STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SCF, INC., A FLORIDA CORPORATION,

Petitioner,

vs. Case No. 19-4245RU

DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,

Respondent,

and

CALDER RACE COURSE, INC.

Intervenor.
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FINAL ORDER

This case came before Administrative Law Judge ("ALJ") John G. Van Laningham, Division of Administrative Hearings ("DOAH"), for final hearing by video teleconference on September 11 and 23, 2019, at sites in Tallahassee and Lauderdale Lakes, Florida.

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STATEMENT OF THE ISSUES

The factual issues in this unadopted-rule challenge relate to whether Respondent, in connection with the administration of the state's gaming laws, has formulated statements of general applicability that have the effect of giving each slot machine licensee the rights *(i)* to maintain and operate an outdoor live gaming facility for the conduct of pari-mutuel wagering activities, wherein slot machine gaming areas could not lawfully be located, so long as its slot machines are housed elsewhere, in an enclosed building; and *(ii)* to locate slot machine gaming areas in a separate, stand-alone building having no integral systems, structures, or elements, provided the building is located on the same parcel, and on the same side of the street, river, or similar obstacle, as the live gaming facility. If Respondent has developed such a statement or statements, then the ultimate issue is whether such statements meet the statutory definition of an unadopted rule.

PRELIMINARY STATEMENT

On August 12, 2019, pursuant to section 120.56(4), Florida Statutes, Petitioner SCF, Inc., d/b/a Southern Cross Farm ("SCF"), filed its Petition Challenging an Agency Statement as an Unadopted Rule with DOAH, where it was docketed as Case No. 19-4245RU and assigned to an ALJ for a hearing. In its petition, SCF alleges that Respondent Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), renewed the slot machine license of Intervenor Calder Race Course, Inc. ("Calder"), in July 2019, basing its decision on one or more agency statements that are generally applicable, have the force of law, and are not codified as rules.

To be more specific, SCF alleges that the Division, in reliance upon an unadopted rule or rules, has been renewing Calder's slot machine license annually for years, notwithstanding that, after tearing down its grandstand in 2016, Calder no longer has a "live gaming facility" within the meaning of section 551.114(4), Florida Statutes; and even though Calder's slot machine gaming area is located in a casino which is not "contiguous and connected to" the current live gaming facility as required by section 551.114(4). SCF further alleges that the Division, in reliance upon an unadopted rule, refuses to grant formal hearings to petitioners who challenge licenses issued by the Division, when it determines that the only factual dispute is whether, as a matter of ultimate fact, the applicant satisfies the requirements for licensure.

By Order dated September 3, 2019, Calder's unopposed request to intervene in this proceeding was granted.

The final hearing commenced on September 11, 2019, and, to complete the presentation of evidence, was continued until September 23, 2019, on which date the hearing was concluded. At the final hearing, SCF presented the

testimony of seven witnesses: *Carolyn Trabue*, who was the compliance officer for Pompano Park/Isle of Capri when it opened its slot machine operations in 2007, and who later held a similar position at Calder when it received a slot machine license in 2009-10; *David Roberts*, former director of the Division; *Belinda Kitos*, president of SCF; *Jamie Pouncey*, the Division's current licensing coordinator; *Daniel Joseph Dillmore*, the Division's current deputy director and the Division's designated agency representative on certain issues; *William Badgett*, the general manager of Gulfstream Park Racing Association, Inc. ("Gulfstream Park"), and the person in charge of the most recent horse race meets conducted at Calder; and *Louis Trombetta*, the Division's current director and the Division's designated agency representative on certain issues. The Division, too, called Ms. Pouncey and Messrs. Dillmore and Trombetta as witnesses in its case. Calder presented the testimony of *Jason Stoess*, the senior director of finance for Calder.

Petitioner's Exhibits 1, 4 through 7, 11, 15 through 17, and 20 through 22 were admitted into evidence. Official recognition was taken of Petitioner's Exhibits 9, 10, and 12. Intervenor's Exhibits 1 through 8 were received in evidence, and official recognition was taken of Intervenor 's Exhibit 9. The Division joined in offering Intervenor 's Exhibits 6 and 9, and Respondent's Exhibit 1 was admitted into evidence.

The final hearing transcript of the proceedings held on September 11, 2019, was filed on October 4, 2019. The transcript of the proceedings held on September 23, 2019, was filed on October 14, 2019.

In a joint motion filed on October 29, 2019, the parties requested an extension of time to file their proposed final orders, which was granted, as was a second joint motion filed on December 9, 2019, which enlarged the deadline to January 13, 2020. On December 23, 2019, an Order extending the

page limit was issued, at the Division's unopposed request, which granted leave to file proposed final orders of up to 60 pages in length. Each party timely filed a proposed final order of less than 60 pages.

On February 17, 2020, the undersigned, granting Calder's motion, took official recognition of the Final Order entered on February 3, 2020, by the Division in *The Florida Horsemen's Benevolent & Protective Association, Inc. v. Calder Race Course, Inc., et al.,* DBPR Case No. 2018-040787 (Fla. DBPR Feb. 3, 2020) (the "*Calder* FO").

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2019.

FINDINGS OF FACT

A. PARTIES

1. SCF is a Florida corporation whose principal place of business is located in Marion County. SCF has been in the business of breeding thoroughbred racehorses since 1996. The company also owns racehorses and, as an owner of racing animals, holds a Pari-Mutuel Wagering Business Occupational License, #PBU476648, from the Division. *See* § 550.105(2), Fla. Stat. As a licensed business owning racing animals, SCF is under the regulatory jurisdiction of the Division. In the three years preceding this action, SCF's horses won approximately $120 thousand in purses from performing in race meets held at Florida pari-mutuel facilities.[1]

[1] Although SCF is a licensed owner of racing animals, it is not a member of the Florida Horsemen's Benevolent and Protective Association, Inc. (the "FHBPA"), a nonprofit corporation that advocates in support of Florida's thoroughbred racing industry and represents the interests of the licensed owners and trainers who comprise its membership. This fact is relevant only to the question of whether SCF is precluded from maintaining this action, under the doctrine of administrative finality, by the Final Order entered in a case brought by the FHBPA in 2018 to challenge agency statements, similar to those at issue here, which the association alleged—but ultimately failed to establish—were unadopted
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2. The Division is the state agency responsible for implementing and enforcing Florida's gaming laws. It licenses and regulates pari-mutuel and slot machine gaming activities in Florida, as well as the professionals and businesses, such as SCF, that supply necessary goods and services to the gaming economy. The only places in Florida, in fact, where SCF's thoroughbreds can legally perform in races upon which bets may be made are the several permitted pari-mutuel facilities, which are also subject to the Division's regulatory jurisdiction; such tracks comprise the exclusive medium for live gaming activities.

3. Calder is the holder of a pari-mutuel wagering permit and, in that capacity, owns a track called Calder Race Course, also known as Gulfstream Park West. As a permitholder, Calder must apply for an annual license to conduct pari-mutuel operations. *See* § 550.0115, Fla. Stat. This annual license gives the permitholder authority to conduct the pari-mutuel wagering activity authorized under its permit on the dates identified in the license. At all times relevant to this case, Calder has held a license to conduct thoroughbred horseracing performances, and SCF-owned horses have raced at Calder Race Course. In addition to its license to conduct pari-mutuel operations, Calder has held, at all times relevant hereto, a license to conduct slot machine gaming.

B. SLOT MACHINE GAMING

4. In 2004, voters approved an amendment to the Florida Constitution, which opened the door to the installation of slot machines at licensed pari-mutuel facilities in Miami-Dade and Broward counties. *See* Art. X, § 23, Fla. Const. During its next regular session, the legislature enacted chapter 551 to implement the constitutional amendment. Under the original definition of

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rules. For reasons discussed much later in this Final Order, the undersigned concludes that the previous Final Order, while favorable to the Division on similar issues, is not a bar to SCF's claims in this proceeding, because SCF was neither a party to the FHBPA case, nor in privity with the FHBPA.

"eligible facility" set forth in section 551.102(4), seven pari-mutuel permitholders potentially qualified for slot machine licensure; a later statutory amendment increased that number to eight.

5. A slot machine license may be issued *only* to a permitted pari-mutuel facility. That is, to become and remain a slot machine licensee, an eligible facility must operate a pari-mutuel facility in accordance with the provisions of chapter 550, Florida Statutes. So, as a condition of initial slot-machine licensure, a permitholder must demonstrate its compliance with chapters 551 and, as applicable, chapter 550. § 551.104(4), Fla. Stat. To renew, which must be done annually, a slot machine licensee must "[c]ontinue to be in compliance with" chapter 551; "[c]ontinue to be in compliance with chapter 550, where applicable[;] and maintain [its] pari-mutuel permit and license in good standing pursuant to the provisions of chapter 550." Id. In short, slot machine gaming is secondary to pari-mutuel wagering operations because it cannot exist, lawfully, in the absence of such operations.

6. This means, among other things, that an applicant for a slot machine license is required to have a "current live gaming facility," in which pari-mutuel wagering occurs in the physical presence of real-time races or games, and that a live gaming facility ("LGF") must be maintained at the permitholder's pari-mutuel facility during the life of the slot machine license, if issued. *See* § 551.114(4), Fla. Stat. In 2005, when chapter 551 was enacted, all seven of the facilities initially eligible for slot machine licensure had large existing grandstands or other buildings that created indoor, conditioned spaces; these "conditioned environments," in other words, were separated from the outdoor elements and conditions (wind, rain, heat, cold, etc.) by sheltering walls and roofs. Simply put, each of these facilities had a building envelope or exterior shell and, thus, each such facility fell within the definition of a "building" under the common usage of that term. It is reasonable to infer, if not presume, that when section 551.114(4) was being written, the legislature, or at least the drafters of the legislation who coined

the term "live gaming facility," had in mind the buildings then currently in use as "live gaming facilities" at the relatively few eligible facilities that would be subject to the law. At the time chapter 551 took effect, moreover, the Division, in fact, considered these buildings to be the permitholders' LGFs.

7. A slot machine licensee must have a designated slot machine gaming area ("SMGA") where "slot machine gaming may be conducted in accordance with the provisions of" chapter 551. §§ 551.102(2), 551.114, Fla. Stat. Section 551.114(4) specifies where the licensee is allowed to locate its SMGA:

> Designated slot machine gaming areas may be located within the current live gaming facility or in an existing building that must be contiguous and connected to the live gaming facility. If a designated slot machine gaming area is to be located in a building that is to be constructed, that new building must be contiguous and connected to the live gaming facility.

For ease of reference, the term "slot machine building," or "SMB," will be used herein to refer to any building besides the LGF in which a licensee optionally locates its SMGA.

8. As the statute makes clear, *every* SMB, whether previously existing, newly constructed, upgraded, refurbished, retrofitted, or freshly painted, must be "contiguous and connected to" the LGF. This will be called the "CCT Requirement."

C. THE DIVISION'S INTERPRETATION OF THE STATUTE

9. Over time as it implemented section 551.114(4), the Division interpreted the text in ways which SCF alleges constitute unadopted rules. The circumstances surrounding the development of these interpretations are interesting, and a good deal of evidence was adduced in this proceeding establishing them, but it is not necessary, for present purposes, to make detailed findings concerning these historical facts. Readers who would like to know more about the events leading to this rule challenge may read the

Recommended Order ("*Calder* RO") that the undersigned issued in *The Florida Horsemen's Benevolent & Protective Association, Inc. v. Calder Race Course, Inc., et al.*, DOAH Case No. 18-4997, 2019 Fla. Div. Admin. Hear. LEXIS 283 (Fla. DOAH May 24, 2019) (the "*License Challenge*"). If the undersigned were to make extensive findings of historical fact in this Final Order, such findings would be substantially the same as, if not identical to, the findings set forth in the *Calder* RO.

10. The primary relevance, to the instant case, of the historical facts relating to the Division's approvals of SMBs at Calder and another track (Pompano Park/Isle of Capri), respectively, would be to show that, despite the absence of rulemaking or other written evidence of its statutory interpretations, the agency has formulated (but not formally adopted) governing principles for making regulatory decisions—"nonrule policies," in other words—whose existence and contents can be deduced from the agency's actions, namely the issuance of slot machine licenses or renewals manifesting underlying determinations that this SMB or that one is compliant, as a matter of ultimate fact, with the provisions of chapter 551, including the CCT Requirement.

11. Recently, however, on February 3, 2020, the Division issued the *Calder* FO, wherein the agency expressed very clearly not only its understanding of what the relevant words of section 551.114(4) mean (the semantic content), but also what law is made thereby (the legal content). It is, therefore, no longer necessary to *deduce* the Division's statutory interpretations from its actions; that these statements exist, and have specific linguistic content, are matters now beyond genuine dispute, the statements having been communicated in writing by the agency itself.[2]

[2] This is what the undersigned meant when he wrote in the Order Regarding Official Recognition that, based on the *Calder* FO, the Division's interpretive statements relating to section 551.114(4) "appear to be not genuinely disputable." In other words, to be clear, the *existence and contents* of the Division's interpretive statements are now beyond reasonable

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12. From the *Calder* FO, the Division's interpretive statements can be fairly, accurately, and concisely described.[3] The first statement of interest

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dispute, although there might be some relatively insignificant disagreements at the margins regarding the *meaning* of the agency statements. Independent of all that, the question of whether the Division's interpretation of section 551.114(4) is the best interpretation, or even a reasonable one, is sharply disputed. While the *correctness* of the Division's interpretive statements is a matter of continued conflict, that particular dispute need not be decided in this proceeding, whose focus, instead, is on whether the statements meet the definition of a rule, a question that has little to do with whether the statements reflect the best, or correct, reading of the statutory text. (A statement that expresses nothing but a literal comprehension of the statutory text, reflecting only such meaning as is readily apparent without reading between or beyond the lines of the codified language, is not a rule by definition; nor, however, is it an "interpretation," strictly speaking. Such a literal paraphrase could be called "correct," though, and so, to the extent a decision is required regarding whether a statement adds legal content to the underlying statute's straightforward semantic content, some consideration must be given to the correctness, in this narrow sense, of the statement at issue.)

[3] So that no one can misinterpret what the undersigned is doing here, let it be clear. First, the undersigned is not implying that the *Calder* FO is *itself* an unadopted rule. The *Calder* FO is, of course, an order, which determines the substantial interests of specifically named parties, subject to judicial review. The undersigned *is* saying, however, because it is indisputably true, that the *Calder* FO contains statements that communicate—expressly, unambiguously, and in specific language (not by implication or through interpretation)— the Division's interpretation of section 551.114(4). In fact, the *Calder* FO includes a section titled "Interpretation of Section 551.114(4), F.S."

Thus, while the *Calder* FO is not, per se, an unadopted rule, it is *evidence* of the Division's interpretation of a section 551.114(4); indeed, it is *convincing* evidence thereof. (The agency's interpretive statements are not hearsay because what makes them relevant is their existence and contents, not the "truth" of the matters asserted. *See* § 90.801(1)(c), Fla Stat.) Further, the Division's interpretation of the statute is, obviously, highly relevant because agency statements that interpret law fall within the definition of a rule when, as SCF alleges here, they do so in ways which give the law meaning not readily apparent from the raw semantic content of the statutory text being implemented. It should also be noted that it makes no difference where or how an agency communicates a statement of general applicability that meets the definition of a rule. There is no "final order immunity" that somehow shields statements contained in a final order from examination in a section 120.56(4) proceeding. We are concerned here with three basic questions: (i) does the statement exist; (ii) if so, what is the content of the statement; and (iii) does the statement's content meet the definition of a rule? The *Calder* FO persuasively proves both the existence of the statements at issue and the contents of the statements issue.

Second, in describing the Division's interpretive statements, the undersigned is not attempting to summarize the entire *Calder* FO. Nor is he purposefully adding to, or subtracting from, the agency's statements. This is not an exercise in straw-man argumentation. To the extent possible, the undersigned is using the agency's exact words; his intent, again, is to express the Division's statutory interpretation accurately and fairly. The *Calder* FO is available for anyone to read, and the undersigned invites everyone who is interested to do just that and decide for him or herself whether the descriptions herein of the

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concerns the CCT Requirement. As the undersigned reads the *Calder* FO, the Division has interpreted the statute to mean that a licensee's SMB is "contiguous and connected to" its LGF if the SMB and LGF: (i) "share a common boundary," for which simply "being located on the same piece of property" is sufficient; (ii) are no more than a "short distance" from one another; (iii) are *not* on opposite sides of "a public roadway, waterway, or any [similar] barrier"; *and* (iv) are "connected" by a walkway between the two, for which an outdoor sidewalk is sufficient. In its Response in Opposition to the Order Regarding Official Recognition, however, the Division stated that (ii) and (iv) "may not be required" in every instance and, thus, are not necessary conditions. In other words, the SMB and LGF might be *farther* than a "short distance" from each other and still be "contiguous"; and the two structures, if respectively self-contained, might be "connected" other than by a "walkway" between them. Making this correction, the agency statement becomes: A licensee's SMB is "contiguous and connected to" the LGF if the SMB and LGF: (i) "share a common boundary," for which "being located on

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Division's interpretive statements are accurate and fair. (The Division expressed some minor disagreements with the undersigned's original descriptions of the agency interpretations at issue, and these disagreements will be addressed in the text above.)

Third, relatedly, the undersigned emphatically disclaims any intention of using unfair descriptions of the *Calder* FO to turn "narrow issues" into "more general" statements having a "broader scope of applicability" than the agency intends. The fact is, however, that there is nothing "fact-specific" about the Division's interpretation of section 551.114(4), and the Division's insisting otherwise will not make it so. This point will be discussed further above, but let it be emphasized in this footnote that a statement's relative applicability is determined based upon the level of generality expressed by the statement's language, that is, by the inclusiveness or exclusiveness of the semantic content of the text. The more inclusive the statement, the more generally applicable it is. A statement of general applicability, so framed, is not rendered "fact-specific" simply because it has been applied to the facts of a specific case in determining the substantial interests of a particular party.

the same piece of property" is sufficient;[4] and (ii) are *not* on opposite sides of "a public roadway, waterway, or any [similar] barrier."[5]

13. What cannot be disputed, bottom line, is that the Division, in its own words, interprets "the plain statutory language" of section 551.114(4) as "contemplat[ing]" that the SMB may be "a stand-alone separate building" from the LGF. *See Calder* FO at 42. From this interpretation, it follows logically that having structural elements in common with the LGF, or sharing integrated systems therewith (e.g., exterior envelope, HVAC, electric, and plumbing), is *not* a necessary condition of an SMB's satisfying the CCT Requirement; that is, even *without* such integration, the SMB and LGF may be deemed statutorily "contiguous and connected to" each other, according to the Division. The undersigned will call this the "nonintegration principle."

14. The nonintegration principle is the Division's seminal insight regarding the meaning of section 551.114(4); if the nonintegration principle were deemed false (incorrect), such determination would guarantee the falsity (incorrectness) of the Division's statement that "the plain statutory language" of section 551.114(4) "contemplate[s]" that the SMB may be "a stand-alone separate building" from the LGF. This is because, to state the obvious, "a stand-alone separate building" is, by that description, a *self-*

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[4] Because it is necessary that all of the permitholder's pari-mutuel facilities be located on the property "specified in the permit," *see* section 550.0115, Florida Statutes, and because slot machines must be located "within the property of the [permitholder's] facilities," *see* sections 551.101 and 551.114(1), part (i) of the agency statement makes "shar[ing] a common boundary" practically a given, and certainly a gimme.

[5] It is usually unhelpful to define anything by describing what the thing being defined is not, which entails a process of elimination. Saying that being "contiguous and connected" means being *not* separated by a public roadway, etc., tells us nothing that we didn't already know; it is the answer to a question that no one would ask, akin to saying that the CCT Requirement prohibits a permitholder from locating its SMB in a different city or state from the LGF. Like part (i) of the agency statement, part (ii) imposes a "requirement" that is a gimme, if not a given. Taken together, the two parts, (i) and (ii), comprising the agency statement under consideration, come very close to eliminating the CCT Requirement altogether, reducing it to the ineffectual status of "requirement in name only." As the Division sees it, the CCT Requirement has little practical effect, if any, other than ensuring that the SMB and LGF have the same address, which is already assured.

contained structure that is *not integrated* with another structure. So, the Division's statement that the statute allows the use of a nonintegrated SMB is true only if SMB/LGF integration is not a necessary condition of compliance with the CCT Requirement.

15. In its Response in Opposition to the Order Regarding Official Recognition, the Division states that the *Calder* FO "does not comment on whether it is ever necessary, to satisfy the [CCT] requirement, that the SMB and LGF 'have any common structural elements or integrated systems, e.g., exterior envelope, HVAC, lighting, etc.'" This is trivially true inasmuch as the *Calder* FO does not specifically describe the nonintegration principle as such. But the point is irrelevant because, as just explained, if section 551.114(4) permits locating an SMGA in a separate, stand-alone building, as the Division maintains, then the nonintegration principle must exist, and it must be true, regardless of whether the Division actually utters the words that communicate the concept.

16. If the Division meant to say more, i.e., to imply that there might be an as-yet unrevealed *exception* or exceptions to the nonintegration principle, this possibility, whatever else might be said about it,[6] does not negate the nonintegration principle itself. This is because the principle does not hold that nonintegration is a necessary condition of compliance with the CCT Requirement; that is, integration does not guarantee failure. Nor does it hold

[6] One thing that can be said if there exists an exception to the nonintegration principle is that an SMB's "being located on the same piece of property" as the LGF would *not* be a sufficient condition for finding that the two "share a common boundary," contrary to what the Division has said elsewhere. If there were an exception, then sometimes (when the exception applies) integration would be required in order for the two structures to share a common boundary and be deemed contiguous to one another. To explain, locating a self-contained SMB on the same piece of property as the LGF *guarantees* compliance with the "common boundary" requirement—i.e., is a sufficient condition therefor—only if the nonintegration principle has no exceptions. (The undersigned takes for granted that integration would never be required to meet the only other identified requirement, namely that the SMB and LGF not be separated by a public roadway, waterway, or similar barrier, because that condition would be so easily met by putting the two structures on the same side of the street or river.)

that nonintegration is a sufficient condition of compliance with the CCT Requirement; that is, nonintegration does not guarantee success. Rather, the nonintegration principle holds that integration is *not* a necessary condition of compliance with the CCT Requirement; or, put another way, that nonintegration is statutorily permissible. Why is this significant? Because if section 551.114(4) literally requires an integrated SMB/LGF in all cases where the SMGA is located outside the current LGF, then the Division's interpretation of the CCT Requirement is *not* readily apparent from what is actually stated in the statutory text, even if it might conform to the legislature's communicative intent,[7] which would mean that the agency has declared what the law *shall be* (a legislative power), as opposed to applying the law as it *is* (an executive power). And, as we know, an agency is authorized to exercise delegated *legislative* authority only through formal rulemaking.

17. The second statement concerns the meaning of the term LGF, which the Division defines as being any area, including an "open-aired, unenclosed place" or "space," *from which* patrons can "view … and/or [be] within the physical presence of" contests occurring in real time, *and at which* they may engage in pari-mutuel betting on such contests using equipment designed to facilitate these "live gaming activities." In its Response in Opposition to the Order Regarding Official Recognition, the Division asserts that the foregoing description of its definition of the term LGF is too narrow, because the Division defines LGF to include the racetrack as well. The undersigned accepts this assertion to be true, and revises his original description accordingly.

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[7] The legislature might have intended, for example, to communicate meaning beyond the plain semantic content of the statutory text, whose full linguistic content thus could not be understood without an appreciation of pragmatic considerations, such as programmatic goals, arguably better known to the agency than to the citizenry. If so, the necessary and proper, *lawful* agency response would be to take quasi legislative action and *adopt a rule*.

18. The track, of course, is the "field of play" for live horse racing performances, analogous to the three-walled court (or *cancha*) on which jai alai players perform. Clearly, there can be no LGF without a track or cancha; this practically goes without saying. Including the live performance site, definitionally, as an element of the LGF, however, is inconsequential to this case because neither a track nor a cancha, by itself, could constitute an LGF; there must be *something* to accommodate patrons, who obviously cannot watch, or place wagers on, live contests while sitting or standing upon the track or jai alai court. The relevant question in this case is whether the statute literally requires that *something* to entail conditioned space within an enclosed building shell.[8]

19. Reduced to its undisputed essentials, the Division's position is that while an LGF *may* be an enclosed building, it needn't *necessarily* be. An open-air, unenclosed place or space will suffice, if properly equipped to facilitate wagering. It is this "open-air option" to which SCF objects as the instantiation of a policy that exceeds the raw semantic meaning of the term LGF and thus constitutes an unadopted rule.

20. SCF alleges that the Division has formulated a third unadopted rule, extrinsic to the *Calder* FO, which is not interpretive in nature but rather is a prescriptive statement to the effect that certain ultimate facts are conclusively determinable as a matter of law if the basic facts are undisputed. To the point, SCF contends that the Division has decided that, if a hearing is requested to determine whether an SMB satisfies the CCT Requirement, the proceeding will be governed by section 120.57(2) unless the objective facts on

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[8] At times, the Division appears to imply that the LGF comprises entire pari-mutuel complex, so desirous is the agency to get across the idea that the term LGF must be read expansively. While warning of the dangers of defining LGF too narrowly, the Division seems unconcerned about the opposite problem, namely reading LGF so broadly that the term ceases to have relevant meaning. If the LGF is everything on the permitted premises, then it is nothing specifically identifiable. For the LGF to have discernible boundaries—a necessary condition of contiguity with another structure, by the way—there must be a limiting principle or *Continued on next page...*

the ground are genuinely disputed. SCF contends that the Division is using this "gatekeeper mechanism" to deny SCF (and another party) the formal hearings they have requested, pursuant to sections 120.569 and 120.57(1), to challenge the renewal of Calder's slot machine license, based on allegations that Calder does not have a statutorily compliant LGF and that its SMB fails to meet the CCT Requirement.

21. The Division has not published a notice of rulemaking under section 120.54(3)(a) relating either to the open-air option, the nonintegration principle, or the gatekeeper mechanism. Nor has the Division presented evidence or argument on the feasibility or practicability of adopting any of these alleged statements of general applicability as a *de jure* rule.

D. THE DIVISION'S IMPLEMENTATION OF THE ALLEGED UNADOPTED RULES

22. As mentioned above, the historical facts giving rise to the agency interpretations at issue are not only, for the most part, undisputed, but also, more importantly, largely irrelevant for purposes of determining the merits of this action under section 120.56(4). The Division's implementation of the alleged unadopted rules does have some bearing, however, on the question of SCF's standing, which is a hotly contested issue in this case. Therefore, an abridged history follows.

23. Of the eight pari-mutuel facilities eligible for slot machine licensure, only Pompano Park/Isle of Capri ("PPI") and Calder have chosen the option contained in section 551.114(4) to erect a new building in which to locate their respective SMGAs. All of the other eligible permitholders opted to locate their SMGAs within their current LGFs; these were *buildings*, enclosing conditioned environments, not open-air places exposed to the elements. Because Broward County satisfied the local referendum requirement before Miami-Dade County did, PPI's application for slot machine licensure was the

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principles to delimit the definitional scope. The Division has been reluctant to commit to such limiting principles.

first to require the Division's decision as to whether an SMB that was to be constructed would meet the CCT Requirement.

24. The physical configuration of PPI's SMB, as planned and built, was not "contiguous" to its existing LGF under any ordinary understanding of the word "contiguous," which denotes actual contact along a common boundary; the buildings were in "reasonably" close proximity, but they did not communicate in the sense of opening into each other. Nor was PPI's SMB "connected to" its LGF in accord with the image that readily comes to mind when thinking about how two contiguous structures would be connected to each other. The two separate, stand-alone buildings were "connected," not physically, through any sort of direct contact, but figuratively, by basic transport infrastructure—i.e., a covered walkway between them.[9] This apparent departure from the plain meaning of section 551.114(4) resulted from the Division's desire to give the eligible permitholders some "leeway" in satisfying the strict statutory requirement that an SMB be "contiguous and connected to" the current LGF, according to David Roberts, who headed the Division from 2001 through 2009, and who was involved in making the decision.[10]

25. After Miami-Dade County satisfied the local referendum requirement in 2009, Calder applied for its initial slot machine license. Because Calder,

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[9] They were connected, that is to say, in the same way Tallahassee is connected to Jacksonville via Interstate 10.

[10] On October 17, 2019, the agency head of DOAH began systematically reviewing every final order and recommended order prior to, and as a prerequisite of, its issuance. Pursuant to this review, the director makes written "comments and suggested edits" on some, but not all, orders. Although the presiding officer is not required to accept the director's suggested edits, he is not given the option of declining the director's review. As a result, the undersigned received two comments, one on the paragraph above and the other on paragraph 30 of this Final Order, which are, at least arguably, "relative to the merits," and hence which are, or might be, ex parte communications prohibited by section 120.66(1)(a), Fla. Stat. (no "ex parte communication relative to the merits" shall be made to the presiding officer by "[a]n agency head," among others). Erring on the side of caution and disclosure, the undersigned hereby places on the record the director's comment concerning paragraph 24: "This is the crux of

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like PPI, intended to place its SMGA in a self-contained casino, which would be newly constructed, Calder sought and received the Division's permission to build a separate, stand-alone SMB pursuant to the same informal policy that had relaxed the strict CCT Requirement for PPI. The Division's issuance to Calder of its initial slot machine license manifested the Division's determination that Calder's SMB and LGF, as initially configured after construction of the new SMB, were compliant with all of the statutory requirements for slot machine gaming licensure, including the CCT Requirement.

26. In 2016, Calder demolished its grandstand building; as of this hearing, Calder has not replaced its former LGF with a new building of any kind. The demolition of the grandstand was one of several actions taken in furtherance of a business decision by Calder to distance itself from live racing activities at Calder Race Course. Other actions included slashing the number of annual performances during the race meet, from an average of 250 performances per year to 40 performances per year; the entry into a contract with Gulfstream Park to operate and manage Calder's abbreviated race meet; and a reduction in the number of stalls available for the stabling and training of racehorses.

27. There is an ongoing dispute as to whether Calder, without an enclosed building for live gaming, has a legally sufficient LGF. *See License Challenge*. What is not disputed is that Calder lacks an LGF capable of housing an SMGA in compliance with chapter 551, because an SMGA must be housed in a building. Calder's "LGF," such as it is, currently consists of open-air viewing areas where patrons can watch, and place wagers on, live races. The primary viewing area is located in front of the final stretch of the racetrack, at a spot called the "apron." There are some outdoor seats and tiki huts on the apron, and, during the race meet, Calder erects a collapsible canopy tent,

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your most defensible finding." Any party desiring to rebut this communication shall be allowed to do so in accordance with section 120.66(2).

which, despite the absence of walls, provides a bit of shelter for wagering machines, video screens, and, of course, patrons, for whom additional outdoor seating is provided.

28. The casino is at least 100 yards from the temporary "big tent." It is possible to walk from the casino to the big tent, and return, on a concrete walkway, but the walkway is only partially covered, which means, when it rains, that patrons cannot go back and forth between the SMB and the "LGF" without getting wet. The walls of the SMB do not touch or abut the areas where patrons can view the live horse races and place bets. Indeed, a patron can walk into the main entrance of the casino, play the slot machines, and then leave, without once seeing, or being within a football field's length of, an area that allows the viewing of live horse racing.

29. At the time of the hearing, Gulfstream Park's general manager was William Badgett. (Gulfstream Park, recall, operates Calder's race meet pursuant to contract.) Mr. Badgett testified as follows regarding the decline in attendance and wagering after the demolition of Calder's grandstand:

> [W]hat I've seen is—it's, pretty much, in black and white. The numbers over the year—year to year to year[—]have declined mostly because this is the best that we can offer at the facility without building a permanent structure. … When it rains the water comes down the hill and people just leave. And what I've seen from the owners is they'll come to watch a race. After the race they'll leave. … [I]t has declined year to year to year in the handle and the amount of people that we see there.

When asked whether, based upon his many years of experience in the horseracing industry as a trainer and as a track manager, he believed that the lack of a grandstand and of any protection from the elements has negatively affected the amount of live handle at the race meets at Calder Race Course, Mr. Badgett answered, "Yes, absolutely." Describing the

experience of watching a race at ground level on the apron, Mr. Badgett testified:

> What we do is we put televisions in the tent because it's not as—You, more or less, have to walk down the apron if you want to see it live. There's a structure in the middle of the—of the in-field, which is the tote board, which doesn't work anymore. So, it's a little bit of an obstruction. You can see [the race], but you're better off watching it on television.

The undersigned credits Mr. Badgett's testimony on these points.

E. DETERMINATIONS OF ULTIMATE FACT

30. It is determined as a matter of ultimate fact that both the open-air option and the nonintegration principle have the effect of law because the Division, if unchecked, intends consistently to follow them in carrying out its responsibilities to administer chapters 550 and 551 generally, and section 551.114(4) specifically. Each statement creates rights (in the form of expanded locational options for SMBs and architectural options for LGFs) that are exercisable by slot machine licensees.[11]

31. While directly regulating the physical plant of a permitted pari-mutuel facility, these statements collaterally regulate live gaming licensees, including businesses owing racing animals such as SCF, whose licensed occupations require access to, and the use of, the permitholders' LGFs and other pari-mutuel facilities. From the perspective of a licensed racehorse owner, the LGF (which it neither owns nor controls) is the environment for its audience, the spectators whose money (wagered on races) helps fund the purses and awards that compensate the licensee for its services. A law that allows an LGF to be an open-air place as opposed to a climate controlled

[11] The undersigned hereby places on the record the director's comment regarding paragraph 30: "Finding the agency's future intent as a matter of fact is troubling." Any party desiring to rebut this communication shall be allowed to do so in accordance with section 120.66(2).
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building is detrimental to the interests of a business licensee whose success in a pari-mutuel occupation depends upon the continued presence of a large, paying audience, for the obvious reasons that an open-air place is unlikely to be as comfortable, or as amenity-rich, as a building; and, taken together, less comfort and fewer amenities, relatively speaking, are more likely to discourage potential customers from showing up.[12]

32. Similarly, the nonintegration principle negatively affects the interests of live gaming licensees such as SCF because it allows the permitholder literally to draw patrons away from the live gaming activities upon which the live gaming licensees depend, to a "nearby," but physically separate and independent, SMB. The relative draw of the SMB, moreover, which must be an enclosed building, is enhanced if the LGF, pursuant to the open-air option, does not afford patrons a conditioned environment. That is, when the nonintegration principle works in tandem with the open-air option at the same pari-mutuel facility, the result is even more disadvantageous to live gaming licensees, because the disequilibrium in patron comfort, as between slot machine players and live game spectators, ratchets up as the LGF becomes more stripped-down.

33. The bottom line is that the nonintegration principle and the open-air option are unadopted rules because, in the Division's hands, they create legally protected opportunities for permitholders to design, configure, and construct their physical plants, in ways that predictably and substantially affect live gaming licensees.

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[12] The undersigned regards this as self-evident. Common, everyday experience informs the undersigned—who doubts that any reasonable person can genuinely deny—that an enclosed, dry, heated or cooled environment, separated from the outdoors, where a spectator can sit and watch a race without being exposed to direct sunlight, wind, or insects, is more attractive to potential customers, in the main, than an open-air place where the spectator might be uncomfortably hot or cold, windswept, and bitten by mosquitoes; thus, a building is a relatively stronger draw.
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34. The gatekeeper mechanism, in contrast, while perhaps having some of the characteristics of a general principle, is primarily a quasi-judicial ruling, operative only in the context of a quasi-judicial administrative proceeding, and lacking any broad regulatory effect. While such a ruling plainly affects the interests of the party or parties to the particular proceeding, it is judicially reviewable without the mediation of yet another administrative proceeding (unlike an intended regulatory decision, which becomes final unless a hearing is requested).[13] To be sure, the question of whether an agency statement to the effect that "formal hearings shall not be granted if the historical facts are undisputed, leaving for determination only the ultimate fact of compliance" (whose level of generality is somewhat higher than the gatekeeper mechanism at issue) could be deemed an unadopted rule is fairly debatable. Yet, even *that* apparently rule-like statement, which arguably "describes the procedure or practice requirements of an agency,"[14] would be actionable only as an interlocutory order in a quasi-judicial proceeding, because only such a proceeding would give the agency an opportunity to *use* the statement. It is hard, therefore, to distinguish between

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[13] In other words, if a party disagrees with the agency's decision under section 120.569(2)(a) to deny the party's request for a formal hearing, that party does not need to request another administrative hearing to contest the decision. The agency's decision to deny a formal hearing and proceed under section 120.57(2) is a nonfinal order, which may be immediately appealed under section 120.68(1)(b), *see United States Service Industries-Florida v. Department of Health and Rehabilitative Services*, 383 So. 2d 728 (Fla. 1st DCA 1980), or reviewed on plenary appeal from an adverse final order, *see Spuza v. Department of Health*, 838 So. 2d 676 (Fla. 2d DCA 2003). If the agency refuses to discharge its duty under section 120.569(2)(a), mandamus will lie. *See Cmty. Health Charities v. Dep't of Mgmt. Servs.*, 961 So. 2d 372 (Fla. 1st DCA 2007).

[14] *See* § 120.52(16), Fla. Stat. (definition of "rule").

"policy" and "reversible error" in this instance.[15] Ultimately, the undersigned determines that the gatekeeper mechanism is not a rule by definition.

CONCLUSION OF LAW

35. Subject to a determination that SCF has standing, a matter which is discussed below, DOAH has jurisdiction in this proceeding pursuant to sections 120.56, 120.569, and 120.57(1).

36. Section 120.56(4)(a) authorizes any person who is substantially affected by an agency statement to seek an administrative determination that the statement is actually a rule whose existence violates section 120.54(1)(a) because the agency has not formally adopted the statement.

37. In administrative proceedings, standing is a necessary condition for subject matter jurisdiction. *Abbott Labs. v. Mylan Pharms., Inc.*, 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009). To have standing as a "substantially affected" person to challenge an agency statement defined as a rule, the petitioner generally must show that he, she, or it will suffer an immediate "injury in fact" within the "zone of interest" protected by the statute the alleged unadopted rule is implementing or by other related statutes. *See, e.g., Fla. Medical Ass'n, Inc. v. Dep't of Prof'l Reg.*, 426 So. 2d 1112, 1114

[15] If the Division is indeed denying formal hearings on the grounds that the question of whether Calder's SMB satisfies the CCT Requirement is purely one of law because there are no disputes of material fact regarding the nature and configuration of the real and tangible personal property, including fixtures, located at or upon Calder's pari-mutuel facility, then the agency is likely going to suffer a reversal or reversals on appeal at some point, which should bring about a course correction. It is easy to see that, even if the Division has correctly interpreted section 551.114(4), just the question of whether a stand-alone SMB is located at a statutorily acceptable, albeit not necessarily "short," "distance" from the LGF is a genuinely disputable ultimate fact, notwithstanding that the physical distance between the two would be measurable and, presumably, could be established with enough accuracy to satisfy all parties. This is because, obviously, the finder-of-fact would need to determine whether, say, 200 yards is, or is not, a sufficiently close proximity not to exceed the limits of the CCT Requirement. That said, DOAH is without jurisdiction to review an agency's decision not to refer a petition to DOAH for formal hearing and, ordinarily, is not even aware of such nonfinal agency action. SCF's objection to the gatekeeper mechanism as being an unadopted rule is, in effect, an attempt to have DOAH review the Division's interlocutory orders, which the undersigned isn't authorized to do.

(Fla. 1st DCA 1983). This two-pronged standing test for rule challenges is indistinguishable from the third-party standing requirements of *Agrico Chemical Company v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981), which apply in disputed-fact hearings under sections 120.569 and 120.57(1).

F. SCF'S STANDING

38. The Division and Calder contest SCF's standing to maintain this proceeding. They contend, in a nutshell, that SCF has failed to establish alleged economic harm, which they claim is too speculative for proof in any event; and that SCF's alleged financial loss, even if there were any, is not protected by law and, thus, falls outside any zone of interest. These arguments miss the mark.

39. As a threshold observation, to repeat for emphasis, the only statutory prerequisite for bringing and maintaining a rule challenge of any type is that the petitioner be "substantially affected" by the rule, whether it be an existing, proposed, unadopted, or emergency rule. Contrary to what one might think, section 120.56 actually says nothing about "injuries in fact" or "zones of interest." These concepts entered administrative law years ago as judicial gloss and have been accepted ever after as authoritative, in case after case after case. In the undersigned's opinion, the law of rule-challenge standing, which is replete with inharmonious decisions giving rise to uncertainly, confusion, and unpredictability,[16] would be much cleaner today if everyone had simply stuck to the statutory language; then, standing would be a straightforward matter of ultimate fact, turning on the question of whether the petitioner is substantially affected by the rule under review, which seems as workable a standard as any, and has the advantage of being statutorily prescribed. While the undersigned cannot turn back the clock, he can at least

[16] For a scholarly analysis of the case law on standing as it stood circa 2013, see Judge Robert E. Meale's opinion in *Guardian Interlock, Inc. v. Department of Highway Safety and Motor Vehicles*, DOAH Case No. 13-3685RX (Fla. DOAH Jan. 10, 2014).

be mindful that, in determining standing, the immediate injury/zone of interest test is best understood as a tool for measuring whether, as the statute requires, the petitioner is "substantially affected" by the offending rule.

40. Another preliminary observation worth making here is that *unadopted* rules are uniquely harmful, a point that does not receive the attention it deserves in discussions about standing. All rule challenges, it has been said, involve "a claim of illegality," *Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, Inc.*, 612 So. 2d 646, 651 (Fla. 1st DCA 1993), and actions brought under section 120.56(4) are no exception to this universal truth. When the rule at issue is a proposed or existing rule, that "claim [of illegality] is predicated upon the alleged unconstitutional exercise of delegated legislative authority." *Id.* As bad as it is when an agency is found to have promulgated an invalid rule, however, at least the agency undertook to make the rule properly, in the open for all to see, and thereby exposed its work to scrutiny and challenge. As a result, the petitioner had the advantages of knowing that the rule existed and what it said; when he brought the challenge, he did not need to establish these basic facts, and could focus instead on whether the rule is an invalid exercise of delegated legislative authority.

41. In contrast, when the legal content has *not* been adopted, or proposed for adoption, pursuant to the rulemaking procedure of section 120.54, as is true in all cases involving unadopted rules, the persons who someday might be affected by the unadopted material often remain unaware of its existence until, to their surprise, they *are* affected by it, usually when the agency takes some action with which they disagree. At that point, an affected person suffers the same injury he or she would have suffered had a rule been adopted, *plus* discrete and substantial injuries attributable directly to the agency's failure to engage in rulemaking on top of that. These include, most urgently, the need to expend resources just to discover the existence of the

unadopted rule, not to mention proof of its content, which the agency is likely to dispute or deny, as the Division has done here; this particular burden is one that persons who are substantially affected by a proposed or existing rule need not shoulder. Then, there is the uncertainty inherent in being kept in the dark about what, exactly, the agency has decided the law will be, which is another of the adverse effects of covert lawmaking on those who would be governed by an unadopted rule. Finally, because a proceeding under section 120.56(4) does not result in a determination of whether the alleged unadopted rule, if properly adopted, would be an invalid exercise of delegated legislative authority, the petitioner, even if successful, faces the prospect of yet another rule challenge should the agency, following the loss of its unadopted rule, initiate rulemaking to address the subject of the unadopted rule.

42. In sum, with an unadopted rule, as with any rule, there are effects attributable to the statement of law made thereby; but, unlike *de jure* rules, unadopted rules cause distinct, additional effects that are attributable solely to the elusiveness of off-the-books law. Despite this, standing in section 120.56(4) proceedings is typically determined using the same analytical framework that applies in rule challenges brought under sections 120.56(2) and 120.56(3). That is, we ask whether the petitioner has suffered an immediate injury in fact from the alleged statement of general applicability *qua* rule, as if the unadopted rule had actually been adopted, and whether the injury that the *legal content* has caused, if any, is within a zone of protected interests. Left unexamined are, not only the negative effects that inexorably follow from the fact that the rule has *not* actually been adopted, but also the question of whether any statute is designed to prevent *those* effects. In short, we focus on the *rule* in the "unadopted rule" and forget that it is *unadopted* rule that we are dealing with. Our focus should be wider, to take into account the absence of formality that always accompanies unadopted rules.

43. One last preliminary point, before getting down to business, will be to note that there is "a difference between the concept of 'substantially affected' under section 120.56(1), and 'substantial interests' under section 120.57(1)." *Dental Hygienist Ass'n*, 612 So. 2d at 651. Thus, in determining whether a person is substantially affected by a rule, it is a mistake to rely upon "decisions in licensing and permitting cases[, which] have made it clear that a claim of standing by third parties based solely upon economic interests is not sufficient unless the permitting or licensing statute itself contemplates consideration of such interests, or unless standing is conferred by rule, statute, or based on constitutional grounds[,]" because these cases are inapposite. *Id.* At bottom, "a less demanding standard applies in a rule challenge proceeding than in an action at law, and that the standard differs from the 'substantial interest' standard of a licensure proceeding." *Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg.*, 688 So. 2d 404, 407 (Fla. 1st DCA 1997).[17]

44. If there is one class of persons who unquestionably have standing to challenge a rule, it is the persons whom the rule purports to regulate. If you are licensed as a registered nurse, for example, and the Board of Nursing proposes to adopt a rule regulating the practice of nursing, then you are going to have standing to challenge that rule, period. Persons who are directly regulated by a rule are comparable to specifically named persons whose substantial interests are being determined by an agency; this latter group has standing, not because they satisfy the *Agrico* test, which is inapplicable to such *first* parties, but because such persons are literally "parties" by definition, *see* section 120.52(13)(a). Although directly regulated persons are not defined as "parties" for purposes of challenging the rules that control them, it is highly unlikely, if not unthinkable, that anyone under an agency's

[17] And yet, perhaps paradoxically, in rule challenges, the courts routinely apply the *Agrico* test for standing, which is the most stringent "substantial interest standard," used for determining *third*-party standing in licensure proceedings.

jurisdiction, such as a licensee, could be found to lack standing to bring a rule challenge against a rule directly regulating the person's licensed profession or occupation.

45. In *Televisual Communications, Inc. v. Department of Labor & Employment Security*, 667 So. 2d 372, 374 (Fla. 1st DCA 1995), the court recognized a related class: persons affected by a rule that has the *collateral effect* of regulating their industry. In that case, the proposed rule at issue directly regulated doctors who, as a condition of receiving payment under the workers' compensation program for treating injured workers, were required by statute to become "certified providers" by completing a five-hour, agency approved training course covering such topics as "cost containment" and "utilization control." *Id.* at 372. Among other things, the proposed rule provided that a training course would not be approved unless the vendor guaranteed that an instructor would be present, in person, to answer questions at all presentations. *Id.* at 373.

46. The petitioner, TVC, was a publisher of educational materials whose correspondence courses did not meet the personal instruction requirement of the proposed rule, which meant that TVC would be unable to sell its "home study course" to Florida physicians seeking to become certified as workers' compensation providers. At hearing, where TVC was found to lack standing, the company's president testified that, in addition to start-up costs of "approximately $75,000," which presumably would not be recovered if TVC were precluded from entering the Florida market,[18] he "assume[d]" that TVC had "the potential for about doubling [its] sales" by doing business in Florida, "even if [the company] were able to successfully sell [its] programs [only] to [a small share of] 10% or less of the [existing Florida] market." *Id.* The profits that TVC hoped to realize from these anticipated sales would not materialize,

[18] This is implied, but not explicitly stated, in the opinion.

of course, if the proposed rule took effect. *Id.* The appellate opinion does not give any indication whether it was reasonable for TVC to "assume" that it would capture as much as ten percent "or less" of the market, or how much profit the company would make if it "doubled" its sales, or what TVC stood *not* to gain if its share of the market were only, say, *one* percent.[19]

47. The court reversed on the question of standing, primarily, if not exclusively, on the grounds that the proposed rule would have the "collateral effect of regulating TVC's industry." *Id.* at 374. In other words, even though the proposed rule *directly* regulated physicians, not publishers, TVC was affected thereby, nonetheless, because, by requiring physicians to complete an *approved* training course, and by further specifying the criteria for agency approval of such a course, the proposed rule *indirectly* would regulate training-program vendors, whose courses would have to meet the prescribed specifications as a condition of approval, and would have to have approval as a condition of merchantability. *Id.* "In summary," the court wrote, "the rule purports to regulate the industry that provides the medium for education of health care providers."[20] *Id.* The court also found that the testimony of TVC's

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[19] Presumably, TVC's president meant that he assumed the company would achieve *at least* a ten percent market share, because "10% or less" includes zero percent, and because obviously TVC's sales could not have been "doubled" at every percentage of new Florida market share between zero and ten.

[20] This is a delightfully ambiguous sentence. To what *industry* was the court referring? And which *medium*? Earlier in the same paragraph, the court tells us that "[t]he hearing officer erred … in concluding that the proposed rule does not purport to subject TVC, or those similarly situated, to regulation or control." *Id.* So, we can be pretty sure that the "industry" the court had in mind was the educational publishing industry, rather than the workers' compensation industry. This means, then, that the relevant industry-provided "medium" must have been the VHS tapes and handouts comprising TVC's course materials—although the term *media* (plural) would have been a better fit.

But, while the court clearly said otherwise, the rule really did *not* "purport to regulate" the publishing industry; that is, it did not expressly claim this as its goal, nor did it deceptively or speciously appear to make such regulatory effect its purpose. No, the rule *actually* regulated the workers' compensation industry; that was its ostensible purpose, clearly visible on the surface. In line with the doctrine of collateral regulatory effect, it would have been more accurate for the court to say—for it was, in fact, holding—that the rule "purported to regulate" the *workers' compensation industry* even as it *effectively*, if less

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president was not "too speculative to support standing," because of the decision in *Department of Professional Regulation, Board of Chiropractic v. Sherman College of Straight Chiropractic*, 682 So. 2d 559 (Fla. 1st DCA 1995).

48. In *Sherman College*, a college of chiropractic medicine was held to have standing to challenge a rule that (i) prescribed requirements for licensure as a chiropractic physician, which included the requirement of graduation from an accredited college; and (ii) had been recently revised to make the accreditation standards stricter, so that the college in question ceased to meet the accreditation standards, with the result that its graduates were no longer eligible for licensure in Florida. The college was affected by the rule because it had lost students from Florida, who had accounted for roughly 14 percent of its approximately 132 enrollees, which caused unquantified economic losses in the form of lost tuition, fees, and alumni donations; and because it had lost reputation due to its students being barred from practicing in Florida. *Id.* at 560.

49. Although not stated, in so many words, by the court in *Sherman College*, this, too, was essentially a case of indirect regulation by collateral effect. Like the publisher TVC, the college was not directly regulated by the rule at issue. For that reason, *Sherman College* lent support to the decision in *Televisual*. It is not clear, however, why the *Televisual* court believed that

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transparently, regulated the educational publishing industry. The sentence, as it happens, can be plausibly read as saying this. Indeed, the undersigned thinks it somewhat possible the court intended the sentence to have a double meaning. If we comprehend the "medium for education of health care providers" to have been the *environment* in which the business of training physicians for certification could flourish, which is a reasonable understanding of the plain language (especially given the court's use of a singular noun here), then the medium-providing industry would be the workers' compensation industry—the "purported" target of the regulation.

The long story short is that *Televisual* can be taken as support for the proposition that a rule which "purports to regulate" one industry may have collateral regulatory effects on another, ostensibly unregulated industry whose business involves the sale of goods or services to, or within a market arising out of, the superficially regulated industry.

Sherman College provided support for acceptance of the TVC president's assumptive testimony as nonspeculative, unless the court simply meant that the evidence of financial harm in *Televisual* was no worse than that adduced in *Sherman College*. Even such faint praise as that is probably being generous to TVC as compared to the college. Indeed, some might regard the college's injury-in-fact argument as "much stronger" than TVC's because, unlike the situation in *Televisual*, where the petitioner stood not to earn profits it hadn't yet ever realized, in *Sherman College* something previously given to the petitioner (i.e., recognition by Florida that the petitioner's graduates had earned a degree from an accredited college) was being *taken away*, which caused the petitioner to lose economic advantages it had once enjoyed. *Cf. Off. of Ins. Reg. v. Secure Enters., LLC*, 124 So. 3d 331, 339 (Fla. 1st DCA 2013) ("Had this been a situation where [the rule] eliminated an existing [economic benefit] for [manufacturers of] garage doors, [the petitioner's] injury in fact argument[, which is based on the absence of an economic benefit that has never been provided,] would be much stronger.").

50. *Televisual* and *Sherman College* are the most relevant cases vis-à-vis the question of SCF's standing, because, like both of those cases, this case presents an example of indirect regulation by collateral effect. In fact, SCF stands on more solid ground in claiming to be substantially affected by the alleged unadopted rules than did either of the substantially affected petitioners in the controlling cases (who challenged *actual* rules, to boot). Here is why. Unlike either TVC or Sherman College, SCF is a *licensee*. As such, it transacts regulated business activity under the Division's direct jurisdiction, supervision, and control. SCF must operate its pari-mutuel business, moreover, necessarily and exclusively within a heavily regulated industry, which is also under the Division's direct jurisdiction, supervision, and control. The pari-mutuel industry is a closed ecosystem, and it is only within this tightly controlled environment—this singular *medium*, if you will—that SCF can lawfully do business in the state of Florida as a licensed

owner of racing animals. Accordingly, any rule that "purports to regulate" the pari-mutuel industry is likely to have some ripple effects on pari-mutuel licensees. A rule or unadopted rule that "purports to regulate" *LGF*s is almost certainly going to substantially affect live gaming licensees such as SCF due to collateral regulatory effects of the sort recognized in *Televisual* and *Sherman College*.

51. To drive this point home, consider that the petitioner in *Televisual*, TVC, was not required to have a license to publish and sell training materials in the state of Florida generally, or to Florida licensed physicians specifically. The rule at issue only "regulated" TVC because TVC wanted to sell a particular training course to a particular subset of Florida physicians—something, in fact, it could have done lawfully even without course approval.[21] When it comes down to it, the rule in *Televisual* did not "regulate" the educational publishing "industry" at all; rather, it indirectly "regulated" the sale in this state of one very specialized product, and then only when the product would be used for a particular purpose, by specifying the minimum specifications that the product would need to meet to be used successfully by the consumer for that particular purpose. This might constitute regulation, but it is regulation of the loosest sort. TVC, after all, would have faced no administrative sanction or criminal penalty for selling unapproved training courses in Florida, which would have been perfectly lawful.

52. Likewise, the school in *Sherman College* was not required to hold a license to enroll and educate students from Florida; Florida students were not prevented by law from enrolling in the college, either. The petitioner's students did not come solely from Florida (only a small fraction did, in fact), and, for all that appears in the appellate opinion, the college's graduates were

[21] To be sure, without course approval, probably few physicians, if any, would have purchased the materials. But *salability* is a separate consideration from *legality*.

free to practice chiropractic medicine in any state except Florida. The college's failure to meet the standards for accreditation, as stated in Florida's revised rule, would not have been grounds for administrative sanction or criminal penalty.

53. Contrast these situations with that of SCF. SCF is required to hold a license to own racing animals and to race its horses at permitted pari-mutuel facilities in Florida. SCF can legally race its horses in live gaming performances in Florida only at permitted pari-mutuel facilities, and then only in or around, or by making use of, a permitholder's LGF; if SCF were to engage in this regulated activity elsewhere, such as at an unpermitted track, SCF would face criminal prosecution, *see, e.g.*, section 849.14, Florida Statutes, and administrative enforcement, *see* section 550.105(5).

54. The alleged unadopted rules at issue prescribe minimum specifications for an LGF and prescribe conditions for the permissible orientation of an LGF in relation to an SMB, where an SMB is in use. The unadopted rules therefore directly regulate permitholders. Because they pertain to the LGF, however, and because the LGF is where, within the pari-mutuel facility, a live gaming licensee such as SCF must conduct its regulated business, the unadopted rules necessarily affect SCF and others similarly situated. This is especially true given that the Division defines the LGF to include the track, which is where SCF's horses (and those of other licensed owners of racing animals) must perform in live gaming contests.

55. It is concluded that: (i) the unadopted rules at issue purport to regulate the pari-mutuel gaming industry, and specifically the LGFs that must be located at every permitted pari-mutuel facility; (ii) the pari-mutuel gaming industry, including specifically the LGFs of the permitholders, provides the exclusive medium for racing horses in live gaming performances; (iii) as a licensed pari-mutuel business owner of racing animals, SCF must race its horses at LGFs that are regulated by the alleged unadopted rules;

(iv) the rules therefore indirectly regulate SCF by collateral effect; and (v) consequently, SCF has standing to maintain this action.

56. The undersigned believes, and concludes, that a person has standing to bring a challenge to an unadopted rule under section 120.56(4) where the unadopted rule has the collateral effect of regulating that person's industry—a standard that SCF easily meets here—and that nothing more need be established. If, however, it is necessary, as well, to show a separate injury in fact, it is sufficient for standing purposes for the petitioner in a section 120.56(4) action to rely upon the peculiar harm (described above), which is suffered by *everyone* who falls under the regulatory umbrella of an *unadopted* rule.

57. If it is necessary, as well, to show some form of financial impact, SCF's evidence is more compelling than the puffery of TVC's president in *Televisual*, whose rosy assumption of realizing big (but notably unquantified) profits from a small, hoped-for market share was unsupported by any hard data (mentioned in the opinion, at least) and, bluntly, looks a lot like wishcasting. To be sure, SCF has not demonstrated that the purses or breeders' awards that it receives will be reduced by some identified percentage or quantifiable dollar amount due to declining handle resulting from dwindling attendance caused by the alleged unadopted rules. This is not surprising, however, because there are many variables, besides gross handle, which affect SCF's earnings from race horses, year to year.

58. One obvious such factor is how well the owner's horses perform. Place of finish matters; winning is more lucrative than coming in, say, third, and either of these beats finishing last. Unless the owner's horse finishes "in the money" in a given race, the owner will not receive a purse, regardless of the handle, and place of finish affects the size of the breeders' award a breeder will receive on its horse, as well. But regardless, smaller audiences generate smaller handles, and smaller handles translate into, or are likely to produce, smaller purses and smaller breeders' awards, other things being equal. This

is enough to show a substantial effect from an unadopted rule that will foreseeably shrink audiences, even if quantifiable damages are not established.[22]

59. SCF has proved that attendance dropped off at Calder following the demolition of its grandstand, which Calder was able to accomplish directly pursuant to the open-air option, and secondarily as a result of the nonintegration principle.[23] This is enough to establish a reasonably foreseeable loss of handle and consequent loss of funds for prizes and breeders' awards, which SCF has earned in the past and is reasonably likely to receive in the future. SCF's evidence in this regard is no less persuasive than the proof in *Sherman College* of a decline in the number of enrolled students from Florida following the promulgation of stricter accreditation standards, which led to unquantified (but evidently nonspeculative) economic losses. SCF's proof of injury is stronger than TVC's as described in *Televisual* because SCF is facing a loss of income relative to *actual* historical gain, as opposed to a loss of potential gain from *assumed* future growth.

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[22] That having fewer customers leads to less gross revenue and smaller profit is practically self-evident, as a matter of logic. Sure, a business might compensate for a drop in traffic by raising prices to increase revenue, or by cutting costs to increase margins, or both. But the market will have its say about the extent to which these measures can be implemented, and, in any event, they only mask the revenue loss, which still exists. So, for example, if roadwork makes it difficult for patrons to get to a restaurant, and as a foreseeable result the restaurant has fewer patrons, the restaurant is substantially affected by the construction, even if it is able to hold profits steady by laying off a waitress or cook. We don't really need proof to figure this out. The restaurant's loss in that situation is, however, more readily quantifiable than SCF's because, unlike SCF, the restaurateur need not win a contest in addition to preparing and serving the meal as a condition precedent to the patron's paying his check.

[23] These policies are two sides of a coin because one leads to the other, and vice versa. If the LGF is an open-air place, then a nonintegrated, stand-alone SMB is required to house the SMGA, which must be located in a building. Conversely, if the permitholder has both a stand-alone SMB (pursuant to the nonintegration principle) and an enclosed, stand-alone LGF, then tearing down the LGF-building and setting up an open-air place in its stead is a practical option—more attractive, certainly, than would be the prospect of demolishing the portion of an integrated SMB/LGF facility comprising the LGF.

60. Finally, if it is necessary, as well, to show that SCF's injuries are within a zone of interest, then we start with the understanding that, "[i]n the context of a rule challenge, the protected zone of interest need not be found in the enabling statute of the rule itself." *Ward v. Bd. of Trs. of the Int. Imp. Trust Fund*, 651 So. 2d 1236, 1238 (Fla. 4th DCA 1995). Of course, in the context of an *unadopted* rule challenge, where there has been no rulemaking, there is no place to look for "law implemented" *through rulemaking*. Absent rulemaking, there can be no enabling statute, because the enabling statute is the place where the language of the law "being carried out or interpreted by an agency *through rulemaking*" is found. § 120.52(9), Fla. Stat. (emphasis added). Thus, in a section 120.56(4) action, the zone of interest may be found in any statute that protects against the type of injuries suffered by the person whom the unadopted rule has substantially affected.

61. There happens to be just such a statute, namely section 120.54(1)(a), which mandates that an agency must adopt "[e]ach agency statement defined as a rule by s. 120.52 … as soon as feasible and practicable." Plainly, this statute is designed to compel agencies to make policy prospectively, through rulemaking; and, concomitantly, to discourage policy making through adjudication, which tends to impose rules of decision retroactively. Plainly, then, the "zone of interest" surrounding section 120.54(1)(a) includes protecting persons against the uncertainty and unfairness of being substantially affected by policies of general applicability that have not been adopted as rules.

62. For all the above reasons, it is concluded that SCF has standing to bring this action under section 120.56(4).

G. CALDER'S STANDING

63. Having expended considerable effort on the question of SCF's standing, the undersigned would be remiss if he failed to devote a small part of this discussion to the more difficult question of whether Calder has standing to intervene. As a preliminary matter, Calder argues that its

standing is not jurisdictional, because if SCF has standing, then DOAH has subject matter jurisdiction over this proceeding whether or not Calder comes along for the ride. Because Calder's standing is not jurisdictional, the argument continues, SCF needed to raise lack of standing as an affirmative defense to Calder's participation. Because no objection was raised to Calder's intervention, the issue has been waived, and the ALJ should not take it up *sua sponte*. This is a compelling argument if Calder's standing is not jurisdictional.

64. The question of whether an intervenor's standing is jurisdictional is not settled, however, but instead is fairly debatable. Calder's argument that DOAH's jurisdiction to hear this matter does not depend on the intervenor's standing is reasonably persuasive, but it should also be pointed out that an intervenor's participation as the agency's partner in a section 120.56(4) action is not without cost, not only because the hearing will likely be longer, but also because the intervenor might end up in the driver's seat, pushing the agency to take more aggressive positions in the alliance than it would have taken on its own. Nevertheless, the undersigned will punt *that* issue for now, given that dropping Calder at this late stage of the administrative proceeding would be pointless. But this case is likely to land in the court of appeal, where, perhaps, the issue of Calder's standing to participate might be revisited, to practical effect.

65. Section 120.56(1)(d) provides that "substantially affected persons may join the [rule challenge] as intervenors on appropriate terms which shall not unduly delay the proceedings." The intervenor, in other words, just like the petitioner, must be substantially affected by the rule—or unadopted rule, as the case may be.

66. How might Calder be substantially affected by the alleged unadopted rules at issue here? It beats the undersigned. Calder seems to think that its permit is on the line in this case, but that is not true. This case is about whether the Division's interpretive statements concerning section 551.114(4)

meet the definition of a rule, nothing more. The ultimate question is whether the *agency* is in violation of *section 120.54(1)(a)*, not whether a particular *permitholder* is in violation of *section 551.114(4)*. If, as a result of this proceeding, the Division is required to engage in rulemaking to adopt the nonintegration principle or the open-air option, or both, as rules, that is none of Calder's business, for adopting the rules would not be Calder's duty or burden, but the agency's alone. Obviously, Calder would have standing to challenge, or intervene in a challenge to, the Division's proposed rules, were such rulemaking to take place.[24]

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[24] This might seem to contradict the main point above, which is that Calder is not substantially affected by the alleged unadopted rules. If Calder does not have standing to intervene in this section 120.56(4) proceeding, one might wonder, then why would it "obviously" have standing to participate in a section 120.56(2) proceeding to challenge proposed rules seeking to codify the statements at issue here? The answer is that in challenges to proposed or existing rules, the ultimate question is whether the legal content of the rule(s) in dispute is the product of a valid exercise of the agency's delegated legislative authority, not whether the legal content meets the definition of a rule. If the legal content is determined to be substantively valid in a rule challenge, it becomes law and, consequently, substantially affects all within its field of operation, which would include Calder in the specific example at hand.

In contrast, in a section 120.56(4) action, there is no way that the legal content in dispute (the alleged statement of general applicability) will become law by operation of the eventual decision, regardless of the outcome. If it is determined that the statement does *not* meet the definition of a rule, the conclusion signifies that, while the statement might correctly *describe* law, the statement does not *make* law on the agency's authority. A statement that merely describes, without creating, law does not substantially affect anyone; it's the underlying law, that being described, which would have such effect. On the other hand, if the statement is determined to be a rule by definition, it does not thereby become law; to the contrary, it stops being law and stays *un*authoritative until and unless the agency adopts the statement as a rule. A statement that merely reflects an agency's preferred policy choice or statutory interpretation, but which is not also authoritative in the sense of controlling or governing law, does not substantially affect anyone until and unless the agency adopts the statement as a rule.

In sum, it is obvious that Calder would be substantially affected by a determination that the statements at issue are, or are not, substantively valid exercises of delegated legislative authority, but such a determination will not be made in this case. It is not clear, however, that Calder can be substantially affected by a determination that the statements were never law to begin with, or which operates to strip authority from statements that should never have been law in the first place.

67. Naturally, Calder does not believe that it has been substantially affected by an unadopted rule, because, to be sure, Calder does not believe that either the nonintegration principle or the open-air option constitutes a rule by definition. Having taken advantage of both interpretive statements, Calder's interest is in preserving the status quo, a favorable (for Calder) state of affairs which would be upset if either agency statement were determined to be an illegal unadopted rule. But no one has the right to continuous and unbroken enjoyment of benefits under an unadopted rule. Calder might be "substantially affected" *by the invalidation of* the unadopted rules, but only if the Division subsequently reversed course on the policies at stake, or if proposed rules codifying the nonintegration principle and the open-air option were determined to be invalid exercises of delegated legislative authority. Either of these outcomes is currently speculative at best. Moreover, in any event, no one has a presently protected right to have an agency *not* later change its mind on a matter of policy that has not been adopted as a rule,[25] or to *not* have its future interests determined *un*favorably in accordance with *substantively valid* rules.

68. The upshot is that Calder appears not to have standing to intervene in this action. The undersigned recognizes that intervention on the side of the agency whose statement is being challenged in a section 120.56(4) proceeding is routinely allowed. But that doesn't make it right. Had Calder's standing been timely challenged, the undersigned probably would have declined to permit Calder to join this proceeding as an intervenor. As things stand, because no objection to Calder's participation was raised; because the issue of Calder's standing is arguably not jurisdictional; and because the issue is largely academic at this point in the administrative proceeding, Calder will not be dropped, despite that it is not substantially affected by the alleged unadopted rules.

[25] Reliance on nonrule policy is not without risk.

H. STANDARDS OF DECISION

69. Agency rulemaking is not discretionary under the Administrative Procedure Act. *See* § 120.54(1)(a), Fla. Stat.; *Dep't of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81, 86 (Fla. 1st DCA 1997) (The "legislature's intention [was] to remove from agencies the discretion to decide whether or not to adopt rules."). Each agency statement meeting the definition of a rule under section 120.52(16) must be adopted "as soon as feasible and practicable." § 120.54(1)(a), Fla. Stat.

70. The statutory term for an informal rule-by-definition is "unadopted rule," which is defined in section 120.52(20) to mean "an agency statement that meets the definition of the term 'rule,' but that has not been adopted pursuant to the requirements of s. 120.54."

71. If the petitioner proves at hearing that the agency statement is an unadopted rule, the agency then has the burden of overcoming the presumptions that rulemaking was both feasible and practicable. In this regard, section 120.54(1)(a)1. provides as follows:

> Rulemaking shall be presumed feasible unless the agency proves that:
>
> a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
>
> b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking.

Section 120.54(1)(a)2. provides as follows:

> Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:
>
> a. Detail or precision in the establishment of principles, criteria, or standards for agency

> decisions is not reasonable under the circumstances; or
>
> b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

The Division made no attempt to prove (or even to argue) that it would have been infeasible or impracticable to adopt the statements at issue as rules. Thus, feasibility and practicability are presumed.

72. The term "rule" is defined in section 120.52(16) to mean "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." As the First District Court of Appeal explained:

> The breadth of the definition in Section 120.52(1[6]) indicates that the legislature intended the term to cover a great variety of agency statements regardless of how the agency designates them. Any agency statement is a rule if it "purports in and of itself to create certain rights and adversely affect others," [*State, Dep't of Admin. v.] Stevens*, 344 So. 2d [290,] 296 [(Fla. 1st DCA 1977)], or serves "by (its) own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." *McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 581 (Fla. 1st DCA 1977).

State Dep't of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st DCA 1977); *see also Jenkins v. State*, 855 So. 2d 1219 (Fla. 1st DCA 2003); *Amos v. Dep't of HRS*, 444 So. 2d 43, 46 (Fla. 1st DCA 1983). Accordingly, to be a rule:

> [A] statement of general applicability must operate in the manner of a law. Thus, if the statement's effect is to create stability and predictability within

> its field of operation; if it treats all those with like cases equally; if it requires affected persons to conform their behavior to a common standard; or if it creates or extinguishes rights, privileges, or entitlements, then the statement is a rule.

Fla. Quarter Horse Racing Ass'n, Inc. v. Dep't of Bus. & Prof'l Reg., Case No. 11-5796RU, 2013 Fla. Div. Admin. Hear. LEXIS 558, at *37-38 (Fla. DOAH May 6, 2013), *aff'd*, *Fla. Quarter Horse Track Ass'n v. Dep't of Bus. & Prof'l Reg.*, 133 So. 3d 1118 (Fla. 1st DCA 2014).

73. Because the definition of the term "rule" expressly includes statements of general applicability that implement or interpret law, an agency's interpretation of a statute that gives the statute a meaning not readily apparent from its literal reading and purports to create rights, require compliance, or otherwise have the direct and consistent effect of law, is a rule, but one which simply reiterates a statutory mandate is not. Id. at *39-40; *see also Grabba-Leaf, LLC v. Dep't of Bus. & Prof'l Reg., Div. of Alcoholic Bevs. & Tobacc*o, 257 So. 3d 1205, 1208 (Fla. 1st DCA 2018) (simple reiteration of what is "readily apparent" from the text of a law falls within rulemaking exception*); State Bd. of Admin. v. Huberty*, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); *Beverly Enters.-Fla., Inc. v. Dep't of HRS*, 573 So. 2d 19, 22 (Fla. 1st DCA 1990); *St. Francis Hosp., Inc. v. Dep't of HRS*, 553 So. 2d 1351, 1354 (Fla. 1st DCA 1989).

74. This is a critical precept, which must be scrupulously observed to curb executive encroachment upon legislative power. The constitutional separation of powers is infringed when a bureaucrat legislates from his or her desk, no less so than when a judge legislates from the bench. In each instance, an employee or official of one branch of government exercises power that belongs to another branch. Critics of judicial activism should be as ready to call out the excesses of the administrative state, which, unlike the least dangerous branch, has at its disposal an impressive arsenal of executive powers that can be used to implement and enforce its preferred policies. To be sure, agencies

are authorized to exercise legislative power as delegated by statute, but only insofar as the legislature specifies and only in accordance with the rulemaking procedure.

75. To be generally applicable, a statement's level of generality must be such as to constitute an abstract principle, but it need not apply universally to every person or activity within the agency's jurisdiction. It is sufficient that the statement apply uniformly to a category or class of persons or activities over which the agency may properly exercise authority. *See Schluter*, 705 So. 2d at 83 (policies that established procedures pertaining to police officers under investigation were said to apply uniformly to all police officers and, thus, to constitute statements of general applicability); *see also*, *McCarthy v. Dep't of Ins.*, 479 So. 2d 135 (Fla. 2d DCA 1985) (letter prescribing "categoric requirements" for certification as a fire safety inspector was a rule).

I. THE SCOPE OF THE STATEMENTS AT ISSUE

76. In this case, the statements at issue reflect the Division's interpretation of section 551.114(4). Because the statute is generally applicable, it follows that an agency interpretation of the statute must be generally applicable as well. Logic dictates that if the Division reads the adjective clause "must be contiguous and connected to the live gaming facility" as authorizing *one* permitholder's use of a separate, stand-alone building for its SMB, then *every other* permitholder must likewise be entitled, under the same statutory authority, to use a separate, stand-alone building for *its* SMB. The same is true of the Division's definition of "live gaming facility," pursuant to which a building is not required to enclose any portion of the LGF, and an open-air place may suffice. If it is sufficient for one permitholder to operate an open-air LGF, it is sufficient for all, because the statute applies equally to all.

77. The Division argues that its statements apply only to Calder's "unique" circumstances. Part of the difficulty in addressing the Division's

argument is that the statements, by their terms, clearly are not limited to Calder, which makes it hard to figure out what the grounds of the Division's argument are. As best the undersigned can tell, the argument is based on the fact that the agency's interpretive statements have only been applied in connection with the issuance or renewal of Calder's slot machine license; or (relatedly) that they were developed only in reaction to Calder's business decisions, respectively, to build a separate, stand-alone casino for its slot machines and to demolish the grandstand facility that had been its LGF; or both. Even if true, however, these facts do not determine the scope of either statement.[26]

78. The scope of an agency statement is determined by the language of the statement. A statement such as, e.g., "an LGF need not be a building, but may be an open-air space, provided the facility is located at 21001 Northwest 27th Avenue, Miami Gardens, Florida 33056," is very specific. A statement that "an LGF need not be a building, but may be an open-air space," is not. The statement at issue in this case regarding the LGF is the latter, not the former. Likewise, there is nothing specific or exclusive about the statement that an SMB may be a separate, stand-alone building. The fact that Calder, and perhaps only Calder, has a separate, stand-alone SMB does not limit the scope of the statement; any permitholder could construct a separate, stand-alone SMB as these qualities (separateness and self-containedness) are not unique to any particular facility.

79. It is concluded, therefore, that the open-air option and the nonintegration principle are statements "of general applicability" within the meaning of section 120.52(16). Because each is, at a minimum, a statement of general applicability ("SGA"), the remaining questions are (i) whether the

[26] In fact, the nonintegration principle was developed for, and applied to, PPI's original SMB, so it is not accurate to say that this particular interpretive statement applies "only to" Calder. As far as the instant record shows, furthermore, no permitholder seeking to build a
Continued on next page...

challenged SGAs, or either of them, give section 551.114(4) a meaning not readily apparent from the plain semantic content of the statute; and, if so, (ii) whether the interpretive statements, or either of them, have the direct and consistent effect of law.

J. THE LITERAL MEANING OF "LIVE GAMING FACILITY"

80. There is more than a little daylight between "open-air space" and "building," inasmuch as there are nonbuilding structures which provide more shelter than an open-air space. If the LGF must be a building, however, then it clearly cannot be an open-air space. Therefore, in determining whether the Division's open-air option is readily apparent from the literal meaning of section 551.114(4), it is efficient to start with the question of whether the statute requires that the LGF be a building.

81. There are two undisputed points about the semantic meaning of the statutory text that can be taken for granted. First, the permitholder must *always have* an LGF. Section 551.114(4) makes this very clear, and no party has suggested otherwise. The permitholder does not necessarily have to put slot machines in the LGF, but it must have one.

82. Second, the SMGA must be located in a building, which means that it cannot legally be situated in an open-air place. The SMGA, in other words, must be enclosed within, and protected by, a building envelope that creates an enclosed, conditioned environment. This is reasonably clear from section 551.114(5), which requires the permitholder to provide office space "for the oversight of slot machine operations." Reinforcing the conclusion are Florida Administrative Code Rules 61D-14.050 and 61D-14.018, which impose requirements on the SMGA's structural enclosure that only a building could meet. In the *Calder* FO, the Division indicates that it agrees with this point.

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separate, stand-alone SMB has ever been refused permission to do so, nor has any been deemed noncompliant, retroactively, for having done so.

The Division's position is that the LGF need not be a building, not that the SMGA may be placed in a nonbuilding structure.

83. The Division's statements about the necessity of housing the SMGA in a building are interesting in themselves and, therefore, worth examining, notwithstanding the agreement on this particular issue. In support of its contention that an LGF can be a nonbuilding structure or open-air place, the agency looks to the statutory definition of SMGA and comments as follows:

> "Designated slot machine gaming area" is defined by section 551.102(2), Florida Statutes, as "the area or areas of a facility of a slot machine licensee in which slot machine gaming may be conducted in accordance with the provisions of this chapter." That is to say, there are slot machines present in the *buildings which house slot machines*. "Live gaming facility" is undefined in pari-mutuel law. The legislature instead allowed for a variety of premises types and premise layouts to satisfy the requirements of section 551.114(4), Florida Statutes.

Calder FO at 36 (emphasis added). The Division's argument, which is repeated in so many words throughout the *Calder* FO, is that while the SMGA needs to be in a building, a building is not needed for the LGF.

84. Notice, however, how the Division readily equates the term "facility" as used in section 551.102(2) with "buildings which house slot machines."[27]

[27] Section 551.102(2) is a poorly written, grammatically challenged sentence. To get technical, the dependent adjective clause beginning with the locative preposition "in" and the relative pronoun "which" clearly tells us something about a *noun*, but the sentence, as a whole, creates some moderate syntactic ambiguity about *which noun* is being modified. As a result, the dependent clause can plausibly be read as referring either to "area or areas" or to "a facility." Because "in" is a preposition of location that is ordinarily used to describe an enclosed space, however, the best and most natural reading, the undersigned believes, comprehends the adjective clause as modifying "facility"—so that an SMGA is *an area of a facility, in which* facility *slot machine gaming may be conducted* as opposed to *an area in which slot machine gaming may be conducted, which* area *is part of a facility*. Either way, the Division—in contrast to its understanding of section 551.114(4)—reads a term ("area" or "facility"), whose definition is not limited to "building," as meaning "building" in section 551.102(2).

The Division's reading of this statute is correct, because the term "facility" can and should be understood literally to mean "building" when the context clearly so requires, as here. The irony is that the Division continues to insist that the word "facility" in the term LGF must be understood literally to mean, according to the broadest of usages, just about anything a "facility" could possibly be, regardless of the language of section 551.114(4) as a whole. Yet, the context in which the term LGF is used, namely instructions for the location of the SMGA, is highly specialized; the statute is not referring to any conceivable facility, but a facility within which an SMGA may lawfully be located along with live gaming equipment and fixtures. Such contextual considerations pragmatically inform the literal meaning of the language. The Division, however, does not see it that way, in this instance.

85. The crux of the Division's argument as it relates to the meaning of LGF, and why the Division believes that an LGF need not be a building even though a building is needed to house an SMGA, is found on page 36 of the *Calder* FO:

> "[T]he statute unambiguously states [1] that the SMGA must be located within the live gaming facility *or* in a building that is contiguous and connected to the LGF. [2] This requirement places no additional restrictions on the size, structural components or amenities of an LGF. [3] The differentiation between these words "building" and "facility" in section 551.114(4), Florida Statutes, indicates that an LGF does not have to possess the same qualities as required of the building used to house the SMGA.

Of these three statements, No. 1 is clearly correct, and No. 2 is correct as far as it goes. With respect to No. 2, one must pause at the adjective *additional*, without which the statement would be clearly erroneous. The requirement that an SMGA be located in a building, coupled with the CCT Requirement, plainly *do* place such "restrictions on the size, structural components or

amenities of an LGF" as are necessary to meet these requirements—but no *additional* restrictions.

86. Statement No. 3 is where things get tricky. Section 551.114(4), first of all, does not literally "differentiate" between the words "facility" and "building." That is, the statute does not expressly identify or describe any differences between the two, nor does it give any readily apparent reason to suspect that the two words represent different things, respectively, for purposes of the statute. The Division is inferring a differentiation merely from the use of different terms. To be sure, the use of different terms sometimes implies that different meanings are intended; but not always. It depends, as ever, on the context, but also, importantly, on the degree of semantic overlap between the words being used. The English language is full of words which are so similar in meaning, in some or all senses, as to be interchangeable. The terms "facility" and "building," while not semantically identical in all senses, are clearly synonymous in some senses. Ordinary people use the word "facility" to mean "building" all the time. When someone tells you he went to a "health care facility" for medical treatment, you know that he is talking about a hospital or clinic, and that the "facility" in question is a building, not an open-air space. You do not infer that the speaker is differentiating "health care facility" from hospital building, even if, in the next breath, he tells you that he got lost in the hospital building.

87. Second, an LGF most certainly *does* "have to possess the same qualities as required of the building used to house the SMGA" when the SMGA is located within the LGF. That being the case, why would it be readily apparent from a literal reading of the statute that an LGF doesn't need to be a building simply because the SMGA is not located in the LGF, but in an SMB that is contiguous and connected to the LGF? Here is what the Division has to say about that: "[S]ection 551.114(4), Florida Statutes, is permissive because an SMGA 'may' be located within the current live gaming facility or within two other options, neither of which requires the current

LGF to be capable of housing slot machines." *Calder* FO at 37. Not only is this answer logically nonresponsive to the question,[28] but it begs a highly disputed question by assuming that an SMB may be contiguous and connected to a nonbuilding structure, or even an open-air space, which could not legally accommodate the SMGA.

88. Nevertheless, it is the fact that section 551.114(4) lays out "three options" for the permitholder which gives the Division the idea that having an LGF capable of housing an SMGA is optional. According to the Division, "pari-mutuel permitholders [are allowed] to decide where the slot machines could be located, which is: (1) within the LGF, (2) in an existing building that is contiguous and connected to the LGF, or (3) in a newly-constructed building that is contiguous and connected to the LGF."[29] The Division reasons that because the permitholder has the options (the "second option" and "third option") to locate its SMGA in an SMB rather than within the LGF (under the "first option"), it has another option, namely, the option *not* to have an LGF within which the SMGA could be located (the "fourth option").

89. The importance of the "fourth option" to the Division's position cannot be overstated. Without it, there is simply no escaping the conclusion that

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[28] It is true that the option to locate the SMGA in an SMB does not require the LGF to be capable of housing slot machines. So what? No one ever said that the requirement must be found in the "other options," for the good reason that the "other options" are not the only—or even the most natural or obvious—places to look. Further, *possessing* some tool which can be used for a particular purpose is different from *using* the tool for that purpose. Thus, merely having the option to use some other suitable tool for the same purpose would not nullify, render "illogical," or be inconsistent with a requirement that the former tool be kept on hand at all times. Indeed, one could reasonably and logically be required always to have *both* tools in the kit, with the option to use either at the worker's discretion, as a means of ensuring that the job will get done even if one tool fails.

[29] The Division's description of the "three options" is a fair summary of the literal meaning of the statutory text. The undersigned notes, however, that there are, in effect, only two locational options, LGF or SMB. Whether the SMB is old or newly constructed is immaterial to understanding the statute. Either way, the SMB must be a building that satisfies the CCT Requirement. Plus, an SMB "that is to be constructed" becomes an "existing building" once it is built. But this is splitting hairs. Call them three options if you like—it makes no difference.

section 551.114(4) literally requires that the LGF be a "building" within which the LGF may be located.[30] So let's look at it closely. The first thing that jumps out is that the "fourth option" is not written into the statute. You would think that, if the legislature had intended to provide this important "fourth option," it would have drafted section 551.114(3) to say something like this: Designated slot machine gaming areas may be located within the current live gaming facility *if the live gaming facility is a building suitable for such use; otherwise, they must be located* in an existing building, etc. Language to that effect would have made it clear that the "first option" is contingent on the LGF's being a building and that the permitholder has the "fourth option" of maintaining a nonbuilding LGF. As it is, the Division is inferring that the option to use the LGF for the SMGA is conditioned on "suitability" and that suitability is optional.

90. Next, it is one thing for a permitholder to choose not to place its SMGA in the LGF. It is another to choose not to have an LGF within which the SMGA could be placed. These are not unrelated, but neither are they the same thing. It is appropriate to call the alleged right to have an LGF which is incapable of housing slot machines the "fourth option," because this "fourth option" is plainly distinguishable from the "first option;" it gives the permitholder yet another alternative. Not only is the "fourth option" separate and distinct from the "first option," it is not a logical corollary to the "first option," either. Declining the "first option" in favor of the "second option" or "third option" is not the least bit inconsistent with having an LGF which is capable of containing the SMGA. A permitholder can reject the "first option" and have a building as its LGF, too.

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[30] To recap: The permitholder must have an LGF. The SMGA must be located within a building. Therefore, unless the permitholder has the "fourth option" of maintaining an LGF that is not capable of housing the SMGA, the LGF must be suitable for that purpose, which means that it must be a building, regardless of whether the SMGA is located within the LGF or not.

91. In dealing with statutes, as with any technical writing, the plain meaning of the text, which ordinarily would be taken for granted, can be surprisingly difficult to explain when someone finds a seam to exploit; and even the best written texts have seams, if someone is sufficiently motivated to find them. The seam in section 551.114(4) arises from two words—"may" and "or"—each of which has a plain meaning within the context of the statute, but both of which have other senses of meaning that the Division is using to stretch the statute. Briefly, the Division overemphasizes the *permissive* sense of the word "may," which does some work in the sentence, but not all the heavy lifting. The Division ignores the *prescriptive* sense of "may," which is clearly operating, as well, in section 551.114(4). Moreover, the Division incorrectly reads the word "or" as an exclusive disjunction, when the context makes clear that this is an inclusive-or.

92. To illustrate, imagine this situation: A boss instructs her employee to perform a duty (Job1) and further directs that, to complete Job1, the employee "may use tool A or tool B if B is sharp." Several things are unambiguously clear. *First*, the word "may" gives the employee some discretion, but this particular "may" clearly has a compulsory element in addition to the permissive component. The literal meaning of the directive is that the employee *shall* use *only* A or B (and not something else) in completing Job1, but he is free to decide, between them (provided B is sharp), which to use. *Second*, the directive necessarily carries with it the imperative to acquire A or B, unless the employee already possesses one or both, because compliance is impossible without at least one of the prescribed tools. *Third*, the use of B is conditioned on its being sharp, while the use of A is not so conditioned. In ordinary discourse, this means that Job1 requires a sharp tool (or the condition would not have been imposed on B), and that, for whatever reason, the boss is satisfied that A *is* sharp; otherwise, she would have conditioned *its* use on meeting the sharpness requirement as well.

93. Suppose that, in addition to the above facts, the boss has elsewhere ordered her employee to have A in his possession at all times, and that she knows he does, in fact, have A on hand. Now, the option to use "B if B is sharp" looks more like an accommodation to the employee: A is always sufficient (because there are no conditions on its use), but the employee may use B (if B is sharp); to use B, however, he must necessarily have both A (which is, and must be, sharp) and B in his toolkit while performing Job1, even if he never touches A in the process. Also, it is clear that the option to use B gives the employee an additional alternative; that is, the options are cumulative, not exclusive, because nothing in the language or the logic of the directive prohibits the employee from using both tools A and B while the work is in process. He is not required to use both, but neither is he precluded from doing so.

94. Let's imagine that Job1 is a one-off assignment that the employee successfully completes on the same day he receives the orders, using tool B because his tool A is currently not sharp enough to accomplish the task. Has the employee complied with his boss's instructions? Pursuant to the Division's logic in interpreting section 551.114(4), the answer would be *yes*, because if the employee had a sharp B, then the "second option," which did not require the employee to have a sharp A, meant that the employee effectively had a "third option," namely possession of a dull A. The undersigned doubts that this is what the boss intended. Rather, the undersigned would say that, until Job1 was finished, the employee was required to have at least one sharp tool, A, in his possession at all times, even if he used another sharp tool, B, which he was allowed to do.

95. But the hypothetical stacks the deck in the Division's favor, making an affirmative answer to the question of compliance seem fairly reasonable, if not actually correct, because Job1 was a singular event, which ran its entire course in one workday. To make the hypothetical closer to the real situation at hand, let's say that Job1 is cutting foam tiles to fit, for custom

installations, and that this duty, instead of being a one-time assignment, is the employee's primary responsibility, which he is required to perform every workday. Replace the variables A and B with "aviation (tin) snips" and "utility knife (box cutter)," respectively. Instead of the *boss* giving the instructions verbally, imagine that the instructions are prescribed by the employer in a *handbook* with which the employee is required to comply. Finally, let's have the handbook state: "Foam tile may be cut with your current aviation snips or with a sharp utility knife that must be replaced each time you sharpen the aviation snips."

96. Imagine, now, that the employee hates to sharpen tin snips, a time-consuming maintenance chore which requires getting out a file and a whetstone, and, therefore, he prefers to use a utility knife, whose blade can be conveniently replaced in a matter of minutes. Consequently, he lets his snips get dull and stops using them to cut tile, thinking that the "second option" gives him this leeway. After several months, the tin snips are no longer capable of cutting foam tile; the tool will still cut some other materials, however, and the employee uses it from time to time for such other purposes. The employee never purchases a new box cutter, figuring that, because he never sharpens the blades of his tin snips, he's not required to purchase a replacement for his existing box cutter. Is the employee in compliance with the handbook?

97. The Division would say *absolutely*. The undersigned says *no way*. First, the directive does *not* set up a one-time decision between mutually exclusive alternatives. Consider, by way of contrast, a sentence such as: "For lunch today, you may have either a hamburger or a hotdog." In that example, the "or" is clearly an "exclusive-or," also known as an exclusive disjunction. An exclusive-or makes clear that either one or the other of the two alternatives can be had, but not both, and not neither. Use of the word "either" is generally the means by which, in the English language, we communicate our intent that the disjunctive "or" be understood as an

exclusive disjunction. Tellingly, our hypothetical handbook, like the real section 551.114(4), does not use the "either/or" construct, or something even more explicit, e.g., "but not both."

98. In ordinary discourse, the word "or" is generally used as an *inclusive* disjunction unless the context makes such an intention improbable or the author clearly indicates a contrary intent—usually, as mentioned, by including "either" in the sentence together with the "or." Thus, when your server asks if you'd like "cream or sugar" for your coffee, you can reasonably answer, "both," because the "or" is plainly an inclusive-or. The hypothetical handbook, in instructing the employee how to fulfill a job-related duty, requires him to use one tool or another during the course of performing the tile-cutting task, expressing the directive in a sentence that clearly employs an inclusive-or. The prescriptive nature of the directive, however, must also be accounted for. The employee is given some discretion, but not permission to proceed however he pleases. He may use either prescribed tool, or both, but he is not free to use *neither* his current pair of tin snips nor a sharp box cutter. With respect to choice of tools, he has two cumulative options, which collectively form a command by circumscribing the universe of authorized tools.[31]

99. The fact that the employee's obligation to cut tiles is continuing is important. It means that the decision regarding which tool to use can be taken and retaken, even multiple times during the same day; the employee can switch back and forth between tin snips and box cutter if he likes. In this light, that use of the employee's *current* pair of tin snips is one of the required methods of discharging his duties is significant, because it means that the snips must *currently* be, i.e., when the decision is made, capable of doing the

[31] Section 551.114(4) likewise authorizes the use of both optional locations, nonexclusively, but only those two and not some other location. Indeed, the statute clearly permits the permitholder to have multiple SMGAs, and these could be placed, simultaneously, in the LGF and an SMB.
Continued on next page...

required work, which in the hypothetical means being sharp enough to cut foam tile; but, because the obligation is ongoing, no ultimate decision point, in the sense of a "last moment to choose," is ever reached.[32] Therefore, to comply with the directive, the employee's snips must be always sharp and fit for the job, because, at any given time, he has a cumulative, noncontingent option (and command) to use that tool.

100. The bottom line is that the word "or" in the directive is an inclusive-or with respect to the "use" component of the command: A, B, or (A and B) may be used on the job. The requirement of "possession" is made a bit more complicated, however, by the fact that the employee must "have" A even if he doesn't "use" A on the job. For possession, the "or" works out to: A, or (A and B), because, again, the employee must have A no matter what, and, therefore, he can't have only B. Because, moreover, for reasons discussed above, the A currently in the employee's possession must be capable of cutting tile on the job, merely "having" A is insufficient. In sum, the requirement always to have A; the requirement that A be currently available when the decision is made regarding which tool to use; and the essentially infinite time horizon as regards making the decision in question, taken together, amount to a requirement that the employee always have an A which is suitable for the job.

101. This sounds complicated, but it is actually fairly simple. The employer has decided that if the employee has only one suitable tool, that tool must be the tin snips. The employer grants the employee contingent permission to use a box cutter, but if he does so, he must still have sharp tin snips available, even if he only uses the box cutter; if he has both, however,

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[32] This is equally true of the obligation to house an SMGA in one of the prescribed enclosures—it continues. Obviously, however, unlike the hypothetical employee, no permitholder, as a practical matter, would be making frequent decisions as to the location of an SMGA. But, as far as section 551.114(4) is concerned, the permitholder can make that decision, again and again, at any point in time during the life of the slot machine license.

the employee may use either one or both at his discretion. The employer's clear intent is that the employee will have in his possession at all times, no matter what, at least one tool capable of cutting foam tile, and that tool shall be the tin snips. It might be argued that this "makes no sense" given that other tools can do the job just as well. It might be argued, as well, that requiring the employee always to have sharp tin snips "makes no sense" or is "illogical" if he can use a box cutter instead of the snips. What cannot be argued is that the decision is a matter of policy, which the employer sets, not the employee.

102. Under the Division's interpretive logic, the employee is given permission to cancel the employer's policy decision, in that he is given a "third option" to *not* currently have sharp snips, as long as he at least has a sharp utility knife. The undersigned regards this interpretation as imposing meaning on the hypothetical directive that is not readily apparent from a literal reading of the text, for reasons discussed above. For the very same reasons, the Division's interpretation of section 551.114(4) is nonliteral, because the Division reads into the statute a "fourth option" that effectively grants the permitholder permission to cancel the legislature's policy decision that the permitholder shall have and maintain, at all times, at least one enclosed building within which an SMGA may be located, and that *that* facility shall be the LGF.

103. There is one last point the undersigned will make before taking up the next issue. In the *Calder* FO, on page 38, the Division quotes with approval several paragraphs of the Final Order that was entered in *Florida Horsemen's Benevolent and Protective Association v. Department of Business and Professional Regulation*, Case No. 17-5872RU, 2018 Fla. Div. Admin. Hear. LEXIS 654 (Fla. DOAH Sept. 4, 2018) (the "*FHBPA Challenge*"), including the following:

> [T]he [petitioner's] reading [of section 551.114(4)] [as necessarily implying that an LGF must be

> capable of housing an SMGA] might be compelling if the only option open to a pari-mutuel facility were to place the [SMGA] in its current [LGF]. However, *it would make no sense to require that a current [LGF] be capable of housing a slot machine operation when the slot machine operation is in fact going to be placed in a different building*.

Id. at *34 (emphasis added). The interpretive question at hand should not turn on whether having an LGF capable of containing slot machines, even though such facility is not currently being used as an SMGA location, makes sense as a business decision for the permitholder. The question of whether such a requirement "makes sense" is a matter of policy for the legislature to decide, not the regulated industry, and not some other branch of government. Moreover, the undersigned can think of reasons why it *did* make sense, from a policy standpoint, for the legislature to require that the permitholder shall have and maintain, at all times, at least one enclosed building, namely the LGF, capable of housing an SMGA, even if the SMGA actually ends up being located in an SMB "contiguous and connected to" the LGF. Here's one: The legislature might reasonably have wanted to require permitholders to keep open the ready option of putting slot machines in the LGF as a means of incentivizing that result, on the theory that slot machines will draw patrons to the LGF. In setting policy, the legislature must consider interests beyond those of the permitholder, which in this situation include the interests of the live gaming industry.

104. The open-air option, whereby the Division has expressed the view that an LGF need not be a building capable on housing an SMGA, but may be an open-air space, represents a major policy decision. The question in this case in not whether this is a good policy; maybe it is, maybe not. The question in this case is not whether the Division has rulemaking authority to codify the open-air option pursuant to section 120.54; maybe it does, maybe not, but it hasn't. The question is whether the legislature, not the Division, prescribed

the open-air option as the law of the state. The answer to this question must be found in the plain language of section 551.114(4).

105. There is, above, a lot of analysis of the statutory language—perhaps too much. But cutting to the chase, as regards the open-air option, it is easy to conclude that the Division's interpretive statement is not readily apparent from a literal reading of the text based on what the statute does *not* say. Using an inclusive disjunction to prescribe just two locational options (LGF or SMB), section 551.114(4) *does not condition the use of the LGF as an enclosure for the SMGA on its being capable of housing slot machines*. The fact that there is a cumulative "second option" does not provide grounds in logic for implying such a condition, because it is clearly not a condition of exercising the "second option" that the LGF be *in*capable of housing slot machines. But most important, if the legislature had intended *implicitly* to authorize the use of open-air spaces (or any facility incapable of housing SMGAs) as LGFs, it would not simultaneously have *expressly* authorized the use of *any and all* current LGFs as enclosures for SMGAs, because the express provision makes such an inference unreasonable; there is no getting around that the unconditional "first option" in section 551.114(4) is logically inconsistent with an implied grant of permission to operate an open-air LGF.

106. The Division's interpretive statement defining "live gaming facility" to include open-air spaces is not readily apparent from the literal, or raw semantic, meaning of the statutory language.

K. THE PLAIN MEANING OF THE CCT REQUIREMENT

107. Under the Division's interpretation of the CCT Requirement, an SMB may be "contiguous and connected to" the LGF even if the two have no physical or structural elements in common—no integrated systems, no integrated building envelope, no intersection. This nonintegration principle allows the Division to declare that a separate, stand-alone building may be used to house the SMGA pursuant to the "second" and "third" locational

options prescribed in section 551.114(4). Does this jump out from the plain meaning of the statutory text?

108. In the *Calder* RO, the undersigned examined the statutory language to reach a conclusion about what the law, comprehended literally, affirmatively requires. In this case, it is necessary only to determine whether it is *not* readily apparent from the literal meaning of the statute that separate, stand-alone buildings are permissible as SMBs. That is, because the Division takes the position that no integration is required, it is unnecessary to make a decision regarding how much integration, if any, is required to satisfy the CCT Requirement. The difference between a separate, stand-alone building and, say, an annex or addition to the LGF, is one of kind rather than degree. If the statute does not literally authorize the kind of building the Division says is permissible, then the Division is not enforcing the statute's meaning; it's inventing meaning.

109. The undersigned's reading of the CCT Requirement was set forth in the Calder RO, in relevant part, as follows:

> The term "contiguous" means "being in actual contact" and "touching along a boundary or at a point." *See* "Definition of *contiguous*," Merriam-Webster.com, http://www.merriam-webster.com (last visited May 2, 2019). Similar in meaning, but not synonymous, the term "connected" means "joined or linked together." *See* "Definition of *connected*," *id*. Taken together, "contiguous and connected" clearly do *not* mean merely proximate, abutting, adjoining, or adjacent, but conjoined, integrated, and united for a common purpose. The plain meaning of these words, as used in these sentences [comprising section 551.114(4)], conveys that the legislature intended to require a substantial physical unity between the named structures[.]
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> * * *

> With this in mind, we can safely discard as too remote the possibility that the legislature envisioned two structures abutting and connected along a common vertical edge (or corner), even though such an odd configuration might technically satisfy the literal meaning of "contiguous and connected." Plainly, the legislature intended to mandate that, if used, an SMB be contiguous and connected to the LGF across the vertical plane of their abutting faces. Section 551.114(4) effectively requires that the LGF and SMB be two separate and structurally independent *buildings* using a party wall.
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> [The legislative intent], which is manifest in the plain language of the statute, was to require the licensee to locate the SMGA in the current LGF or in an *annex* thereto.

Calder RO, 2019 Fla. Div. Admin. Hear. LEXIS 283, at *54-57. The undersigned stands by the foregoing as a correct description of the literal semantic content of the statutory text; the exegesis reflects the uninventive understanding of a reader who is not looking between or beyond the lines to give any "leeway" to those who find the law too restrictive as written, but is simply comprehending the words in their ordinary senses, being mindful, of course, of the statutory context, which clues the reader in on the communicative intentions behind the plain language.

110. What's remarkable about the agency statement is that the nonintegration principle affords much more than just a little leeway. A separate, stand-alone building is practically the antithesis of a "building that [is] contiguous and connected to" another facility. The Division's nonintegration principle is so far removed from the plain meaning of the statutory text that it amounts, in effect, to a statutory amendment, not a statutory interpretation.

111. The undersigned acknowledges that the plain, linguistic meaning of the CCT Requirement is quite restrictive, and that the permitholder's architectural options are limited thereby. But even the Division, it may be remembered, appreciates that the CCT Requirement demands a "common boundary" between LGF and SMB. Where the Division goes astray is in equating "common boundary" with "located on the same parcel." Contiguity and connectedness, operating jointly as here, clearly and unambiguously require more than a shared address, and a "common boundary" between two connected buildings is literally a party wall. This is a strict reading, to be sure, but it is not absurd. One can easily imagine the legislature intending to make the CCT Requirement difficult to comply with as a means of discouraging the use of SMBs.

112. If the Division believes that the literal meaning of section 551.114(4) is too rigid, or deforms the full linguistic content of the statute in ways that thwart what it regards as the law's intended purposes or desired legal effects, the Division is not without recourse. It has a general grant of rulemaking authority to administer the provisions of chapter 551. *See* § 551.122, Fla. Stat. "[R]ulemaking is a legislative function, not an executive function. When the agency promulgates a rule having the force of law, it acts in place of the legislature." *Dep't of Rev. v. Novoa*, 745 So. 2d 378, 380 (Fla. 1st DCA 1999). The legislative power is the power of making laws and declaring what the law shall be. *See, e.g.*, *Chiles v. Children*, 589 So. 2d 260, 264 (Fla. 1991). Acting in its quasi legislative capacity, therefore, the Division has wider discretion to interpret the statute purposively (leaning on the statute's objective purposes), say; or— practicing intentionalism—in the light of clear legislative history, if any, than do courts, quasi- judicial officers, and agencies acting in their executive or regulatory (nonlegislative) capacity, all of whom, to the extent reasonably possible, should adhere to plain meaning textualism in working out the statute's legal effect.

113. The question in this case, however, is not whether the legislature improperly delegated its constitutional duty to the Division, nor whether the Division violated the doctrine of separation of powers by adopting a rule without authority, thereby encroaching on legislative power. As in *Novoa*, the question is "whether [the agency] has employed a policy that should have been adopted as a rule." *Id.* An affirmative answer to *that* question is compelled by the unavoidable conclusion that the Division has interpreted section 551.114, not based on plain meaning textualism, but with the goal of infusing the statute with legal content that advances the agency's policy preference, namely, to afford permitholders greater flexibility, or leeway, than the text, given its most natural and literal meaning, allows. The agency's policy might (or might not) accord with the law the legislature intended the statute to make, but it does not comport with the plain meaning of the statutory text, i.e., the words the legislature actually wrote.

114. To be fair to the Division, its approach, though prohibited by section 120.54(1)(a), is one that was for years indulged and condoned as the efficient engine of "incipient" or "nonrule" policy,[33] which latter received, not condemnation, but great deference by reviewing courts.[34]

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[33] The reason for affixing the label of "nonrule policy" to an agency principle is to relieve the agency of the burden of adopting the principle as a rule through the rulemaking procedure. As the "price" for this dispensation, the agency is required to defend its nonrule policy at hearing, where the policy is fair game for challenge and, thus, subject to rejection. The agency's burden is to "expose and elucidate" the grounds for its nonrule policy—to "prove it up." The highly influential *McDonald* court believed that the obligation to "prove up" a nonrule policy would nudge the agency towards rulemaking. *See McDonald v. Dep't of Banking & Fin.*, 346 So. 2d 569, 580-82 (Fla. 1st DCA 1977).

[34] Under the doctrine of judicial deference, "courts … [hold] that an agency decision construing a statute within its substantive jurisdiction should not be reversed unless it is clearly erroneous." *Brown v. Comm'n on Ethics*, 969 So. 2d 553, 557 (Fla. 1st DCA 2007). "An agency's interpretation of an ambiguous statute or rule that it administers is not clearly erroneous if 'it is within the range of possible and reasonable interpretations.'" *Soc'y for Clinical & Med. Hair Removal, Inc. v. Dep't of Health*, 183 So. 3d 1138, 1145 (Fla. 1st DCA 2015).

115. Indeed, starting in the Seventies,[35] when the modern Administrative Procedure Act ("APA") was new and Florida's administrative law was in a state of flux, courts found ways to favor adjudication over rulemaking as the preferred means of developing policy (law),[36] prompting periodic legislative pushback. *See Dep't of High. Saf. & Motor Veh. v. Schluter*, 705 So. 2d 81, 85-86 (Fla. 1st DCA 1997) (recognizing that "the 1991 legislature['s] … selection of rulemaking … as the primary means of policy development" demonstrated that it had "clearly disapproved [of] the judiciary's longstanding preference for adjudication").

116. Agencies anticipating judicial deference enjoy the practical discretion not only to choose between reasonable interpretations of ambiguous statutes, but also to refine, hone, and polish statutes which may not be semantically or syntactically ambiguous, but which fail (in the agency's judgment) adequately to express, through the plain meaning of the text, the communicative intentions of the legislature. Such exercises of interpretive discretion by an agency subject to deferential judicial review are practically authoritative because, if challenged in court, they are likely to be ratified. "With the deference doctrine behind them, agencies expect compliance with their statutory interpretations (and will take action to enforce compliance if necessary), and persons under agency jurisdiction are practically compelled to comply." *See* John G. Van Laningham, *When Courts Bow to Bureaucrats: How Florida's Deference Doctrine Lets Agencies Say What the Law Is*, 45 Fla. St. U. L. Rev. Online 1, 16 (2018) (available at

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[35] *See McDonald*.

[36] In essence, policymaking via adjudication, also known as retroactive policymaking, means that the agency is permitted to determine a party's substantial interests based upon a principle not found in either a statute or a properly adopted, *de jure* rule. The most widely used term for such a principle is "nonrule policy." This concept—not found in the APA—is pure judicial gloss. To underscore the point that a nonrule policy is somehow less "solidified" or "crystalized" than an actual rule, the adjectives "incipient," "emerging," and "evolving" are often used as well.

http://www.fsulawreview.com/online/). When courts can be reliably counted upon to apply and enforce reasonable agency interpretations, agency interpretations gradually acquire the force of law. *Id*.

117. But there has been a sea change in administrative law as a result of the voters' approval, in 2018, of "Amendment Six," which added an anti-deference provision to the Florida Constitution. Effective January 8, 2019, article V, section 21, of the Florida Constitution rescinds the doctrine of judicial deference as a rule of Florida law.[37] Thus, Florida agencies can no longer expect to receive judicial deference, which means that they have lost the interpretive discretion they used to enjoy—and with it the latitude to formulate quasi legislative policy retroactively, through adjudication. *See Citizens of Fla. v. Fla. Pub. Serv. Comm'n*, 44 Fla. L. Weekly D703 (Fla. 1st DCA Mar. 13, 2019) (Agency "discretion is limited … by the language of statutory text and now by the constitutional amendment that prohibits courts from deferring to an agency's interpretation of a statute.").

118. The upshot is that when an agency faced with a question of statutory meaning elects not to engage in rulemaking, it must (or should) think about how a court would likely read the statute, and then enforce the statute according to such an understanding. Because courts do not have the legislative power to make law or declare what the law shall be, they are likely to give statutes the legal effect deemed most consistent with plain meaning of the statutory language. Because agencies do not have legislative power, either, except as properly delegated and then only when exercised pursuant to the rulemaking procedure of section 120.54, they, too, should confine

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[37] Article V, section 21, of the Florida Constitution provides as follows:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

themselves to the plain meaning of any statute they are bound to administer, unless and until rulemaking has been accomplished.

119. The constitutional anti-deference provision is relevant in a section 120.56(4) proceeding because it directs the ALJ not to defer to an agency statement that gives a statute legal effect not readily apparent from the literal meaning of the text (and thus meets the definition of a rule), *even covertly* by excusing such statement as a reasonable exercise of agency discretion—as, in other words, just a forgivable "nonrule policy," rather than an illegal unadopted rule.[38] *Such discretion no longer exists outside of rulemaking*. If the agency wants the discretion to interpret the statute using a more liberal approach than plain meaning textualism, e.g., purposivism or intentionalism; or if the agency wants its interpretive statement to receive

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[38] This kind of informal or practical deference probably explains, at least in part, the decision in the *FHBPA Challenge*, where it was determined that agency statements similar to those at issue in this case were not unadopted rules. There, the ALJ wrote:

> Contiguous and connected" is an undefined term in the statute. Without belaboring the dictionary definitions of these common words, *the undersigned finds that the Division was entitled to some exercise of discretion* in applying the term "contiguous and connected" to the unique facts on the ground at Calder, without going through the process of adopting a rule that would apply only to Calder.

Fla. Horsemen's Ben. & Prot. Ass'n, 2018 Fla. Div. Admin. Hear. LEXIS 654, at *27 (emphasis added). Nothing in the APA "entitles" an agency to "exercise … discretion," outside of rulemaking, in interpreting statutes, so to allow an agency this prerogative is deference in action. Moreover, while the plain meaning of a statute might authorize a discretionary decision, the decision is not discretionary to apply the statute's plain meaning, so the fact that the Division's interpretation needed a bodyguard of "discretion" to whisk it past the dictionary definitions is the tell that the agency is giving the statute legal effect in excess of its strict semantic content. Besides which, there is no exception to the rulemaking duty which says that the agency need not go through the process of adopting a rule to codify its discretionary interpretation of a statute where such a rule "would apply only to" one person. Rather, the agency must either adopt a rule, or apply the statute *as written* to that one person like everyone else. Ordering that statutory requirements be relaxed for one person "only" is incompatible with the rule of law. Finally, in regard to the "unique facts" of Calder's situation, the Division's statement that separate, stand-alone SMBs may be compliant with the CCT Requirement is obviously not applicable only to Calder, even if Calder is the only permitholder who has taken advantage of it. The qualities that characterize "separateness" and "self-containedness" are not unique to Calder's SMB.

judicial deference, then it must successfully promulgate a rule. If the agency attempts to adopt a rule and fails, it will be because the agency's statutory interpretation was substantively invalid—indeed unconstitutional—and should never have been implemented in the first place; and persons whose substantial interests would have been determined based upon a misreading of the statute will be spared that unfortunate fate.

120. If the agency has not promulgated a rule codifying its statutory interpretation, then, in the best-case scenario, its interpretation will simply receive no deference in administrative and judicial proceedings, but will be evaluated on the same footing as any party's argument. If the agency has not adopted an interpretive statement as a rule *but takes action based thereon as though it had*, then it risks worse consequences, namely, being held accountable, in a section 120.56(4) proceeding, for violating section 120.54(1). In such a proceeding, as this one, to determine whether the interpretive statement is an unadopted rule, the agency statement must be measured against the "readily apparent," "literal" meaning of the statutory language—and be invalidated if it is anything but a near paraphrase of the plain semantic content.

121. It is concluded that, by allowing SMGAs to be located in separate, stand-alone SMBs, the nonintegration principle gives section 551.114(4) a legal effect not readily apparent from its literal, linguistic meaning.

L. FORCE OF LAW

122. As for whether the Division's interpretive statements at issue regarding section 551.114(4) have the direct and consistent effect of law, it is worth repeating that, in light of the anti-deference provision of the Florida Constitution, the only way an agency currently can make an authoritative statement having the direct and consistent effect of law is to promulgate a rule. It was the deference doctrine, not the APA, which gave "nonrule policies" their putative authority, and, hence, it follows that, without deference, a "nonrule policy" is just a policy that is not a rule. A "policy" that

is not a rule is only an argument or position, lacking the coercive force of law, but enjoying the persuasive force of logic and reason.

123. If an agency statement is not a *de jure* rule, it does not—and cannot—truly have the force and effect of law, no matter how authoritative it sounds.[39] Therefore, whether an SGA has the effect of law is ultimately a question of fact regarding the agency's intent, which boils down to whether the agency, if unchecked, intends to be bound by, and to enforce compliance with, the SGA. Where the agency, as here, actually has taken final agency action determining a party's substantial interests based on an SGA (*see Calder* FO), the requisite intent to enforce is most easily shown. Actual enforcement, however, is not necessary to prove that the agency intends to require bilateral compliance with its SGA, if unhindered. In the absence of actual enforcement, the petitioner in a section 120.56(4) proceeding has a more difficult task, from an evidentiary standpoint, but not an impossible one. If, for example, the agency has taken a firm position on a matter of statutory interpretation, then the intent to obey, apply, and enforce the statute as the agency understands it may be reasonably inferred.

124. This case does not present a close question in regard to the effect-of-law criterion. Each SGA here, as applied by the Division on its own authority, creates rights and has the effect of law. The open-air option gives permitholders a nonstatutory option, namely the right to have an unenclosed, nonbuilding LGF within which an SMGA could not lawfully be located, provided its slot machines are housed in an SMB. The nonintegration principle gives permitholders the nonstatutory right to locate an SMGA in a separate, stand-alone building having no integral systems, structures, or

[39] "Authoritative" here refers to interpretive finality, the idea that the interpreter's word is the "last word" on the statute's meaning. A judicial interpretation of a statute is authoritative and, thus, has the force of law. A valid administrative rule which interprets a statute is authoritative and has the effect of law. An agency's interpretive statement which has not been codified in a valid rule, on the other hand, is not authoritative, as a matter of law.

elements, provided the SMB is located on the same parcel, and on the same side of the street (or river, etc.) as the LGF.

M. ADMINISTRATIVE FINALITY

125. As an affirmative defense, the Division argues that the Final Order in the *FHBPA Challenge* operates as a bar to this proceeding under principles of administrative finality.

126. The doctrine of administrative finality, which is analogous to res judicata, holds that "orders of administrative agencies must eventually pass out of the agency's control and become final and no longer subject to change or modification." *Austin Tupler Trucking v. Hawkins,* 377 So. 2d 679, 681 (Fla. 1979)*; Delray Med. Ctr. v. Ag. for Health Care Admin.*, 5 So. 3d 26, 29 (Fla. 4th DCA 2009) ("In the field of administrative law, the counterpart to res judicata is administrative finality."); *see also Reedy Creek Utils. Co. v. Fla. Pub. Serv. Comm'n*, 418 So. 2d 249, 254 (Fla. 1982) ("An underlying purpose of the doctrine of [administrative] finality is to protect those who rely on a judgment or ruling.")

127. Administrative finality embraces both the doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion). *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1142 n.4 (Fla. 2d DCA 2001); *see also, Felder v. Dep't of Mgmt. Servs.*, 993 So. 2d 1031, 1035 (Fla. 1st DCA 2008) ("[A]dministrative finality is based on principles similar to those supporting collateral estoppel and res judicata, except that its emphasis is on litigants' need to have confidence in the authority of an administrative order."). Calder contends that SCF's claims under section 120.56(4), namely that the open-air option and the nonintegration principle are unadopted rules, are precluded by the former administrative determination to the contrary; thus, it is asserting a kind of res judicata.

128. "It has been well settled by [the Florida Supreme Court] that several conditions must occur simultaneously if a matter is to be made res judicata: identity of the thing sued for; identity of the cause of action; identity of

parties; identity of the quality in the person for or against whom the claim is made." *Albrecht v. State*, 444 So. 2d 8, 12 (Fla. 1984), *quoted in Fla. Power Corp. v. Garcia*, 780 So. 2d 34, 44 (Fla. 2001). Here, "identity of parties" is missing. SCF was not a party to the *FHBPA Challenge*. To try to get past this roadblock, the Division contends that SCF was "in privity" with the FHBPA, which grounded its ability to bring the *FHBPA Challenge*, in part, on associational standing.[40] The *FHBPA Challenge* was maintainable, at least to some degree, because it was found that a substantial number of the FHBPA's members were substantially affected by the alleged unadopted rules.[41]

129. When an association brings a rule challenge or other type of administrative proceeding based on the standing of its members, the action somewhat resembles a class action, but it is *not* a class action, and probably should not be treated as one. *Cf.* Fla. R. Civ. Pro. 1.222. The APA does not establish a procedural vehicle for a representative party to maintain a claim or defense on behalf of a class, whereby the resulting final order, whether

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[40] It has long been recognized that a trade or professional association is entitled to bring a rule challenge in a purely representative capacity provided it demonstrates "that [1] a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule, [2] that the subject matter of the rule is within the association's general scope of interest and activity, and [3] that the relief requested is of the type appropriate for a trade association to receive on behalf of its members." *See Fla. League of Cities, Inc. v. Dep't of Envtl. Reg.*, 603 So. 2d 1363, 1366 (Fla. 1st DCA 1992) (citing *Fla. Home Builders Ass'n v. Dep't of Labor & Emp't Sec.*, 412 So. 2d 351, 352-53 (Fla. 1982)) (bracketed numbers added); *see also NAACP, Inc. v. Fla. Bd. of Regents*, 863 So.2d 294 (Fla. 2003).

[41] It bears mentioning, parenthetically, that the Division's position on administrative finality is inconsistent with its position that SCF lacks standing to bring this action. This is because the association's members are, like SCF, licensed owners and trainers of racing animals. Thus, the FHBPA's members—which did not include SCF—were no more or less affected by the alleged unadopted rules than SCF is. If SCF does not have standing to maintain this action, as the Division argues, then neither did the FHBPA have associational standing to bring the *FHBPA Challenge* on behalf of its members. If the FHBPA lacked standing, then DOAH did not have jurisdiction to decide the merits in that case; without subject matter jurisdiction behind it, the Final Order would be a nullity, and, as a nullity, the Final Order would be without preclusive effect. To be clear, there is nothing wrong with the Division's taking inconsistent positions in the alternative, and the undersigned is not criticizing the agency for doing so. The fact remains, however, that the Final Order in the *FHBPA Challenge* is not 100 percent favorable to the Division.

favorable or not, will include all members who, after receiving legally sufficient notice of the existence of the class, do not request to be excluded from the class. Given that there are no procedures or procedural safeguards similar to those of rule 1.220 to be followed in administrative proceedings, the question of whether *all* of an association's members (as opposed to only those who make separate appearances as parties) are bound by the resulting final order in a case brought by the association on behalf of its members is one without an obvious answer. Because SCF was not, in fact, a member of the FHBPA at the time of the *FHBPA Challenge*, however, that interesting question need not be decided here.

130. The Division's "privity" argument takes the "class action" analogy a step further, because even if the FHBPA's members could be bound, as a "class," by the Final Order in the *FHBPA Challenge*, SCF was not a member of the class; it was, rather, more like an interested bystander, at most. For one to be "in privity" with a party litigant for purposes of res judicata requires much more than that. To be in privity, a person's interests must be so closely aligned with the party's interests that the litigating party necessarily acts as his "virtual representative," with the result that he, the nonparty, will be bound by the final judgment. *See Stogniew v. McQueen*, 656 So. 2d 917, 920 (Fla. 1995). Here, there is simply no basis for concluding that SCF was virtually represented by an organization to which it did not belong. To reach that result would require the conclusion that the FHBPA virtually represented *every* owner and trainer of race horses in the state of Florida, including those having no historical connection to the association whatsoever, which is absurd. While it is reasonable to infer that SCF probably rooted for the FHBPA to win the *FHBPA Challenge*, as SCF is clearly interested in achieving the same goal, the undersigned sees no way that SCF, which was neither a party thereto nor a litigating party's member, could have been bound by the outcome of that case. *See id*.

131. Finally, even if administrative finality were applicable, which it is not, it is well established that "Florida courts do not apply the doctrine of administrative finality when there has been a significant change of circumstances or there is a demonstrated public interest." *Delray Med. Ctr.*, 5 So. 3d at 29. Here, there *has* been a significant circumstantial change, in the law, resulting from the later enacted, anti-deference amendment to the Florida Constitution. For reasons discussed in footnote 38, *supra*, the undersigned believes that the ALJ in the *FHBPA Challenge* likely gave the Division the benefit of a deferential review, at least with respect to the nonintegration principle. But regardless, even if he did not, the anti-deference amendment *is* relevant, for reasons discussed at pages 64-65, *supra*, to the determination which must be made in this section 120.56(4) action. Because article V, section 21, of the Florida Constitution did not exist at the time of the decision in the *FHBPA Challenge*, administrative finality would not preclude the revisiting of claims pursued in that case in the light of the anti-deference amendment.

N. ADMINISTRATIVE STARE DECISIS

132. The Division argues that, even if administrative finality does not apply, the principle of administrative stare decisis requires the undersigned to follow the "precedent" established by the *FHBPA Challenge*, as though the ALJ's Final Order constituted settled law. This argument is rejected.

133. Although inapplicable here, a type of "stare decisis" has been found to exist in administrative law. As one court explained:

> The concept of stare decisis, by treating like cases alike and following decisions rendered previously involving similar circumstances, is a core principle of our system of justice. … While it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent[, from the statutory requirement that agencies index their orders and make them publicly available, that] the legislature

> intends there be a principle of administrative stare decisis in Florida.

Gessler v. Dep't of Bus. & Prof'l Reg., 627 So. 2d 501, 504 (Fla. 4th DCA 1993), *superseded on other grounds*, *Caserta v. Dep't of Bus. & Prof'l Reg.*, 686 So. 2d 651 (Fla. 5th DCA 1996). An agency's failure to follow its own precedent without adequate explanation is, potentially, reversible error. *Nordheim v. Dep't of Envtl. Prot.*, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998); *see also* § 120.68(7)(e)3., Fla. Stat. This principle applies only to *agency* final orders, however, not the final orders of ALJs.

134. The reason is basic. If it were true that a person's substantial interests could be determined based on an ALJ's "controlling," on-point final order, it would necessarily also be true that the "holding" of the final order would have the force and effect of law and be generally applicable. Were any "agency statement" in an ALJ's final order, or any holding derived therefrom, deemed to be both controlling and generally applicable, such statement or principle would be a rule, by definition. But ALJs do not possess delegated legislative authority to promulgate law by rule, nor do they have the constitutional power of the article V judiciary to say, with binding authority, what the law is as a general matter.[42] The separation of powers would be violated if ALJs began treating each other's final orders as controlling law, rather than secondary sources having the power to persuade.

135. Even if an ALJ's orders had precedential value, which they don't, it would be that of a trial judge's decisions, not those of a court of appeal, which is to say, somewhat limited. While there are no doubt sound prudential reasons, e.g., consistency, predictability, stability, etc., for, say, circuit court judges to follow their colleagues' decisions *when possible*, no circuit judge is bound by another circuit judge's ruling on an identical or similar issue. *See*

[42] ALJs have statutory power to say (or recommend) what the law is in a given case, for the limited purpose of determining the substantial interests of parties appearing before them, which is not trivial, but which is different from the judicial power.

Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (describing "proper hierarchy of decisional holdings"). The same is true at DOAH. The undersigned regards his fellow ALJs' decisions as persuasive (not binding) authority, deserving of respect, and the undersigned will follow such decisions to the extent possible without abrogating his ethical obligation personally to decide each matter over which he, and he alone, presides. *Cf. Model Code of Judicial Conduct* Canon 2, R. 2.9(A)(3) (Am. Bar. Ass'n 2020). The undersigned admires the ALJ who decided the *FHBPA Challenge* and would follow his colleague's lead but for the fact that, politely and respectfully, he disagrees with the decision in the *FHBPA Challenge* and has explained why in this Final Order.

136. Most worrisome is the Division's assertion that because DOAH is an agency, an ALJ must follow DOAH's final orders the way agencies are required to follow their own precedents. This argument is dangerously wrong on a matter of fundamental importance to Florida administrative law, because it conflates the unique, exclusively quasi-judicial role of DOAH as an independent, central panel of individual, impartial, quasi-judicial officers (ALJs) with that of the administrative/regulatory agencies, which, unlike DOAH, have significant policy-making roles in addition to their quasi-judicial powers; and which also, *because* they have significant policy-making roles, are politically accountable, and responsive, in ways that ALJs, as quasi-judicial officers having no political role, are not.

137. The argument's alarming premise is that an ALJ's order is an act of DOAH, which in turn implies that DOAH, as an agency, must somehow approve or authorize the ALJ's decision, so that the decision is ultimately *DOAH*'s decision, not the ALJ's. If this disturbing implication were true, then ALJs would lack genuine decisional independence, and parties could never really be sure who (in conjunction with, or in place of, the presiding ALJ) was actually deciding their cases. Thankfully, however, the argument's premise is false.

138. DOAH is an executive branch agency, to be sure, but DOAH does not decide cases as a collegial body. Indeed, DOAH does not decide cases at all, in any sense; only ALJs do. An ALJ is not an "agency," moreover, but a quasi-judicial, *presiding officer*. Each case pending before DOAH has one, and only one, presiding judge at a time. It is the ethical responsibility of the presiding judge, personally and independently, to decide the matter. This distinguishes DOAH from other agencies whose agency heads issue final orders on behalf of their respective agencies as a whole. *See* § 120.52(3), Fla. Stat.[43] An individual ALJ's recommended and final orders reflect the personal decisions of, and speak for, that ALJ *alone*, not for DOAH as an agency, and not for *anyone* employed by DOAH, including other ALJs.

139. The ALJ in the *FHBPA Challenge* exercised his best independent judgment in reaching the conclusions that *he*, not DOAH, made—and rightly so. The undersigned has done the same here. When different ALJs reach conflicting results, the ensuing instability, if any, is unlikely to last long, given the parties' appellate rights, and it is, in any event, a very small price to pay for ALJ independence—especially for private, or politically powerless, litigants—as compared to the alternative. The decisional independence of ALJs, largely taken for granted, is not constitutionally protected in the manner of judicial independence and is, therefore, more vulnerable to erosion unless vigorously defended. The Division's "agency's-own-precedent" argument is, today, a subtle attack on ALJ independence, but if the notion were accepted that DOAH speaks with "one voice" in deciding cases "as an agency," a frontal assault might be in the offing.

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[43] In some cases, including rule challenges, the enabling statute gives the ALJ final order authority. *See, e.g.,* § 120.56(1)(e), Fla. Stat. ("[T]he administrative law judge's order shall be final agency action."). Obviously, this grant does not make the ALJ either an "agency head" or an agency of one, nor does it mean that DOAH's agency head is responsible for the final agency action of the one ALJ whose duty it is to personally make the decision. Indeed, even when the chief judge presides in a given case, the resulting final order is issued in his or her capacity as an ALJ, not as DOAH's agency head.

O. CONCLUSION

140. It is concluded that the open-air option and the nonintegration principle are unadopted rules, and, thus, that the Division is in violation of section 120.54(1)(a).

ORDER

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

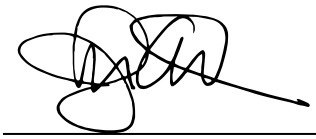
A. The open-air option described in paragraph 19 hereinabove constitutes an unadopted rule in violation of section 120.54(1)(a).

B. The nonintegration principle described in paragraph 13 hereinabove constitutes an unadopted rule in violation of section 120.54(1)(a).

C. The gatekeeper mechanism described in paragraph 20 hereinabove does not meet the definition of an unadopted rule.

D. The Division shall pay reasonable costs and reasonable attorney's fees to SCF as required under section 120.595(4)(a). SCF shall have 45 days from the date of this Final Order within which to file a motion for attorney's fees and costs, to which motion (if filed) SCF shall attach: (i) proof that, at least 30 days before the filing of the petition, the Division received notice that the statement may constitute an unadopted rule, *see* section 120.595(4)(b), Florida Statutes; (ii) appropriate affidavits (attesting, e.g., to the reasonableness of the fees and costs); and (iii) the essential documentation supporting the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 13th day of March, 2020, in Tallahassee, Leon County, Florida.



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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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.