

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA

LEON COUNTY, FLORIDA and the
LEON COUNTY ENERGY IMPROVEMENT
DISTRICT,

Plaintiffs,

vs.

Case No.:

FEDERAL HOUSING FINANCE AGENCY;
EDWARD DeMARCO, in his capacity as Acting
Director of FEDERAL HOUSING FINANCE
AGENCY; FEDERAL HOME LOAN MORTGAGE
CORPORATION; CHARLES E. HALDEMAN, JR.,
in his capacity as Chief Executive Officer of FEDERAL
HOME LOAN MORTGAGE CORPORATION;
FEDERAL NATIONAL MORTGAGE ASSOCIATION;
and MICHAEL J. WILLIAMS, in his capacity as Chief
Executive Officer of FEDERAL NATIONAL
MORTGAGE ASSOCIATION,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs, Leon County, Florida and Leon County Energy Improvement District,
sue Defendants and allege:

INTRODUCTION

1. Leon County, Florida (hereinafter the “County”) formed the Leon County Energy Improvement District (hereinafter “LEID”) on April 13, 2010, under its existing local government home rule powers under Florida law and pursuant to its taxing authority, to provide financing to County property owners for energy efficiency

improvements. The County created LEID as a mechanism to implement the Leon County Energy Assistance Program (“LEAP”) in furtherance of achieving its community greenhouse gas reduction and energy conservation goals. LEAP is modeled after property assessed clean energy (“PACE”) programs across the United States whereby clean energy projects on individual homes or businesses are financed and repaid through a local government property assessment process.

2. On May 5, 2010, Defendants Federal National Mortgage Association (“Fannie Mae”) and Federal Home Loan Mortgage Corporation (“Freddie Mac”) issued advice letters to lending institutions stating that PACE assessments acquiring a “priority lien” over existing mortgages pose risk to lenders, servicers, and mortgage securities investors and are key alterations to traditional mortgage lending practice. Additionally, they characterized the PACE assessments as “loans” rather than assessments. These statements also have been made by the Federal Housing Finance Agency (“FHFA”), which oversees Fannie Mae and Freddie Mac.

3. Fannie Mae and Freddie Mac's statements regarding priority liens contravene longstanding Florida and federal law. A lien is a property interest protected by the due process clauses of the United States and Florida Constitutions. *See* Amendment XIV, United States Constitution; Section 9, Fla. Const. art. I. A state legislature may, by statute, alter prospectively the priority of liens arising under state law so as to give priority to a public charge. Florida Statutes give certain assessment liens, including assessments to finance LEAP improvements, a priority equal to that of liens for general taxes and superior to all other liens.

4. These statements by Fannie Mae, Freddie Mac, and FHFA have the effect of prohibiting their mortgage holders from entering into PACE programs and, thus, effectively have stopped the development and implementation of numerous PACE programs across the nation, including the County's LEAP. Further, their actions have jeopardized grant applications for hundreds of millions of dollars to form, and realize public benefits from, PACE programs nationally and in the County.

5. As a result, the County has suffered damages in the form of administrative costs, lost staff time, the hiring of external personnel, and other costs that cannot now be recovered by implementing LEAP. Further, the statements have a chilling effect upon additional participation in LEAP by County residents. In total, the actions by Fannie Mae, Freddie Mac and FHFA have caused the County economic damages in excess of \$900,000.

6. The County has a significant and legitimate interest in: preserving its home rule and assessment powers; pursuing energy conservation and greenhouse gas emissions reductions; protecting the health and welfare of its citizens; protecting the economic interests of its residents in financing energy conservation improvements; protecting its citizens from unfair trade practices or an unfair competitive advantage; and receiving federal monies earmarked for energy conservation purposes.

7. Therefore, the County seeks injunctive relief and a judicial declaration that FHFA has exceeded its authority under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2) and the 10th Amendment to the U.S. Constitution, and that Fannie Mae and Freddie Mac have engaged in unfair business practices in violation of the Florida

Deceptive and Unfair Trade Practices Act, Chapter 501, Florida Statutes ("F.S.").

JURISDICTION AND VENUE

8. This Court has original subject-matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331, because this action arises under the laws of the United States; 5 U.S.C. §§ 701-706, the APA; 28 U.S.C § 2201, et seq.; original and independent jurisdiction over Freddie Mac and Fannie Mae pursuant to 12 U.S.C. § 1452(f) and 12 U.S.C. § 1723a(a); and supplemental jurisdiction pursuant to 28 U.S.C. § 1367.

9. This Court has personal jurisdiction over Fannie Mae and Freddie Mac because each corporation is present and does business within the Northern District of Florida. The Court has personal jurisdiction over FHFA because it serves as the regulator and conservator of Fannie Mae and Freddie Mac.

10. FHFA has made a final administrative determination that is subject to review under the APA, 5 U.S.C. § 702.

11. An actual and justiciable controversy exists within the meaning of 28 U.S.C. § 2201(a), and Plaintiffs are entitled to the relief requested herein. This Court can grant declaratory, injunctive, and additional relief pursuant to 28 U.S.C. §§ 2201, 2202; 5 USC §§ 705, 706; Fed.R.Civ.P. 57; and Florida law.

12. The County and LEID have suffered injury in fact in the form of money damages and infringement upon, and interference with, their governmental assessment authority. Plaintiffs face an imminent risk of additional suffering, continued damages, and irreparable injury as set forth herein. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) and N.D. Fla. Loc. R. 3.1, because the County and LEID are located

within this district.

PARTIES

13. The County is a charter county,¹ in accordance with Fla. Const. art. VIII and Section 125.60, F.S.; a political subdivision of the State of Florida, with the power to sue or be sued; and it acts by and through its Board of County Commissioners pursuant to Section 125.15, F.S. *See* Fla. Const. art. VIII, § 2(b). Among other powers vested in the County under Florida law, the County's home rule powers include establishing and administering housing and conservation programs, Section 125.01(1)(j), F.S., and borrowing and expending money, Section 125.01(1)(r), F.S.

14. The County created LEID by Ordinance No. 10-12 as a dependent special district within the meaning of Chapters 163 and 189, F.S. The purpose of LEID is to accomplish energy efficiency and renewable energy improvements to homes and businesses, including paying the costs necessary and incidental to the program, through non-ad valorem assessments. LEID was created to provide the assessment and financing mechanism for implementing the County's larger program, LEAP. LEID was the first such district in Florida. LEID's place of business is Leon County, Florida. The membership of LEID's Board is identical to the Board of County Commissioners of the County. LEID has the authority to sue under its enabling ordinance.

15. FHFA is a federal agency created on July 30, 2008 pursuant to the Federal Housing Finance Regulatory Reform Act of 2008, 12 U.S.C. §4511, Pub.L. 110-289, 122

¹ The Leon County Home Rule Charter was originally enacted by Ord. No. 2002-07 adopted May 28, 2002; to be presented at special election of Nov. 5, 2002. Ord. No. 2002-16, adopted Sept. 10, 2002, repealed Ord. No. 2002-07 in its entirety. Subsequently, Ord. No. 2002-17, adopted Sept. 10, 2002, special election of Nov. 5, 2002; effective Nov. 12, 2002.

Stats. 2661. FHFA is the single regulator and conservator for government-sponsored enterprises (“GSEs”) involved in the home mortgage market. GSEs are privately owned, congressionally chartered financial institutions created to enhance the availability of mortgage credit. The GSEs regulated by FHFA include Fannie Mae, Freddie Mac, and the Federal Home Loan Banks (“FHLBs”). As a federal agency, FHFA must promulgate rules in accordance with the procedures and process established in the APA, 5 U.S.C. § 553(b).

16. Edward DeMarco is the Acting Director of FHFA and he is sued in that capacity. His principal duties are overseeing the operations of each regulated entity; assuring each regulated entity complies with rules, regulations, guidelines, and orders issued under the Federal Housing Finance Regulatory Reform Act of 2008; assuring each regulated entity carries out its statutory mission only through activities that are authorized under the Federal Housing Finance Regulatory Reform Act of 2008; and assuring the activities of each regulated entity are operated consistent with the public interest.

17. Freddie Mac is a federally chartered private corporation, whose stock is publicly traded, facilitating the secondary market in residential mortgages. By statute, Freddie Mac has the power to sue and be sued in both state and federal court. 12 U.S.C. § 1452(c)

18. Charles E. Haldeman is the Chief Executive Officer and a member of the Board of Directors for Freddie Mac and he is sued in that capacity.

19. Fannie Mae is a federally chartered private corporation, whose stock is publicly traded, facilitating the secondary market in residential mortgages. Together with

Freddie Mac, Fannie Mae owns or guarantees approximately half of the residential loans in the U.S. and Florida, thereby virtually controlling the entire mortgage resale market. By statute, Fannie Mae has the power to sue and be sued in both state and federal court. 12 U.S.C. § 1723a(a).

20. Michael J. Williams is President and Chief Executive Officer for Fannie Mae and he is sued in that capacity.

GENERAL ALLEGATIONS

Property Assessed Clean Energy/Qualifying Improvements Programs

21. In PACE programs, local government assessments to fund energy efficiency improvements are attached to an individual's property through a lien. The scope of the authorized improvements depends upon state and local law. PACE programs are authorized in Florida by HB 7179, wherein the Florida Legislature found that all "energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property resulting from fossil fuel production. Improved property that has been retrofitted with energy-related qualifying improvements receives the special benefit of alleviating the property's burden from energy consumption."

22. The Florida Legislature also found that "there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance." HB 7179 authorizes local governments to incur debt for the purpose of providing financing for a qualifying improvements program, which is payable from revenue received from the improved property. Local governments are explicitly

authorized to levy non-ad valorem assessments to fund these energy retrofit improvements. Local governments are defined by HB 7179 to include counties, municipalities, and dependent special districts. LEID is a dependent special district formed to implement LEAP, the County's PACE program.

Assessments and Special Districts Under Florida Law

23. Florida local government authority to levy special assessments is based primarily on county and municipal home rule powers granted in the Florida constitution. Fla. Const. art. VIII, §§1-2; art. X § 9. The Florida supreme court has expressly ruled that the authority to impose special assessments is embodied in home rule authority for both counties and cities. To make special assessments under Florida law, counties also have general statutory authority pursuant to Section §125.01(1)(r), (q), F.S., and Article VIII, §1(g) of the Florida constitution.

24. Special districts in Florida derive their authority to levy special assessments through general law or special act. Special districts have existed in Florida for almost two hundred years, with the first created in 1822. Today, over 1620 special districts exist in Florida.² The public purposes of Florida special districts include: children services special districts; (Section 125.901, F.S.), county health and mental health care special districts (Section 154.331, F.S.); water supply authorities (Section 373.713, F.S.); community redevelopment districts (Chapter 190, F.S.), neighborhood improvement districts and water resource special districts (Ch. 163, F.S.); and soil and water conservation districts (Ch. 582, F.S.). Special districts have the authority to levy

² <http://www.floridaspecialdistricts.org>

assessments to achieve a dedicated special purpose. Their assessments take priority over all other obligations on a property, including purchase money mortgages, and subordinate and secondary mortgage obligations. *See Fla. Const. art. X, §4(a).*

25. General provisions for the use of special assessments are set forth in Section 197.3631, F.S., and they are defined in Section 197.3632, F.S., as “assessments which are not based upon millage and which can become a lien against a homestead permitted in Section 4, Article X of the State Constitution.” Florida courts define special assessments as “charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money.” The terms “special assessment,” “non-ad valorem assessment,” and “assessment” are synonymous in Florida law and are used interchangeably.

26. Under Florida law, ad valorem tax revenues may be used to provide a general benefit to the community-at-large, but special assessments must be used for specific benefits directly related to the property assessed. Florida courts have identified a two-part test for establishing a valid special assessment. First, the assessment must provide a “special benefit” to the property assessed and, second, it must be “fair and reasonably apportioned” among the benefited properties. In determining that the property is “specially benefited,” the expenditure must have a “logical relationship” between the services provided and the benefit to real property.

27. Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization. Nonetheless, HB 7179 explicitly authorizes local governments to

levy non-ad valorem assessments to fund qualifying improvements programs. HB 7179 also provides that these types of improvements upon real property confer a special benefit, meeting the aforementioned two-part test. Additionally, HB 7179 finds imposition of these types of voluntary assessments to be reasonable and necessary to serve a compelling state interest. Therefore, under Florida law, a local government is expressly authorized to levy assessments for qualifying improvements, including energy efficiency and related improvements.

28. Florida and federal law routinely have upheld the imposition and prioritization of special assessment liens on mortgaged land. Additionally, state legislatures may, by statute, alter the priority of liens arising under state law so as to give priority to a public charge. Florida Statutes give certain special assessment liens a priority equal to that of liens for general taxes and superior to all other liens. *See, e.g.*, Section 153.05(10), F.S. (sanitary sewer assessments) and Section 170.09, F.S. (alternative method of making local municipal improvements). Pursuant to HB 7179, LEAP's non-ad valorem assessments constitute a lien of equal dignity to county taxes and assessments similar to other special assessments, which have enjoyed protection under Florida law for decades. Therefore, the pronouncements of Fannie Mae, Freddie Mac, and FHFA that these PACE assessments are "unlike routine tax assessments" and "do not have the traditional community benefits associated with taxing initiatives" contravene Florida and federal law.

Leon Energy Assistance Program

29. There is a significant body of law supporting the notion that state's powers

include the protection of the environment, including meeting energy conservation and greenhouse gas reduction goals. In 1980, the Florida Legislature enacted Sections 366.80-366.85 and 403.519, F.S., the “Florida Energy Efficiency and Conservation Act.” In Section 366.81, F.S., the Legislature finds and declares that it is critical to utilize the most efficient and cost-effective demand-side renewable energy systems and conservation systems in order to protect the health, prosperity, and general welfare of the state and its citizens. Reduction in, and control of, the growth rates of electricity consumption and of weather-sensitive peak demand are of particular importance. Also, the Legislature intends that the use of solar energy, renewable energy sources, highly efficient systems, cogeneration, and load-control systems be encouraged. Clearly, Florida has found a public interest in promoting energy conservation, efficiency and renewable energy deployment.

30. Chapter 187, F.S., the State’s Comprehensive Plan, requires reductions in energy requirements through enhanced conservation and efficiency measures in all end-use sectors, and requires reduction of atmospheric carbon dioxide by promoting an increased use of renewable energy resources and low-carbon-emitting electric power plants. The State’s policies to meet these goals include: encourage and provide incentives for consumer and producer energy conservation and establish acceptable energy performance standards for buildings and energy consuming items; reduce the need for new power plants by encouraging end-use efficiency, reducing peak demand, and using cost-effective alternatives; and promote the development and application of solar energy technologies and passive solar design techniques.

31. Governor Crist signed Executive Order 07-127 on July 13, 2007, which increased the energy efficiency standards in the Florida Building Code and adopted a target for greenhouse gas emissions reductions to 2000 levels by 2017, to 1990 levels by 2025, and by 80 percent of 1990 levels by 2050. Chapter 553, F.S. also includes energy efficiency standards increasing by 10 percent in each of the next three cycles of the Florida Building Code.

32. The American Recovery and Reinvestment Act (hereinafter "ARRA") was signed into law on February 7, 2009. Among other things, ARRA allocated \$16,800,000,000 to the United States Department of Energy (hereinafter "DOE") for Energy Efficiency and Conservation Block Grants, the Weatherization Assistance Program, and the State Energy Program. The DOE has encouraged the development and growth of PACE programs nationally and use of its grant programs to provide funding for doing so.³

33. In July 2009, before the 2010 Florida legislative session commenced and HB 7179 was adopted, the County began exploring the formation of a PACE program under its home rule authority. Knowing that supplemental authority was likely to be enacted during the 2010 Florida legislative session, the County worked, and expended funds, to assure that the LEID Ordinance would be consistent with the ultimate legislation that became law. The County adopted an ordinance, after a public hearing,

³ "The Department of Energy (DOE) is announcing funding for model PACE projects, which will incorporate this Policy Framework's principles for PACE program design. Under the State Energy Program, DOE has received approximately \$80 million of applications for PACE-type programs to provide upfront capital. Additional PACE programs are encouraged through a Funding Opportunity Announcement, released today, for competitive grants under the Energy Efficiency Conservation Block Grant Program." http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf

forming LEID on April 13, 2010, in anticipation that HB 7179 would pave the way for the creation of PACE programs. On May 27, 2010, Governor Crist signed HB 7179 into law. Upon final passage of HB 7179, the County amended its ordinance on July 13, 2010 to ensure its program would be consistent with Florida law. On July 14, 2010, the County formally launched its LEAP initiative in furtherance of achieving its, and the State's, energy conservation and greenhouse gas reduction goals.

34. The goal of LEAP is to promote meaningful energy reduction efforts, generate net economic benefit to participants, and provide tax-exempt equity in the participant's property. In addition to benefiting the property owner, the goal of LEAP is also to help create jobs, create more disposable income for working class families, and reduce greenhouse gas emissions.

35. Eligibility criteria for LEAP participants are conservative to minimize risk. For instance, the applicant must be the record property owner; the property taxes cannot be delinquent in the last five years; the property owner must be current on any mortgage with no bankruptcy or foreclosure; no federal income tax can be owed; there can be no judgment or similar involuntary lien encumbering the property; and the improvements must be reasonable for the scope of the project and to the property value as approved by LEID.

36. Additionally, LEAP requires an energy audit to be completed. The auditor determines opportunities for energy reduction and makes prioritized recommendations. The property owner must obtain three quotes from licensed contractors, and the quote must include the contractor's license number and all associated project costs, such as

materials, equipment, permitting fees, recording fees, audit costs, contingency fees, etc.

37. The LEAP terms are:
 - a. The interest is based on the 10-year treasury note, plus 1/2%;
 - b. The financing amount is capped between \$1,000 and \$7,000;
 - c. Maximum repayment is 20 years;
 - d. Projects must be on a qualifying list of improvements;
 - e. The property owner must consent to provide the County access to verify that the improvements have been completed;
 - f. There is a disclosure in the application regarding the non-ad valorem assessments;
 - g. The State of Florida Fair Lending Notice is included in the application as required; and
 - h. The applicant must provide notice to any lender of any adjustment to monthly payments (and maximum principal financed) 30 days prior to entering into the written agreement for the program with the County.

38. LEAP permits a higher financing amount if the mortgage holder consents to increased financing and the energy audit shows a demonstrated high level of energy savings or renewable energy produced over the duration of the financing.

39. DOE published “Guidelines for Pilot PACE Financing Programs” on May 7, 2010. LEAP addresses those Guidelines as follows:

- a. A savings to investment ratio (and appropriate financing amounts).
- b. A focus on energy efficiency;

- c. Energy audits with qualified auditors and post-project inspections.
- d. A cap on financing amounts;
- e. LEAP improvements must be reasonable for the scope of the proposed project and the property value, addressing the fact that assessments should not exceed the duration of the improvements;
- f. Requiring lender notice 30 days prior to entering into the program's written agreement;
- g. Unenforceability provisions related to the acceleration of mortgage payments;
- h. Noticing to new purchasers of a property in the form of a disclosure of the non-ad valorem assessments;
- i. Property owners apply any rebates towards the payment of the non-ad valorem assessment;
- j. State of Florida Fair Lending Notice in the LEAP application; and,
- k. The DOE data collection Guidelines also are included in LEAP.

40. While not all PACE programs include the same criteria, the County has taken great care to create a program significantly reducing risk to lenders and participants in the program based on the DOE Guidelines. For instance, capping the financing at \$7,000 and requiring the improvements to be reasonable for the scope and value of the property are more conservative and specific than the DOE Guidelines and HB 7179.

41. In LEAP, the costs of the improvements are assessed on the property in the amount set forth in a written agreement between the property owner and LEID.

LEAP assessments are to be prepared and collected by the County Property Appraiser pursuant to Chapter 197, F.S., and HB 7179, just as any other assessment in Leon County. Non ad-valorem assessments levied pursuant to LEAP are deemed to be a lien “coequal with the lien of all state, county, district and municipal taxes, superior in dignity to all other liens, titles, and claims until paid” consistent with state law.

42. LEAP is an extremely popular program. Within twenty-four hours of opening its application process, the initial one hundred applications allotted for the program were taken. However, consistent with the national average, it is estimated that approximately half of the LEAP applicants have mortgages with Fannie Mae or Freddie Mac, thus immediately making those applicants unable to participate in LEAP.

43. The County and LEID have received numerous inquiries about LEAP, but cannot process or fund pending or new LEAP applications because of the uncertainty created by Fannie Mae, Freddie Mac, and FHFA’s statements. In addition to halting LEAP for the initial LEAP applicants, these pronouncements also have obstructed future participation by County property owners and made securing capital for LEAP’s implementation virtually impossible.

44. The County has incurred significant costs in developing its program. The County has appropriated \$40,000 to fund the energy audits required to enter into LEAP. To date, the County has expended over \$60,000 in staff time and professional services to form LEAP and ensure its consistency with Florida law during the passage of HB 7179.

45. In May 2010, the Florida State Energy Office applied to the DOE for \$5 Million of its \$30 Million in Competitive Awards for State Energy Efficiency Projects.

The Florida application was to develop a PACE Technical Assistance Program for five counties in Florida (Leon County, Orange County, Sarasota County, St. Lucie County, and Miami-Dade County) premised upon Florida's recently passed HB 7179 legislation. Each County would receive \$800,000 in funding to further its program.

46. At the time the grant application was submitted to the DOE, PACE programs were encouraged and deemed an eligible activity for the grant. During the pendency of the application, Fannie Mae and Freddie Mac finalized their positions on PACE assessments. FHFA also announced its position on PACE assessments. The State's application was denied in September 2010. The DOE has stated that "[i]n light of the clear opposition from the regulators for PACE financing programs with a senior lien priority, prudent management of the Recovery Act compels DOE and Recovery Act grantees to consider alternatives to programs in which the PACE assessment is given a senior lien priority."⁴ The Defendant's actions during the pendency of the grant application have damaged the County because they were a determinative factor in the loss of the grant.

Defendants' Interference With Leap

47. Fannie Mae and Freddie Mac have underwritten mortgages or refinanced properties with various special assessments in Leon County for many years. Fannie Mae and Freddie Mac previously have not objected to the placement of these special assessments on mortgages and have incorporated these special assessments into their procedures for many years. In fact, Fannie Mae and Freddie Mac's long standing

⁴ <http://www2.eere.energy.gov/wip/pace.html>

practices and security instruments have accepted that Florida assessments do attain a lien priority over mortgages.

48. On May 5, 2010, Freddie Mac issued its "Industry Letter" to Sellers/Servicers, stating that "an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac." A copy of Freddie Mac's May 5, 2010 Letter is attached hereto and incorporated herein as Exhibit "A." On May 5, 2010, Fannie Mae also issued a "Lender Letter" stating: "PACE loans generally have automatic first lien priority over previously recorded mortgages." A copy of Fannie Mae's May 5, 2010 Letter is attached hereto and incorporated herein as Exhibit "B." The categorization of PACE assessments as a "loan" or "assessment" and its lien status is critical. The terms of the Fannie Mae/Freddie Mac Uniform Security Instruments only prohibit *loans*, not *liens*, that have senior status to a mortgage. Fannie Mae, Freddie Mac, and FHFA improperly define the assessments as loans on multiple occasions throughout their statements.

49. Freddie Mac also stated in an August 31, 2010 Bulletin (Number 2010-20) that it had "reminded Seller/Servicers that an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac." A copy of the August 31, 2010 Bulletin is attached hereto and incorporated herein as Exhibit "C." On the same date, Fannie Mae issued a similar announcement in its "Options for Borrowers with a PACE Loan." A copy of Fannie Mae's August 31, 2010 Announcement is attached hereto and incorporated herein as Exhibit "D."

50. On July 6, 2010, FHFA issued a "Statement on Certain Energy Retrofit Loan Programs," saying that PACE loans are "unlike routine tax assessments and pose

unusual and difficult risk management challenges” and that they “do not have the traditional community benefits associated with taxing initiatives.” A copy of the FHFA’s July 6, 2010 Letter is attached hereto and incorporated herein as Exhibit “E.” Additionally, FHFA stated: “FHFA urged state and local governments to reconsider these programs and continues to call for a pause in such programs so concerns can be addressed.” Importantly, FHFA claims the programs “present significant risk to lenders and secondary market entities, may alter valuations for mortgage-backed securities and are not essential for successful programs to spur energy conservation.”

51. As a practical matter, the July 6, 2010 statement by FHFA prohibits superior priority liens for energy assessment programs while at the same time continuing to recognize superior priority assessment liens for other public benefit improvements authorized pursuant to Florida law.

52. On August 31, 2010, Freddie Mac issued Bulletin Number 2010-20 stating that it will take additional actions such as adjusting loan-to-value and debt-to-income ratios for mortgages secured by properties located in local governments where PACE programs are in existence. For mortgages with settlement dates before July 6, 2010 that are secured by properties subject to PACE obligations originating before that date, if the PACE assessment provides a first lien priority, Freddie Mac will waive the Uniform Security Instrument requirement that the obligation is subordinate to the first lien. Otherwise, Freddie Mac states that “requirements regarding Mortgages secured by properties subject to PACE obligations that provide for First Lien priority remain unchanged.” This statement essentially grandfathers PACE assessments for existing

mortgages prior to July 6, 2010 regardless of the protections or standards in the program.

53. But, if there is a PACE lien on the property prior to July 6, 2010 and the mortgage is refinanced, Freddie Mac is requiring that, if the borrower has sufficient equity in the property to pay off the existing PACE assessment, it must do so as a condition of refinancing its mortgage. Additionally, mortgage sellers must attempt certain financing techniques to pay off the PACE assessment before refinancing. If the PACE assessment cannot be paid off, the PACE obligation will be included in the monthly debt to income ratio.

54. All of these actions contravene statements made in the September 18, 2009 Lender Letter from Fannie Mae directing lenders to treat PACE assessments as any other tax assessments, which is completely contrary to all later statements that the assessments should be treated as loans or otherwise subordinate to a mortgage. A copy of Fannie Mae's September 18, 2009 Lender Letter is attached hereto and incorporated herein as Exhibit "F."

55. On August 31, 2010, Freddie Mac issued Bulletin Number 2010-20, which provides that financing energy efficient and renewable energy home improvements can be achieved without altering the lien priority status of first mortgages or other underwriting requirements. This statement ignores clear state and local authority to levy these assessments as a priority lien and HB 7179's requirement of that status for these assessments.

56. Article VII, Section 10 of the Florida constitution prohibits the state, counties, school districts, municipalities, and special districts from lending money, and

prohibits the use of their taxing power or credit to aid any corporation, association, partnership, or person. Under the Florida constitution, Leon County cannot use a tax to fund a PACE program because a tax can be imposed only “by sovereign right for the support of the government, the administration of the law, and to execute the various functions the sovereign is called on to perform.” Pursuant to Article VII, Section 10, the County also cannot lend money to individual property owners as a traditional loan to finance energy improvements. Therefore under Florida law, PACE financing provided directly by the County can only be done on an assessment basis. Under Florida law, liens resulting from PACE assessments explicitly have priority over mortgages. The County and LEID enacted LEAP in accordance with Florida law related to these assessments and have been adversely affected by the Defendants’ statements concerning PACE assessments.

57. The statements by Fannie Mae, Freddie Mac, and FHFA now prevent the County and LEID from using an explicitly authorized and constitutionally protected assessment power to achieve a compelling state interest, including advancing the energy reduction efforts of LEAP and providing economic benefits to participants, job creation, and greenhouse gas emission reduction.

58. The statements by Fannie Mae, Freddie Mac, and FHFA that PACE assessments are “unlike routine tax assessments” and “do not have the traditional community benefits associated with taxing initiatives” and, thus, cannot take a priority lien position contravene long-standing case law and Florida Statutes. Consequently, Fannie Mae, Freddie Mac, and FHFA have deprived the County and LEID of the lawful

power to provide a legislatively authorized special benefit to property owners fairly and equitably apportioned among its citizens. Defendants' statements are contrary to previously announced policy and, thus, are arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

59. The statements by Fannie Mae, Freddie Mac, and FHFA fail to consider: the mortgage protection procedures built into Florida PACE assessments, including the prohibition against acceleration in the event of default; that LEAP follows prudent and conservative underwriting principles and predominately adopted the underwriting standards of the DOE; and that energy retrofits initiated through PACE programs will improve the borrower debt-to-income ratio through utility bill savings and improve the value of the real property with increased energy efficiency improvements.

60. Finally, it appears that Fannie Mae and Freddie Mac have consistently and without exception purchased and guaranteed mortgages on Florida properties subject to assessment liens which enjoy a statutory priority over any underlying mortgage obligation. There is no law, rule, procedure or other authority that allow the defendants to pick and choose which assessment liens have priority over mortgage obligations.

COUNT I

(FHFA's violation of the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* & 706)

61. The County and LEID reallege and incorporate by reference the allegations of the preceding paragraphs 1-60.

62. Judicial review of federal agency action is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*

63. FHFA's statements, as more particularly described herein, are regulations, guidelines, orders, or rules (hereinafter "rules") pursuant to the APA, 5 U.S.C. §§ 551, *et seq.* Under 5 U.S.C. § 551(4), a "rule" is defined as "the whole or a part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy...." The FHFA rules are agency statements of general applicability designed to implement, interpret or prescribe law or policy.

64. 5 U.S.C. § 551(5) requires an agency to follow specific rulemaking procedures when it formulates, amends, or repeals a rule. These procedures generally include: publishing a notice of proposed rulemaking in the Federal Register; giving "interested persons" an opportunity to comment on the proposed rule; and, after considering the public comments, publishing the final rule, incorporating a general statement of its basis and purpose.

65. The FHFA rules were not promulgated pursuant to the specific rulemaking procedures mandated by the APA. There was no publication of notice in the Federal Register and no opportunity for affected persons to be heard in the process. Moreover, FHFA failed to provide a sufficient statement of the basis and purpose of the rule.

66. The FHFA rules violated substantive requirements of the APA because the findings contained in the rules are unsupported, inaccurate, and beyond FHFA's statutory authority. FHFA has identified no nexus between PACE assessments and an increased risk of default of Fannie Mae or Freddie Mac's mortgage instruments or the safety and soundness of the mortgage industry. FHFA did not identify or articulate a rational connection between its singling out of PACE assessments as loans while allowing other

assessments to remain a priority lien, which presumably means FHFA concluded that these other assessments do not create an increased risk of default on Fannie Mae or Freddie Mac's mortgage instruments or jeopardize the safety and soundness of the mortgage industry.

67. Even assuming there is some identifiable or legitimate basis for the unequal treatment of these assessments, FHFA failed to articulate this basis in its rules. FHFA's actions are not in the public interest, as they improperly encroach into the state powers of taxation and assessment, and unjustifiably and adversely impact lawfully enacted PACE programs and the very economic and public issues PACE was created to address.

68. Agency action must be held unlawful and be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts. 5 U.S.C. § 706(2).

69. FHFA has arbitrarily and capriciously determined that first liens established by PACE programs (such as LEAP assessments) are "unlike routine tax assessments," "do not have the traditional community benefits associated with taxing initiatives," "disrupt a fragile housing finance market," and "are not essential for successful programs to spur energy conservation."

70. Further, FHFA has not explained why existing mortgages or refinancing applications with PACE assessments enacted prior to July 6, 2010 are acceptable, while

PACE assessments enacted after July 6, 2010 are not. This date is an arbitrary line in the sand, marking all PACE programs on one side of the line as assessments and all PACE programs on the other side as loans. There is no justification for this differentiation, and the July 6, 2010 date is an arbitrary way to determine whether or not a program is valid.

71. This Court has the authority to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law,” 5 U.S.C., § 706(2)(A), and to set aside an agency decision made “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D).

WHEREFORE, Plaintiffs respectfully request that this Court:

- a. Vacate and set aside as null and void FHFA’s rules for failing to adhere to the rulemaking procedures mandated by the APA;
- b. Vacate and set aside as null and void FHFA’s rules because the rules and the findings contained in the rules are unsupported, inaccurate, arbitrary and capricious, contrary to the Florida and United States Constitutions, and beyond FHFA’s statutory authority;
- c. Award Plaintiffs their reasonable attorney’s fees and costs pursuant to 28 U.S.C. § 2412(d)(1)(A); and
- d. Grant such other relief as the Court may deem just and proper.

COUNT II

(FHFA’s Violation of the 10th Amendment of the Constitution)

72. The County and LEID reallege and incorporate by reference the

allegations of the preceding paragraphs 1- 71.

73. The Tenth Amendment to the United States Constitution expressly reserves to the states all powers except those limited powers granted to the federal government. The Tenth Amendment ensures the division of powers between the states and federal government that is necessary for the dual sovereignty of the federal system.

74. The Tenth Amendment preserves for Florida the authority to levy and prioritize special assessments based primarily on county and municipal home rule powers granted in the Florida constitution.

75. FHFA's rules violate the 10th Amendment to the United States Constitution, which states in pertinent part, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people."

76. Congress lacks the authority under Article I of the United States Constitution to regulate local government special assessments. FHFA is a federal agency and has no power to preempt state legislation unless and until Congress appropriately confers this power on FHFA. Congress arguably could confer this power on FHFA through a validly enacted federal statute. However, Congress has not done so, and its attempt to preempt the powers reserved to the states is unconstitutional.⁵

77. FHFA may not overrule Florida state law regarding local tax and

⁵ Notably, other federal agencies have conducted their activities based on the proper understanding of constitutional separation of powers. For example, the DOE provided guidelines for states enacting PACE programs. *See* DOE's Guidelines for Pilot PACE Financing Programs. Additionally, the White House drafted information for states enacting PACE programs. *See* the White House's Policy Framework for Pace Financing Programs (October 18, 2009) available at http://www.whitehouse.gov/assets/documents/PACE_Principles.pdf.

assessment powers related to lien priorities without specific authority from Congress. Accordingly, FHFA's rules overruling and reinterpreting state law on lien priorities are inconsistent with its congressionally delegated statutory authority. FHFA has gone beyond its congressionally authorized authority and is encroaching into the state of Florida's constitutionally protected powers. In so doing, FHFA has violated the Tenth Amendment to the Constitution.

78. Because FHFA's rules are beyond its constitutionally delegated authority and do not flow from an express grant of power to Congress under Article 1 of the Constitution, FHFA's actions are a presumptive unconstitutional interference with the County's Tenth Amendment Rights.

79. Alternatively, FHFA's rules are within areas that Congress has expressly reserved to the states and, thus, presumptively interfere with the County's Tenth Amendment Rights.

80. FHFA's rules effectively will invalidate Florida state law in the areas of assessments, contracts, and taxation. Accordingly, FHFA's actions are a presumptive unconstitutional interference with the County's Tenth Amendment Rights.

WHEREFORE, Plaintiffs respectfully request that the Court:

- a. Declare FHFA's rules to be in violation of the Tenth Amendment to the Constitution of the United States;
- b. Declare that Defendants have violated the Plaintiffs' rights as sovereigns and protectors of the welfare of their citizens and residents;
- c. Enjoin Defendants and all other agencies and employees acting on their

behalf from relying on or enforcing the rules against the Plaintiffs, their citizens and residents, and any of their agencies, officials, and employees, and to take such actions as are necessary and proper to remedy their violations deriving from any such actual or attempted enforcement;

- d. Award Plaintiffs their reasonable attorney's fees and costs; and
- e. Grant such other relief as the Court may deem just and proper.

COUNT III

(Fannie Mae & Freddie Mac's Violation of the Florida Deceptive and Unfair Trade Practices Act.)

81. Leon County and LEID reallege and incorporate by reference the allegations of the preceding paragraphs 1- 80.

82. The Florida Deceptive and Unfair Trade Practices Act (hereinafter "FDUTPA") prohibits "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce." Fla. Stat. § 501.204.

83. This Court has pendant jurisdiction to review this claim.

84. Fannie Mae and Freddie Mac, in their Lender/Industry letters dated May 5, 2010 and subsequent statements, have unlawfully determined that: "an energy-related lien may be senior to any Mortgage delivered to Freddie Mac"; PACE programs are an "energy loan program" or a "government-sponsored energy loan"; and Fannie Mae/Freddie Mac Uniform Security Instruments prohibit loans senior to a mortgage.

85. Fannie Mae and Freddie Mac's determinations and subsequent acts or practices have unfairly attempted to secure an unlawful lien priority for their mortgages

over non-ad valorem assessments, contravening Florida and federal law through advertising, distributing, and providing Industry and Lender letters to their mortgage sellers and servicers. Because Fannie Mae and Freddie Mac control over half of the residential mortgages in the United State, great weight is afforded to their practices.

86. Fannie Mae and Freddie Mac's new practices effectively force participants in LEAP who carry their mortgages to either not participate in the program or face great difficulty in securing or refinancing their mortgages in the future. The heavy handed and unfair trade practices of Fannie Mae and Freddie Mac have resulted in an unfair competitive advantage for Fannie Mae and Freddie Mac in obtaining a senior lien status for mortgages and is in violation of FDUPTA.

87. The County and LEID are aggrieved persons or groups under Section 501.211, F.S., which are among those the statute is intended to protect, and therefore are entitled to declaratory and injunctive relief.

88. As a result of these unfair trade practices, the County and LEID have suffered damages, impairment of their ability to use assessment powers for a public purpose, and impairment of their ability to compete for ARRA funds for energy improvements.

WHEREFORE, Plaintiffs respectfully request that the Court:

a. Declare that Fannie Mae and Freddie Mac's actions are an unfair competitive advantage;

b. Declare that Fannie Mae and Freddie Mac's actions are an unfair trade practice and therefore violate FDUPTA;

c. Declare that Leon County and LEID are entitled to declaratory and injunctive relief prohibiting the unfair competitive advantage and unfair trade practices resulting in an unfair competitive advantage; and

d. Grant such other relief as the Court may deem just and proper.

COUNT IV

(Declaratory Relief against all Defendants)

89. The County and LEID reallege and incorporate by reference the allegations of the preceding paragraphs 1- 88.

90. There is an actual controversy of sufficient immediacy and concreteness relating to the legal rights and duties of the County and LEID and the proper legal relations between the County and LEID and the Defendants to warrant declaratory relief and further relief including monetary damages under 28 U.S.C. § 2201 and 2202 and Fed.R.Civ.P. 57.

91. Further, Section 501.211, F.S., allows anyone aggrieved by a violation of the Act to bring an action to obtain a declaratory judgment that an act or practice violates the FDUTPA.

92. The issue is ripe because the County and LEID are unsure of their rights, have suffered damages, and will continue to suffer damages until this issue is resolved.

93. The County and LEID are unable to proceed with LEAP because Defendants' new rules regarding the treatment of mortgages and refinancing applications with PACE assessments have brought significant uncertainty to, and halted PACE programs nationwide and in the County.

94. County residents with Fannie and Freddie mortgages have filed applications to participate in LEAP.

95. The County and LEID cannot fund any energy improvements for residents with Fannie Mae or Freddie Mac mortgages because the Defendants have improperly mischaracterized PACE funding mechanisms as a loan and have unlawfully promulgated rules regarding the prioritization of those liens in violation of the U.S. and Florida Constitutions, the APA, and Florida law.

96. The County and LEID are faced with the choice to fund energy retrofits based on LEAP, which could be subject to lawsuits based on the Defendants' mischaracterization of the law, or render its participants' mortgages unmarketable.

97. The County and LEID's legal interest in administering LEAP has been adversely affected by Defendants' actions, and LEAP is in immediate danger of being terminated.

98. A judicial declaration is necessary and appropriate because otherwise LEAP will be discontinued and the County will be prevented from achieving a compelling state interest in encouraging energy conservation, providing economic benefits to its citizens, creating jobs, and achieving greenhouse gas emission reduction goals.

99. The County and LEID will suffer immediate and irreparable harm for which there is no adequate remedy at law if they are forced to terminate LEAP.

100. The County and LEID desire a judicial determination of their rights, duties, obligations, and interests and a further determination of the validity of the LEAP

non-ad valorem assessments.

101. The County and LEID have suffered monetary damages and are therefore entitled to further relief.

WHEREFORE, Plaintiffs respectfully request that the Court:

- a. Declare that LEAP assessments are liens, not loans;
- b. Declare that LEAP assessments do not pose risk and do not alter traditional lending practices;
- e. Declare that LEAP assessments constitute a lien of equal dignity to county taxes and assessments;
- f. Declare that LEAP assessments do not contravene Fannie Mae or Freddie Mac's Uniform Security Instruments prohibiting loans that have senior lien status to a mortgage;
- f. Award damages, and such other relief based upon a declaration, from Plaintiff's unlawful rules and actions as alleged herein;
- g. Award Plaintiffs their reasonable attorney's fees and costs; and
- h. Grant such other relief as the Court may deem just and proper.

COUNT V

(Injunctive Relief Under 28 U.S.C. § 2202 and Section 501.211, F.S.)

102. The County and LEID reallege and incorporate by reference the allegations of the preceding paragraphs 1- 101.

103. This Court is authorized to grant permanent injunctive relief under 28 U.S.C. § 2202.

104. Section 501.211, F.S., authorizes anyone aggrieved by a violation of the FDUTPA to bring an action to enjoin any person who has violated, is violating, or is otherwise likely to violate the FDUTPA.

105. The foregoing facts establish a basis for injunctive relief against Defendants. Plaintiffs seek injunctive relief against the FHFA, Fannie Mae, and Freddie Mac's actions in order to avoid an unprecedented and unconstitutional intrusion by the federal government into the County and LEID's LEAP program.

106. Defendants' conduct, including but not limited to violations of the U.S. and Florida Constitutions, the APA, and FDUPTA, results in irreparable harm to the County and LEID for which there is no adequate remedy at law.

107. An injunction would not be adverse to the public interest, and in fact would promote the public interest in implementing LEAP.

108. Unless enjoined by this Court, Defendants are likely to continue to engage in illegal conduct. The County and LEID are entitled to injunctive relief.

WHEREFORE, Plaintiffs respectfully request that the Court:

a. Enjoin Fannie Mae and Freddie Mac from taking any adverse action against any mortgagee who is participating or may participate in LEAP and any other action that has the effect of chilling participation in LEAP;

b. Enjoin FHFA, Fannie Mae, and Freddie Mac from interfering with LEAP, from interfering with the right of the County and LEID from levying assessments through a senior lien, and from any action that has a chilling effect on LEAP or the senior lien position of assessments associated with LEAP;

- c. Enjoin Fannie Mae and Freddie Mac from unfairly attempting to secure an unlawful lien priority for their mortgages over non-ad valorem assessments, contravening Florida and federal law through advertising, distributing, and providing Industry and Lender letters to their mortgage sellers and servicers;
- d. Enjoin FHFA pursuant to 5 U.S.C. § 706 from enforcing its improper rules adversely impacting lawfully enacted PACE programs including LEAP;
- e. Award Plaintiffs their reasonable attorney's fees and costs; and
- f. Grant such other relief as the Court may deem just and proper.

Respectfully submitted this 8th day of October, 2010.

/s/

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