information and make a determination as to whether a proposed development will have a negative impact on existing developments in which the Respondent has funds at risk.

94. The challenged language does not require that the credit underwriter recommend against granting an application for funding where the proposed development would negatively impact a Guarantee Fund development.

95. The challenged language does not require that the Respondent deny an application for funding if the credit underwriter determines that proposed development would negatively impact a Guarantee Fund development.

96. The Petitioner has failed to establish that it was "substantially affected" by the requirement that the credit underwriter include the relevant analysis within his report. Subsection 120.56(3)(a), Florida Statutes (2009), provides as follows:

> A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time

> during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

97. The evidence establishes that, prior to the inclusion of the challenged language within the Credit Underwriting Rule, such information had previously been considered by the Board during its review of pending applications for funding.

98. The Respondent could reasonably have required the credit underwriter to "review and determine" the potential negative impact of a proposed development on a Guarantee Fund development, regardless of the insertion of the challenged language into the Credit Underwriting Rule. The credit underwriter could have included the analysis within his report, as part of the project analysis, without the specific directive to do so from the Respondent.

99. Assuming that the challenged language was a "rule" and that the Petitioner had been "substantially affected," the Petitioner has the burden in a challenge to an existing rule of establishing, by a preponderance of the evidence, that the cited rule is an invalid exercise of delegated legislative authority as to the objections raised. § 120.56(3)(a), Fla. Stat. (2009). See also Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778, (Fla. 1st DCA 1981); Dravo Basic Materials Co.,

Inc., v. Department of Transportation, 602 So. 2d 632 (Fla. 2d DCA 1992). In this case, the burden has not been met.

100. Subsection 120.52(8), Florida Statutes (2009), provides, in relevant part, as follows:

> "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:
>
> (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
>
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
>
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
>
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
>
> (e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or
>
> (f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
>
> A grant of rulemaking authority is necessary but not sufficient to allow an agency to

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

101. In the Petition for Administrative Determination of Invalidity of Existing Rule, the Petitioner twice cites to the definition set forth at Subsection 120.52(8), Florida Statutes (2009), of an "invalid exercise of delegated legislative authority," but fails to identify the specific subsections under which the challenge is brought; accordingly, all subsections are addressed herein.

102. There is no allegation or evidence that the Respondent failed to follow applicable rulemaking procedures or requirements in inserting the challenged language into the Credit Underwriting Rule.

103. The evidence fails to establish that the Respondent has exceeded its grant of rulemaking authority in adopting the challenged language. The Respondent clearly has sufficient

authority to adopt appropriate rules. The Respondent also has clear authority to contract with private consultants, to target funding based on geographic and demographic factors, and to administer the Guarantee Fund. Section 420.507, Florida Statutes (2009), provides, in relevant part, as follows

> Powers of the corporation.
>
> The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:
>
> * * *
>
> (12) To make rules necessary to carry out the purposes of this part and to exercise any power granted in this part pursuant to the provisions of chapter 120.
>
> (13) To engage the services of private consultants on a contract basis for rendering professional and technical assistance and advice.
>
> * * *
>
> (22) To develop and administer the State Apartment Incentive Loan Program. In developing and administering that program, the corporation may:
>
> * * *
>
> (d) Geographically and demographically target the utilization of loans.
>
> * * *
>
> (h) Establish, by rule, the procedure for evaluating, scoring, and competitively

> ranking all applications based on the criteria set forth in s. 420.5087(6)(c); determining actual loan amounts; making and servicing loans; and exercising the powers authorized in this subsection.
>
> * * *
>
> (24) To do any and all things necessary or convenient to carry out the purposes of, and exercise the powers given and granted in, this part.
>
> (25) To develop and administer the Florida Affordable Housing Guarantee Program. In developing and administering the program, the corporation may:
>
> (a) Develop criteria for determining the priority for expending the moneys in the State Housing Trust Fund.
>
> (b) Select affordable housing debt to be guaranteed or additionally secured by amounts on deposit in the Affordable Housing Guarantee Fund.
>
> (c) Adopt rules for the program and exercise the powers authorized in this subsection.

104. The evidence fails to establish that the challenged language enlarges, modifies, or contravenes the specific provisions of law implemented. Section 420.5099, Florida Statutes (2009), cited as the specific provision of law implemented, provides, in relevant part, as follows:

> Allocation of the low-income housing tax credit.—-
>
> (1) The Florida Housing Finance Corporation is designated the housing credit agency for the state within the meaning of

> s. 42(h)(7)(A) of the Internal Revenue Code of 1986 and shall have the responsibility and authority to establish procedures necessary for proper allocation and distribution of low-income housing tax credits and shall exercise all powers necessary to administer the allocation of such credits.
>
> (2) The corporation shall adopt allocation procedures that will ensure the maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.
>
> (3) The corporation may request such information from applicants as will enable it to make the allocations according to the guidelines set forth in subsection (2), including, but not limited to, the information required to be provided the corporation by chapter 67, Florida Administrative Code.
>
> (4) The executive director of the corporation shall administer the allocation procedures and determine allocations on behalf of the corporation. Any applicant disputing the amount of an allocation or the denial of a request for an allocation may request an appeal to the board of directors of the corporation. (Emphasis supplied)

105. There is no evidence that the challenged language is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency. The

challenged language clearly, and only, directs the credit underwriter to evaluate the circumstances. The challenged language does not require the Board to render any specific decision based on such circumstances.

106. There is no evidence that the rule is arbitrary or capricious. Again, the challenged language does nothing more than direct the credit underwriter to review the information and make a related determination within his report to the Respondent. The facts clearly establish the rationale for the Respondent's interest in evaluating the potential negative impact of a proposed development on the existing developments in which the Respondent has a financial risk. It is little more than common sense for the Board to consider the potential financial consequences, and prospective loss of affordable housing units, presented by an application to fund a proposed development in an area where there is no need for additional affordable housing.

107. There is no evidence or allegation that any regulatory costs are imposed by the rule.

FINAL ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Petition for Administrative Determination of Invalidity of Existing Rule is DISMISSED.

DONE AND ORDERED this 6th day of October, 2010, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 6th day of October, 2010.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.