STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA QUARTER HORSE RACING ASSOCIATION,INC., FLORIDA QUARTER HORSE BREEDERS AND OWNERS ASSOCIATION, INC., AND GERALD KEESLING,	)	Case No. 11-5796RU
Petitioners,	)	
vs.	)	
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF PARI-MUTUEL WAGERING,	)	
Respondent,	)	
and	)	
FLORIDA QUARTER HORSE TRACK ASSOCIATION, INC.,	)	
Intervenor.	)	

FINAL ORDER

Administrative Law Judge Cathy M. Sellers conducted the final hearing in this section 120.56(4) proceeding, which challenges an alleged agency statement defined as a rule, on April 9-11, June 26-29, and August 23-24 2012, at the Division of Administrative Hearings in Tallahassee, Florida. After the final hearing, Judge Sellers became unavailable, and

Administrative Law Judge John G. Van Laningham was assigned to complete the proceeding pursuant to section 120.57(1)(a).

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent's policy of treating "Gretna-style" barrel match racing as the legal equivalent of traditional quarter horse racing, i.e., a legitimate pari-mutuel wagering event for which a quarter horse racing permitholder can obtain an annual operating license, constitutes an agency statement of general applicability that implements, interprets, or prescribes law or policy in violation of section 120.54(1)(a), Florida Statutes (2012).[1]

PRELIMINARY STATEMENT

This proceeding was commenced on November 10, 2011, when Petitioners filed a Petition Challenging Agency Statement Defined as a Rule with the Division of Administrative Hearings, in accordance with section 120.56(4)(a), Florida Statutes. Petitioners alleged, among other things, that Respondent Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering, has allowed the introduction of a new pari-mutuel activity in the form of barrel racing as evidenced by the issuance of annual licenses for this activity, and that Respondent's approval of pari-mutuel barrel racing constitutes an unadopted rule. By Order dated November 21, 2011, the request to intervene in this proceeding filed by the Florida Quarter Horse Track Association, Inc. ("Intervenor"), was granted. Petitioners were granted leave to file an Amended Petition by Order dated December 5, 2011.

Prior to the hearing, Respondent and Intervenor filed motions to dismiss, which were denied. The final hearing commenced on April 9, 2012, and proceeded for three days. In order to complete the presentation of evidence by the parties, the final hearing was continued to June 26-29, 2012, and then again to August 23-24, 2012.

Over the course of nine days of hearing, Petitioners called eight witnesses: Dr. Steven Fisch, who is the president of both

Petitioner Florida Quarter Horse Racing Association and Petitioner Florida Quarter Horse Breeders and Owners Association; Petitioner Gerald Keesling, a quarter horse breeder; Deborah Schauf and Richard "Trey" Buck, who were authorized representatives of the American Quarter Horse Association; Joseph Dillmore, Jill Blackman, and Jamie Pouncey, employees of Respondent; Milton Champion, a former Director of the Division of Pari-Mutuel Wagering; and David Romanik, a principal of Intervenor and Gretna Racing, LLC. Petitioners' Exhibits 1-36 were accepted into evidence.

Respondent did not call any witnesses or introduce any evidence independently, but joined in the introduction of Intervenor's Exhibits.

Intervenor called seven witnesses: Kathryn "Kappy" Allen, an attorney and barrel racer; Se'Belle Dymmek, a quarter horse breeder; Bernard Dickman, a sports reporter; Douglas Donn, formerly an executive of a thoroughbred horse racetrack; Chuck Taylor and L.P. Stallings, employees of Respondent; and David Romanik, Intervenor's corporate representative. Intervenor's Exhibits 1-5 and 101-108 were accepted into evidence. (Intervenor's Exhibit 108 is the deposition of Richard "Trey" Buck.)

On August 24, 2012, the hearing was adjourned with directions to the parties to submit written objections and

responses related to Mr. Buck's deposition. On September 4, 2012, Petitioners filed their written objections to the deposition. On September 6, 2012, Intervenor filed a Response and Motion to Strike and Motion for Sanctions, to which Petitioners responded on September 13, 2012. On October 4, 2012, an order was entered denying the Motion to Strike and Motion for Sanctions and directing written responses to the deposition objections to be filed no later than October 12, 2012. Intervenor filed written responses to Petitioners' objections on October 12, 2012. On November 13, 2012, Judge Sellers issued an order ruling on all objections and directed the parties to submit proposed final orders by December 14, 2012.

The 14-volume transcript of the final hearing was filed on September 10, 2012. All parties timely filed proposed final orders.

After the parties had filed their post-hearing submissions, Judge Sellers became unavailable to complete the proceeding. As a result, on February 12, 2012, this case was transferred to the undersigned pursuant to section 120.57(1)(a). The undersigned scheduled an oral argument, which was held on March 11, 2013.[2] The undersigned declined to receive additional evidence, electing to decide the case using the existing record.

In an Order Regarding Official Recognition issued on March 19, 2013, the undersigned gave notice that he planned to recognize Florida Administrative Code Chapters 305A-305E (1970) and Florida Statutes 1967 and 1968 Supplement. Respondent and Intervenor's objections to this action are overruled; official recognition of these materials has been taken.

All of the parties' post-hearing submissions were reviewed and considered in the preparation of this Final Order.

FINDINGS OF FACT

A. Parties

1. Respondent Department of Business and Professional Regulation, Division of Pari-Mutuel Wagering (the "Division"), is the state agency responsible for implementing and enforcing Florida's pari-mutuel laws. Its duties include the licensing and regulation of all pari-mutuel activities in Florida.

2. Petitioner Florida Quarter Horse Racing Association ("FQHRA") is a nonprofit Florida corporation located in Tallahassee, Florida. FQHRA's main function is to promote the ownership, breeding, and racing of quarter horses, a function which includes representing individuals who have an interest in racing quarter horses in Florida. FQHRA, moreover, is assigned functions by statute related to quarter horse racing in Florida, which include representing quarter horse owners in negotiating purse agreements with quarter horse permitholders, pursuant to

section 849.086(13)(d)3, Florida Statutes, and setting the schedule of racing at quarter horse racetracks, pursuant to section 550.002(11).

3. Petitioner Florida Quarter Horse Breeders and Owners Association ("FQHBOA") is a nonprofit Florida corporation located in Tallahassee, Florida. FQHBOA's main functions are to receive and distribute breeder and owner awards for quarter horse races in Florida. Section 550.2625(5)(a), Florida Statutes, designates FQHBOA to be the recipient of a portion of the racing revenues from all quarter horse races conducted in Florida, which funds are to be used for the promotion of racing quarter horses in Florida. FQHBOA administers the accredited Florida-bred program and breeders' awards for quarter horses.

4. Gerald Keesling is an owner, breeder, and trainer of race horses competing in quarter horse racing. He has been involved with quarter horse racing for more than thirty years and has raced quarter horses at various tracks around the country, including Pompano Park and Hialeah Park in Florida.

5. Intervenor is an entity formed and operated for the purpose of advancing the interests of "new" quarter horse permitholders in the legislature and before administrative agencies. According to its corporate representative, Intervenor was formed "to advocate for the elimination of the restrictions" facing new quarter horse permitholders in order "to allow these

new permitholders to secure the gaming rights that all of the other permitholders around the state had secured."

B. Pari-mutuel Wagering

6. Gambling is considered to be inherently dangerous to society.[3] This societal disapprobation is reflected in the widespread prohibitions on gambling activities found in Florida law. Indeed, an entire chapter of the Florida Statutes——chapter 849——is devoted to criminalizing many forms of gambling. This case involves a species of gambling known as lotteries, and a specific kind of lottery referred to as pari-mutuel wagering.

7. In pari-mutuel wagering, bets placed on the outcome of a race or game are pooled, and the payout to the winners is drawn from that pool, so that the winners divide the total amount bet (the "handle"), less management expenses and taxes. See § 550.002(13),(22), Fla. Stat. The Florida Constitution categorically prohibits lotteries such as pari-mutuel pools, but makes an exception for certain types of pari-mutuel activities, which the legislature may permit in the exercise of its police powers. See Art. X, § 7, Fla. Const.[4]

8. Pursuant to chapter 550, Florida Statutes, which is known as the Florida Pari-mutuel Wagering Act (the "Act"), the legislature has legalized pari-mutuel wagering on dog racing, jai alai, and three distinct types of horseracing, namely harness racing, in which standardbred horses pull two-wheeled

"sulkies" guided by a driver; thoroughbred horse racing; and quarter horse racing. The Act empowers the Division to regulate and closely supervise pari-mutuel wagering, which is a criminal activity if not conducted in compliance with the Act. See, e.g., § 550.255, Fla. Stat.

9. Any person who desires to conduct pari-mutuel operations on one of the five types of authorized pari-mutuel activities must apply to the Division for a permit. Such a permit is a necessary, but not sufficient, condition of conducting pari-mutuel performances; a license, too, is required. Before a permit can become effective, however, it must be approved by a majority of the voters in the county in which the applicant proposes to conduct pari-mutuel wagering activities. See § 550.054(2), Fla. Stat.

10. After the Division has issued a permit and the permit has been approved in a ratification election, the permitholder must apply to the Division for an annual license to conduct pari-mutuel operations. See § 550.0115, Fla. Stat. This permitholder license——sometimes also called an "annual license," "operating license," "dates license," or simply a "license"——is "an annual license issued by the division to conduct pari-mutuel operations at a location specified in the permit for a specific type of pari-mutuel event specified in the permit." See Fla. Admin. Code R. 61D-2.001(12). The annual license gives a

permitholder authority to conduct the pari-mutuel wagering activity authorized under its permit on the dates identified in the license.

11. The Act mandates that the Division exercise its regulatory power to "adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state," which "rules must be uniform in their application and effect." See § 550.0251(3), Fla. Stat.

C. Quarter Horse Racing

12. Quarter horse racing is widely known as a type of horse racing in which multiple horses——specifically, American Quarter Horses——compete head-to-head in short-distance races, running at high speed. The American Quarter Horse breed took its name from the length of the race in which its members excel, i.e., the quarter mile.

13. The American Quarter Horse Association ("AQHA") is an organization of quarter horse owners, breeders, and trainers. It publishes the official breed registry for quarter horses. In addition, AQHA issues rules and standards for quarter horse racing conducted throughout the United States and abroad, and it keeps official records relating to all quarter horse races registered with AQHA. AQHA publishes an Official Handbook of

Rules and Regulations, which includes a section devoted to Racing Rules and Regulations setting forth the standards and requirements that a race must meet to be recognized by AQHA as a quarter horse race.

14. AQHA works through state-level affiliates. FQHRA is AQHA's affiliate for the state of Florida.

15. Quarter horse racing is part of the long established pari-mutuel racing industry in Florida, which dates back to the 1930s. Before 2011, the type of quarter horse race on which pari-mutuel wagering was conducted in Florida involved a contest between approximately eight to ten horses sprinting side-by-side on a flat, oval racetrack, beginning at a single starting gate and ending when the horses crossed a common finish line. Races of this type——which will be referred to as "traditional" quarter horse races——were conducted at two of Florida's historic pari-mutuel racetracks, Pompano Park and Hialeah Park.

16. For almost eighteen years beginning in the early 1990s, no pari-mutuel quarter horse racing was conducted in Florida. During this time, owners of racing quarter horses, such as Mr. Keesling, transported their horses to other states to participate in quarter horse racing. In the summer of 2005, AQHA organized a meeting in Ocala, Florida, to gauge and foster interest in the development of quarter horse racetracks in Florida.

17. AQHA's efforts eventually bore some fruit. In 2008, the Division issued a permit to conduct pari-mutuel wagering on quarter horse races at Hialeah Park. Quarter horse racing resumed at Hialeah Park in 2009 and has continued under annual licenses issued each year since then. The events at Hialeah Park are traditional quarter horse races. As of this writing, Hialeah Park is the only pari-mutuel facility in Florida where quarter horse races recognized by AQHA are held.

D. Barrel Racing

18. Barrel racing is a kind of obstacle race on horseback——often performed at rodeos, horse shows, and fairs——in which a horse and rider complete a cloverleaf pattern around three barrels arranged in a triangular shape inside a rectangular "arena." Barrel racing is a separate discipline from horse racing conducted on flat tracks, such as traditional quarter horse racing. A challenge involving speed, strength, and agility, barrel racing is a timed event, with each contestant running individually, one after the other, in an attempt to complete the course in the fastest time possible. A penalty of five seconds is added to a horse's time for colliding with a barrel. The outcome of the contest is determined by each horse's respective time; the winner is the horse having the shortest time.

E. Gretna Racing——The Permit

19. On March 18, 2008, Gretna Racing, LLC ("Gretna Racing"), submitted an application to the Division seeking a pari-mutuel permit to operate a quarter horse racetrack in Gretna, a small city in Gadsden County, Florida. Included in the application were a business plan summary and a drawing of the planned racetrack. In its business plan, Gretna Racing informed the Division of its intent to construct "a Quarter Horse racetrack that will allow racing at standard Quarter Horse racing distances." The drawing attached to the application depicted a conventional oval racetrack of the type on which traditional quarter horse races are run.

20. On July 31, 2008, Gretna Racing sent the Division a revised site plan showing a modified quarter horse racetrack design known as a "J-loop." Environmental concerns had prompted the change in the proposed shape of the planned racetrack. As drawn, the J-loop track was capable of accommodating traditional quarter horse races.

21. At no time while Gretna Racing's application was pending did Gretna Racing tell the Division that it planned to conduct any type of pari-mutuel activity other than traditional quarter horse racing or to construct any type of race course other than an oval or J-loop quarter horse racetrack.

22. On September 12, 2008, the Division issued a permit to Gretna Racing for the conduct of pari-mutuel wagering on quarter horse racing in Gadsden County. The permit authorizes Gretna Racing to "Operate A Quarter Horse Racetrack".

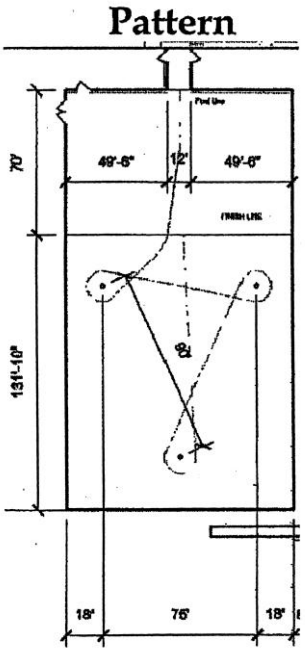
23. After receiving the permit, Gretna Racing did not build either an oval race course or a J-loop quarter horse racetrack as depicted in its application. As of this writing, no such racetrack has been constructed at Gretna Racing's pari-mutuel facility in Gadsden County.

F. Gretna Racing——The License

24. On September 6, 2011, Gretna Racing submitted an application to the Division for an annual license authorizing operating dates on which to conduct pari-mutuel wagering pursuant to its quarter horse racing permit. In the following weeks, Gretna Racing communicated frequently with the Division regarding Gretna Racing's intent to conduct a novel form of barrel racing as a pari-mutuel wagering event under its permit. The type of contest that Gretna Racing had in mind had never before been licensed or regulated by the Division as a pari-mutuel event.

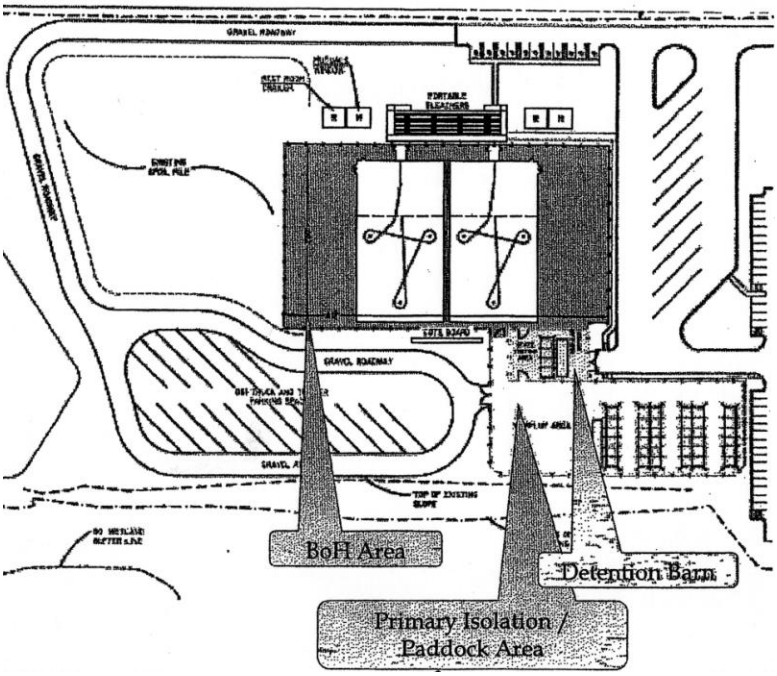
25. At a meeting with Division officials in September 2011, Gretna Racing delivered a PowerPoint presentation in which it characterized the proposed pari-mutuel activity as "the Barrel Horse Race" and advocated for its "[i]ntroduction as a

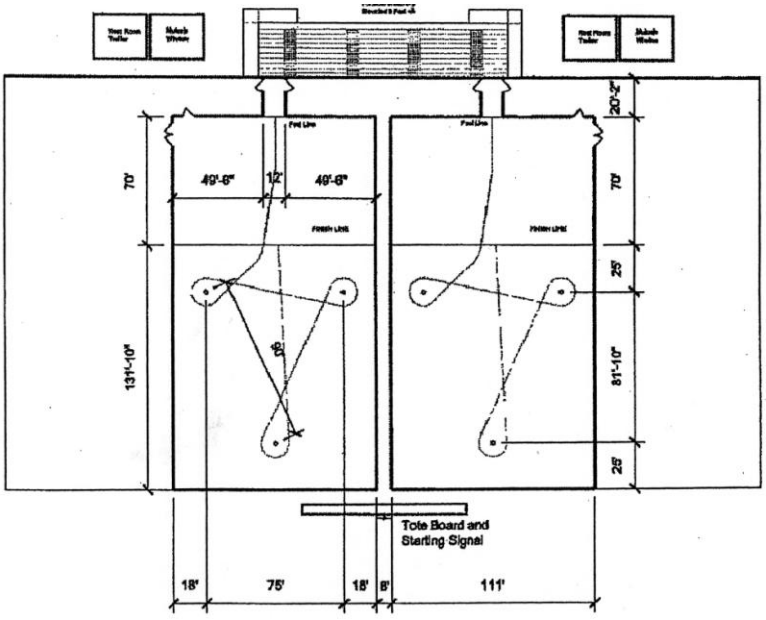
Pari-mutuel Wagering event in Florida . . . ." Among other things, the PowerPoint slide show included a description of the race pattern for barrel racing as a "traditional cloverleaf with 75 feet between barrels 1 and 2 and 90 feet between barrels 2 and 3." This narrative was accompanied by the following diagram, which depicts a single horse running around three barrels in a rectangular arena:



26. Although Gretna Racing referred to the performances it proposed to conduct as "barrel racing"——a term which the parties have continued to use in this litigation——the "Gretna-style" barrel race differs somewhat from the traditional rodeo-style barrel race. The unique twist that Gretna-style barrel racing introduces is the "match race" format, which entails placing two separate arenas next to each other and running two horses

simultaneously around two separate, albeit adjacent, barrel courses whose "[p]atterns are identical," according to Gretna Racing's PowerPoint presentation. In the materials that Gretna Racing gave to the Division while lobbying for approval of its first annual license, the separate courses were depicted as follows:





27. As the foregoing pictures show, instead of having the competing horses run one at a time the way traditional barrel races are conducted, the Gretna-style contest requires the horses to run in pairs, with each horse maneuvering around its own barrel course, inside a separate, fenced-in arena, the two arenas separated by an eight-foot-wide alley. Thus, Gretna-style barrel racing is basically traditional barrel racing "times two", i.e., two rodeo-style barrel races performed at once. This gives the event the appearance, at least, of a match race between two horses.

28. In reality, however, the Gretna-style barrel match race ("BMR"[5]) is not so much a competition between two horses as it is an event comprising two individual performances by horses competing independently against the clock on their respective obstacle courses. This is because each horse, isolated in its own enclosed arena, separately attempts to negotiate the barrels in the quickest time possible; there is negligible (if any) competitive interaction between the horses in the "match race." Moreover, inasmuch as the most important indicator of a barrel-race horse's success is its personal time, being the first horse to finish——and hence the winner of——a given BMR is something of an arbitrary achievement, determined by the convenience of the pairing instead of the intrinsic nature of the competition. For any BMR between horses A and B, the winner——whichever completes

the obstacle course the fastest——could just as well be determined by running the horses one after the other, in the traditional rodeo-style barrel racing format. BMR artificially imposes the determinative element of "order of finish" on a type of contest that does not inherently require simultaneity of performances as a necessary condition of the competition.[6]

29. The Division employees reviewing Gretna Racing's application for licensure had never seen anything like BMR before. They were acutely aware, from the beginning, that Gretna Racing's proposal to conduct pari-mutuel operations on this new kind of contest, with which the Division was unfamiliar, was hardly routine, raising as it did questions of first impression for the Division. As one of them wrote in an e-mail to the Division director dated September 9, 2011, Gretna Racing wanted "to do barrel racing instead of traditional quarter horse racing, along with the possibility of other timed events like calf roping and cutting horse events. Not traditional venues for us."

30. Understandably, Gretna Racing's application was the subject of much internal discussion, genuine disagreement, and, predictably, some controversy. The details of these deliberations are unimportant. What matters——and what the evidence clearly shows——is that the Division knew that Gretna Racing, as a quarter horse permitholder, was seeking approval to

conduct pari-mutuel wagering on BMR, an original type of contest that differed substantially from traditional quarter horse racing. Further, as the result of lobbying on both sides of the issue, the Division was thoroughly familiar with the essential attributes of the BMR performances Gretna Racing planned to hold. Finally, the Division understood that, if licensed, Gretna Racing would conduct pari-mutuel operations on BMR to the exclusion of traditional quarter horse racing.

31. In a September 30, 2011, e-mail to Joe Dillmore, who had by then been named acting director of the Division, an attorney for Gretna Racing advanced a legal argument for allowing BMR as a new pari-mutuel activity, which was premised on section 550.334(5), Florida Statutes. That statute allows a quarter horse permitholder to substitute races of other breeds of horse——including the American Cracker Horse——for up to "50 percent of the quarter horse races during its meet." Gretna Racing asserted that the cracker horse is a "'rodeo' breed" whose members compete in "equestrian events such as barrel racing, pole bending, stump racing, and calf roping"——but not flat track racing. On that basis, Gretna Racing contended that the legislature, in enacting section 550.334(5), must have "intended for [the American Cracker Horse] to be wagered upon via its widely accepted and practiced racing, namely barrel racing and the like." Gretna Racing argued that the barrel

match "racing [it had] proposed . . . meets the statutory definition of racing under a quarter horse permit."

32. It is clear from the evidence that, in submitting its application and seeking approval to conduct pari-mutuel wagering on BMR, Gretna Racing realized it needed the Division to interpret the Act as having legalized pari-mutuel wagering on BMR. Gretna Racing urged the Division to implement such an interpretation through the issuance of an annual license to Gretna Racing authorizing performances of BMR as a pari-mutuel event.

33. On October 19, 2011, the Division issued an annual operating license, number 542, to Gretna Racing, which gave the licensee the authority to conduct 41 total performances under its quarter horse racing permit during the 2011/2012 season. The license does not mention BMR or any other pari-mutuel activity. As a matter of law, however, the license necessarily gave Gretna Racing approval to hold performances of the "specific type of pari-mutuel event specified in [its] permit," i.e., quarter horse racing, and only such performances; the license could do nothing else. See Fla. Admin. Code R. 61D-2.001(12). Thus, the issuance of license no. 542 at once manifested and implemented the Division's determination that BMR is quarter horse racing for purposes of the Act. Had the Division not made such a determination, it could not have issued

license no. 542, for it knew that Gretna Racing intended to hold BMR performances.

34. Nevertheless, the Division was reluctant to express this determination in an unambiguous public declaration, and this reticence has remained throughout the instant proceeding. For example, on October 4, 2011, a couple of weeks before the issuance of license no. 542, a writer for BloodHorse.com, an online trade magazine, sent an e-mail to the Division's spokesperson inquiring "whether [the Division] has determined if barrel racing is permissible for a Quarter Horse permit holder." The spokesperson drafted and circulated internally, via e-mail, a proposed response, namely: "The Department has not made a determination on this subject matter." Department of Business and Professional Regulation Secretary Ken Lawson rejected this, writing in a reply e-mail: "Don't like the answer. We are not deciding on the merits of barrel racing, only on the racing days." The Division, however, of necessity would decide "on the merits" whether BMR was licensable as a pari-mutuel activity under a quarter horse racing permit because that, and not the proposed racing schedule, was the central——and only controversial——question Gretna Racing's application presented.

35. On October 20, 2011, the day after Gretna Racing had received its first annual license, the same BloodHorse.com writer asked the Division to answer the following questions:

> *What are the reasons under Florida law that you determined it is permissible for Gretna to use its [quarter horse] permit to have pari-mutuel barrel racing?
>
> *Does this approval set a precedent for other Florida [quarter horse] permit holders to use them for pari-mutuel barrel racing?
>
> *Barrel racing is new under [the Division]. What are some of the major steps needed for riders, judges and others to obtain licenses?

In response, the spokesperson sent out what she called a "canned statement" saying that "[a]fter a careful review of the guidelines and statutes as set forth by the Legislature, the Department has determined that [Gretna Racing's] application meets the requirements."

36. In lieu of making a clear public statement announcing the policy behind the issuance of license no. 542, the Division has advanced various theories whose common denominator is the attempt to explain why this license does not reflect, manifest, implement, or announce a decision of consequence to anyone besides Gretna Racing. At hearing, for example, the Division (through the testimony of Mr. Dillmore) took the position that everything regarding pari-mutuel wagering which is not forbidden under the Act is allowed, and that therefore——because the Act does not explicitly prohibit BMR——the Division had to grant Gretna Racing's application.[7] This explanation, which turns chapter 550 on its head, is the Division's attempt to deny

having given the Act a construction that legalizes BMR as a pari-mutuel activity, by acknowledging only a much narrower (and legally irrelevant) determination, i.e., that the Act does not plainly prohibit BMR.[8]

37. At another point during the hearing, the Division's attorney articulated the Division's position as being "that . . . whether [the race is] around barrels" or traditional quarter horse racing, "it is all quarter horse racing."[9] This statement is significant because, in its Joint Prehearing Stipulation (joined by Intervenor but not by Petitioners), the Division stated that it has "consistently . . . giv[en] [statutory] terms their plain and ordinary meaning ascertainable by reference to a dictionary." The Division asserted, further, that the meanings of such terms as "'race', 'contest', 'horserace', and 'horseracing' are . . . readily apparent and available via reference to a dictionary." The logical implication of these statements, taken together, is that the Division believes BMR, like traditional quarter horse racing, comes within the plain and ordinary meaning of the term "horse race" (and its variants) as used in the Act, and for that reason is a licensable pari-mutuel activity. This tells that the Division found BMR to be allowed under (as opposed to being, merely, not forbidden by) the Act because the Act permits pari-mutuel wagering operations on quarter horse racing.

38. In its Post-Hearing Brief, the Division tried to tie its positions together in a unified theory of non-responsibility for any general policy regarding pari-mutuel wagering on BMR. The Division's global theory begins with the premise that the agency lacks specific rulemaking authority to define "horseracing."[10] From there, the Division reasons that, in carrying out its duties, which include issuing licenses to permitholders, it must implement the statutory language without expanding, limiting, or defining what is or is not meant by "horse racing" and "quarter horse racing." Confusingly, however, the Division simultaneously asserts that the "determination of what is and what is not horse racing is a matter within the exclusive jurisdiction of the Division . . . as the agency assigned the responsibility of administering Chapter 550." Resp. to the Order Re Off'l Recog'n, etc., at 18.

39. The Division attempts to reconcile these seemingly inconsistent positions by drawing a distinction between (a) what it calls "licensing 'policy'" and (b) quasi-legislative policy affecting a wider class of persons.[11] When making "licensing policy," the Division believes it can define horseracing for a particular permitholder only; this, in fact, and nothing more, is what it claims to have done in connection with Gretna Racing's application for licensure.[12] Yet, the Division

apparently felt that, in evaluating Gretna Racing's application, it needed to apply the most inclusive meaning of "horseracing" that reason will allow because, in its view, the pertinent statutes neither restrict the term "horseracing" (except to the extent that the use of certain breeds is required) nor prohibit barrel racing.

40. Thus, under the Division's theory, upon its receipt of Gretna Racing's application for an operational license, the Division's duty was merely to grant or deny the application within 90 days.[13] Lacking the power to put limits on horseracing, at least for all persons who would be affected by such limitations, and finding none in the statutes, the Division had to grant the application, given that Gretna Racing possessed a valid quarter horse racing permit and BMR is a form of "horseracing" in at least the broadest sense of the word.

41. At bottom, the Division's position rests on the notion that the intensional meaning of the general term "horse race" (and its variants) as used in the Act includes BMR within its extensional meaning. This statement is of little value, however, without knowing just what attributes the Division regards as common to (and shared only by) all of the contests denoted by the term "horse race"——without knowing, in other words, what the Division considers to be the intension of the

operative term. Because the intension of a term determines its extension, i.e., the collection of the objects named, denoted, or referred to thereby, the Division's statement regarding the common attributes of a "horse race" (its intensive definition) is essential for evaluating whether the Division has applied the term correctly and, more important, for deciding whether——as Petitioners contend——the Division has redefined the term so as to expand the scope of pari-mutuel wagering otherwise allowable under the Act.

42. The definition of "horseracing" is critical because any contest that constitutes a licensable horse race for one permitholder must likewise be licensable for all similarly situated permitholders who seek legal sanction to conduct horseracing performances under the Act. Contrary to the Division's theory of "licensing policy," there cannot be one definition of horseracing for this permitholder and another definition for that one. As should be self-evident, the definition of "horse race" for purposes of chapter 550 must apply equally to everyone who seeks to conduct pari-mutuel wagering on horseracing. If, therefore, as Petitioners maintain, the Division has given the term "horse race" a meaning that is not readily apparent from a literal reading of the statutes, then such a definition would constitute a statement of

general applicability. Whether the Division has done so will be discussed below.

G. The Consequences of Licensing Gretna Racing

43. Soon after receiving its first annual license, Gretna Racing began conducting pari-mutuel wagering on BMR at its facility in Gadsden County, holding its first performance on December 1, 2011. The BMR performances conducted by Gretna Racing pursuant to its license were substantially the same as they had been described to Division officials while Gretna Racing's application for licensure was under consideration in September and October 2011.

44. Prior to October 19, 2011, the Division had never approved pari-mutuel wagering on BMR performances. In fact, governmentally sanctioned pari-mutuel wagering on barrel racing had never occurred in Florida or anywhere else in the United States until Gretna Racing commenced operations in December 2011.

45. The pari-mutuel barrel match racing as approved by the Division and conducted by Gretna Racing is not recognized or registered by AQHA as quarter horse racing. AQHA does not keep records of the results of the BMR contests held at Gretna Racing's facility as it does for the traditional quarter horse races conducted at Hialeah Park.

46. Because only two horses compete in each race, BMR requires substantially fewer horses and personnel than traditional quarter horse racing as conducted at Hialeah Park. The handle and purses are much smaller,[14] too, which means that as a pari-mutuel event, BMR is less lucrative than traditional quarter horse racing for many participants.

47. As currently configured, Gretna Racing's facility cannot accommodate traditional quarter horse racing. At the time of hearing, Gretna Racing's facility was the only pari-mutuel racing plant in Florida whose race courses consisted of barrels or other obstacles for horses to navigate around.

48. Shortly after the Division issued an annual license to Gretna Racing, another quarter horse permitholder, Hamilton Downs Horsetrack, LLC ("Hamilton Downs"), filed an application with the Division requesting a license to conduct barrel racing as a pari-mutuel wagering event in substantially the same fashion as Gretna Racing. Hamilton Downs received a license, number 547, for the 2012/2013 racing season, authorizing the conduct of pari-mutuel operations on BMR performances.

49. On March 15, 2012, the Division renewed Gretna Racing's license no. 542 for the 2012/2013 season, authorizing 38 total performances of BMR at the Gadsden County facility.

50. As a result of the Division's issuance of a license to Gretna Racing, according to Mr. Dillmore, if any quarter horse

permitholder "submits an application and says that they're going to conduct quarter horse racing in compliance with [section 550.334(5), which allows other breeds to be used as substitutes for quarter horses provided the licensee is] using 50 percent registered quarter horses in their races[,] and meets the other regulations, [and] they have the detention barn, and the other people are licensed," then the Division will issue the permitholder a license authorizing pari-mutuel wagering on barrel races "as long as they [are] using quarter horses."[15] In other words, the Division's decision in October 2011 that pari-mutuel barrel racing is permissible under a quarter horse permit will be relied upon by the Division in processing future requests by quarter horse permitholders to conduct pari-mutuel wagering on barrel racing, as the grant of a license to Hamilton Downs for that purpose demonstrates.

51. The Division's approval of pari-mutuel barrel match racing reflects and implements a statement of agency policy interpreting the Act so as to legalize gambling on barrel racing as a type of pari-mutuel pool recognized under the statutory authorization for quarter horse racing. This new policy, which has not been promulgated as a rule, is a statement of general applicability because it announces an inclusive interpretation of the term "horse race" that will serve as the basis for other

quarter horse permitholders to engage in this new form of pari-mutuel activity in lieu of traditional horseracing.

CONCLUSIONS OF LAW

H. Jurisdiction and Nature of This Proceeding

52. Subject to a determination that Petitioners have standing, a matter which is discussed below, the Division of Administrative Hearings ("DOAH") has jurisdiction in this proceeding pursuant to sections 120.56, 120.569, and 120.57(1), Florida Statutes.

53. Section 120.56(4)(a), Florida Statutes, 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. Section 120.54(1)(a) declares that "[r]ulemaking is not a matter of agency discretion" and directs that "[e]ach agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable."[16]

54. 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."

55. Section 120.52(16) defines the term "rule" 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. The term also includes the amendment or repeal of a rule.

The statutory definition excludes several types of agency statement from its operation, but none of these exclusions is applicable here.

56. 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. As the Court of Appeal, First District, 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).

57. An agency statement is any declaration, expression, or communication. It does not need to be in writing. See Dep't of High. Saf. & Motor Veh. v. Schluter, 705 So. 2d 81, 84 (Fla. 1st DCA 1997). To be a rule, however, the statement or expression must be an "agency statement," that is, a statement which reflects the agency's position with regard to law or policy. Therefore, the offhand comment of an agency employee, without more, is not an "agency statement;" rather, the statement must be "attributable to [the agency's] collegial head, . . . or some duly authorized delegate." Id. at 87 (Benton, J., concurring and dissenting); see also, State, Dep't of Admin. v. Stevens, 344 So. 2d 290, 296 (Fla. 1st DCA 1977)(The procedures at issue were "issued by the agency head for implementation by subordinates with little or no room for discretionary

modification."). Nor should a statement made in error ordinarily constitute a rule, unless the agency has actually enforced or implemented the allegedly mistaken statement (in which case it would cease being an erroneous statement, though it might have been such originally). See Filippi v. Dep't of Educ., Case No. 07-4783RU, 2008 Fla. Div. Adm. Hear. LEXIS 700 (Fla. DOAH June 20, 2008).

58. 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.[17] See State Bd. of Admin. v. Huberty, 46 So. 3d 1144, 1147 (Fla. 1st DCA 2010); Beverly Enterprises-Florida, 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).

59. A statement which, by its terms, is limited to a particular person or singular factual situation is not generally applicable, nor is one whose applicability depends on the circumstances. Such ad hoc directives are orders, not rules. By contrast, "general applicability" requires that the scope of

the statement——its field of operation——be sufficiently encompassing as to constitute a principle; there must be, in other words, a comprehensiveness to the statement, which distinguishes the statement from the more narrowly focused, individualized orders that agencies routinely issue in determining the substantial interests of individual persons. A generally applicable statement purports to affect, not just a single person or singular situations, but a category or class of persons or activities. See 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).

60. To be generally applicable, a statement need not apply universally to every person or activity within the agency's jurisdiction. It is sufficient, rather, that the statement apply uniformly to a 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 Disability Support Serv., Inc. v. Dep't of Child. & Fams., Case No. 97-5104RU, 1997 Fla. Div. Adm. Hear. LEXIS 5331, *11 (Fla. DOAH June 4, 1997)("[The agency's] arguments equate generally applicable with universally

applicable. It is unnecessary for Petitioner to show that the [statements] apply to all parties contracting with [the agency] for the provision of any sort of service or product subject to Medicaid reimbursement. It is enough to show that the [statements] are generally applicable to classes of providers.").

61. On the other hand, if the class of persons or activities is too narrow, a statement pertaining solely to that category might be considered not "generally applicable." For example, in Agency for Health Care Administration v. Custom Mobility, Inc., 995 So. 2d 984 (Fla. 1st DCA 2008), it was alleged that AHCA's statistical formula for cluster sampling, which the agency used in some cases to calculate Medicaid overpayments, was an unadopted rule. The court found, however, that the formula was not a statement of general applicability because it did not apply to all Medicaid providers, or even to all providers being audited, but rather only to some of the providers being audited. Id. at 986. The category of "all providers being audited using cluster sampling"——which comprised about 10% of all auditees——was too specific to support a finding of general applicability.

62. If in challenging an alleged unadopted rule the petitioner proves at hearing that the agency statement is a

rule, the agency then has the burden of overcoming the presumptions that rulemaking was both feasible and practicable.

63. 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.

In this context, therefore, "feasibility" is essentially a ripeness concern. What the agency must show is that the time to make a rule has not yet come.

64. 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.

65. Section 120.56(4)(c) authorizes the administrative law judge to enter a final order determining that all or part of a challenged statement violates section 120.54(1)(a). The ALJ is not authorized to decide, however, whether the statement is an invalid exercise of delegated legislative authority as defined in section 120.52(8)(b) through (f).[18] Thus, in a section 120.56(4) proceeding, it is not necessary or even appropriate for the ALJ to decide whether the unadopted rule exceeds the agency's grant of rulemaking authority, for example, or whether it enlarges, modifies, or contravenes the specific provisions of law implemented, or is otherwise "substantively" an invalid exercise of delegated legislative authority.

66. Section 120.56(4) is forward-looking in its approach. It is designed to prevent future or recurring agency action based on an unadopted rule, not to provide relief from final agency action that has already occurred. Thus, if a violation is found, the agency must, pursuant to section 120.56(4)(d), "immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action." See, e.g., Ag. for Health Care Admin. v. HHCI Ltd., 865 So. 2d 593, 596 (Fla. 1st DCA 2004).

I. Standing

67. In administrative proceedings, standing is a matter of subject matter jurisdiction. Abbott Labs. v. Mylan Pharms.,

Inc., 15 So. 3d 642, 651 n. 2 (Fla. 1st DCA 2009). To have standing to challenge an agency statement defined as a rule in a proceeding before an administrative law judge, a person must be "substantially affected" by the statement in question. § 120.56(4)(a), Fla. Stat. ("Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a).").

68. Generally speaking, the petitioner must show that he or she will suffer an immediate "injury in fact" within the "zone of interest" protected by the statute the challenged 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 (Fla. 1st DCA 1983). In NAACP, Inc. v. Fla. Bd. of Regents, 863 So. 2d 294, 300 (Fla. 2003), however, the Florida Supreme Court held that student members of the NAACP who were genuine prospective candidates for admission to a state university were substantially affected by rules which eliminated certain affirmative action policies; thus, they had standing to challenge these rules without showing "immediate and actual harm" such as the rejection of an application for admission.

69. There is "a difference between the concept of 'substantially affected' under section 120.56(1), and 'substantial interests' under section 120.57(1)." Dep't of Prof'l Reg., Bd. of Dentistry v. Fla. Dental Hygienist Ass'n,

612 So. 2d 646, 651 (Fla. 1st DCA 1993). Thus, for example, "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[,]" are not controlling in actions brought under section 120.56. Id.; see also Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404, 407 (Fla. 1st DCA 1997)("[T]his court has recognized that 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.").

70. Potential injury to economic interests provides a basis for establishing standing in a proceeding brought under section 120.56, as the court made clear in Department of Professional Regulation, Board of Dentistry v. Florida Dental Hygienist Association, 612 So. 2d 646 (Fla. 1st DCA 1993). There, an association of Florida-licensed dental hygienists (the "hygienists") challenged a rule proposed by the Board of Dentistry (the "board") that would have made graduates of the Alabama Dental Hygiene Program (the "ADHP") eligible to take the licensure examination in Florida, even though the ADHP was not accredited by the American Dental Association. Id. at 647-48.

71. The issue of standing was contested. On appeal, the board argued that the hearing officer had erred in denying its motion to dismiss the hygienists' petition. The court disagreed, reasoning that, because the proposed rule would "diminish the value" of the hygienists' allegedly superior training by allowing "unqualified persons to enter the field," the hygienists had "a sufficient interest in maintaining the levels of education and competence required for licensing to afford them standing to challenge an unauthorized encroachment upon their practice." Id. at 651.

72. In so ruling, the court accepted the premise that, if the proposed rule were adopted, ADHP-trained hygienists would take and pass the Florida licensure examination in such numbers as to substantially affect the petitioning hygienists. It wrote:

> It requires no flight of imagination to reason that if the rule would produce a flood of lesser-trained hygienists, presumably available for employment for less compensation, this would have an economic impact on the existing pool of more highly-trained individuals.

Id. at 649 (emphasis added).

73. The fact that the court did not consider the hygienists' anticipated economic injury to be too speculative teaches that, in a rule challenge context, the concept of

injury-in-fact, at least as it relates to a plausible economic harm threatening licensees, is a relatively relaxed one. In addition, by ruling that dental hygienists have standing to challenge a proposed rule in order to protect their professional and economic interests against competition from less-qualified hygienists who might flood the market with offers of cheap and inferior services, the court opened the door for others to challenge rules that could similarly affect their professional and economic interests.[19]

74. Reduced to a succinct legal principle, the Dental Hygienist case holds that an association of licensed professionals has standing to challenge a proposed rule that would have a reasonably foreseeable economic impact on existing licensees, if events were to unfold in a manner consistent with the petitioner's plausible concerns, especially where to deny standing would effectively shield the challenged rule from judicial scrutiny because then "virtually no one" would have standing.[20]

75. A more recent example of economic interests being found sufficient to confer standing to challenge a rule is Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009), where it was held that a pharmaceutical company which makes a particular generic drug had standing to challenge a rule that prohibited pharmacists from

freely substituting the generic drug for a brand-name version of the product, because the rule caused the petitioner to lose sales.

76. Applying these principles to the case at hand, the undersigned first notes that Petitioners FQHRA and FQHBOA are statutorily recognized participants in the conduct of pari-mutuel wagering on quarter horse racing in this state. A primary purpose of the two associations, moreover, is to promote quarter horse racing. These associations are therefore keenly interested in, and affected by, regulatory policies that govern the conduct of quarter horse racing in the state of Florida. Petitioner Keesling's business, which is the breeding, owning, and racing of quarter horses in Florida, is likewise sensitive to changes in the regulation of pari-mutuel quarter horse racing in this state.

77. Next, the purses paid for BMR performances are smaller, as is the number of horses involved, which means that BMR offers fewer opportunities for horses to race, and fewer dollars for the winners. Therefore, Petitioners' economic interests are clearly implicated by the Division's decision to treat BMR as the equivalent of traditional quarter horse racing for purposes of the Act. Petitioners have other cognizable interests at stake, as well, such as protecting what they consider to be real quarter horse racing against an intrusion of

what is, in their view, ersatz horseracing, an inferior product that threatens to diminish and demean the traditional contest.

78. Petitioners are concerned that the Division has overextended the quarter horse racing "brand" by allowing BMR to be licensed as a pari-mutuel wagering event and offered to the public as quarter horse racing. They fear that this will weaken or dilute the brand to the long-term detriment of traditional quarter horse racing, as the public increasingly associates quarter horse racing with BMR, a down-market imitation in Petitioners' eyes. Petitioners are also afraid that the Division's decision to treat BMR as the legal equivalent of traditional quarter horse racing for purposes of chapter 550 will drive out traditional quarter horse racing, because BMR, which requires fewer horses and personnel and less infrastructure (no actual racetrack is needed, for example), is a cheaper——and thus potentially more attractive——alternative for quarter horse permitholders.

79. The undersigned concludes that Petitioners are substantially affected by the Division's decision to treat BMR as a legitimate pari-mutuel wagering event for which a quarter horse racing permitholder can obtain an annual operating license.

80. Intervenor makes several additional arguments regarding Petitioners' standing, each of which arises from the

undisputed fact that Petitioners, or some of them, requested formal hearings to contest, respectively, the initial issuance and subsequent renewal of Gretna Racing's annual license. In each petition, an allegation was made pursuant to section 120.57(1)(e) that the Division had based its action on an unadopted rule. Instead of referring the matters to DOAH, the Division entered final orders dismissing both petitions for lack of standing. Appeals to the district court were later voluntarily dismissed.

81. Intervenor argues that the dismissals of these previous petitions conclusively decided the issue of standing unfavorably to Petitioners. Intervenor further argues that these dismissals conclusively adjudicated——in favor of the Division——the question of whether the issuance of an annual license to Gretna Racing manifested or implemented an unadopted rule. Both of these contentions are rejected. The first argument is unpersuasive because, as was discussed above, the showing required to maintain standing in a section 120.56 proceeding is different from that required under sections 120.569 and 120.57. See Fla. Dental Hygienist Ass'n, 612 So. 2d at 651. As for the second argument, the dismissal of an administrative proceeding for lack of standing is a determination that the tribunal lacks subject matter jurisdiction, Abbott Laboratories v. Mylan Pharmaceuticals,

Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009), and a dismissal for lack of jurisdiction does not decide the merits of a case, Smith v. St. Vil, 714 So. 2d 603, 605 (Fla. 4th DCA 1998).

82. Finally, Intervenor argues, based on United Wisconsin Life Insurance Co. v. Department of Insurance, 714 So. 2d 603 (Fla. 1st DCA 2002), that Petitioners——having twice filed petitions requesting section 120.57 hearings in which the argument was made that the Division had produced an unadopted rule legalizing pari-mutuel wagering on BMR——have no right to bring this "collateral challenge" to the same alleged unadopted rule. In United Wisconsin, the court affirmed the dismissal of the insurer's section 120.56(4) petition because, first, the insurer had "made no showing" demonstrating the existence of an unadopted rule, id. at 240; and, second, the insurer had made the same arguments regarding the alleged unadopted rule in a prior administrative enforcement action and therefore had "no right to pursue a separate, collateral challenge to an alleged nonrule policy where an adequate remedy exists through a section 120.57 proceeding." Id.

83. The second rationale for the court's decision in United Wisconsin, upon which Intervenor relies, is arguably dicta, given that the insurer's failure to show the existence of an unadopted rule was a sufficient basis for deciding the case

on the merits. Further, if the court meant to hold that availing oneself of relief under section 120.57(1)(e) necessarily precludes a party from later bringing a section 120.56(4) proceeding as to the same alleged agency statement, it probably would have provided a fuller explanation of the grounds for the decision, in view of the substantial differences between sections 120.57(1)(e) and 120.56(4), which afford distinct administrative remedies. In any event, United Wisconsin is distinguishable because, as the court pointed out, the insurer had an adequate remedy through a section 120.57 proceeding. Here, in contrast, Petitioners did not have an adequate remedy under section 120.57, because they were held not to have standing to maintain such a proceeding.

J. Discussion and Analysis

84. The Division has not made a public statement announcing its interpretation of the term "horse race" and denies having done anything but apply the statutory language and, perhaps, its own "licensing policy" in acting upon Gretna Racing's application. The absence of a statement that the agency has admitted making is, of course, consistent with the possibility that none exists. It does not, however, preclude the possibility that the agency has formulated a policy which it prefers not to disclose to the public. In such a situation, the statement might be deduced from agency action, following the

familiar aphorism, "actions speak louder than words." If and to the extent the action manifests the policy behind it, then the action itself is proof of the statement.

85. In this instance, the nature of the action——issuance of a license for the conduct of pari-mutuel wagering on BMR—— makes the Division's conduct easy to read. Because the Division can issue licenses to conduct pari-mutuel wagering on horseracing performances only to permitholders who propose to conduct horse races which are licensable under the Act, the Division must be aware of what the Act comprehends a licensable horse race to be. Further, whatever the Division considers the terms "horse race" and "horseracing" to mean for purposes of chapter 550, any contest that constitutes a licensable horse race for one permitholder must likewise be licensable for all who seek legal sanction to conduct like horseracing performances under the Act. Therefore, the Division's concept of a licensable horse race is not, and cannot be, limited solely to a single permitholder's situation.

86. The Division's issuance of an operating license necessarily signifies its approval of the types of performance which the permitholder, in seeking the license, proposed to conduct; that is, in giving permission to engage in otherwise forbidden gambling on horseracing, the Division always reveals its concept of a licensable horse race. The action itself——as

clearly as a verbal or written announcement——makes the statement that, in the Division's judgment, all performances which the license authorizes constitute horseracing for purposes of the Act. Were this not true, the Division could not lawfully have issued the license.

87. Therefore if, as happened here, the Division decides to issue a license authorizing the permitholder to conduct performances of a type of contest involving horses that has never before been the subject of lawful pari-mutuel wagering, then——merely by issuing the license——the Division has served notice that the contest in question is a horse race under the Act as the Division interprets the Act. Such an action is consequential because the same contest must also be a horse race for anyone else who applies for a license to conduct pari-mutuel wagering on such contest.

88. The Division claims that the act of issuing a license to conduct horseracing performances as a pari-mutuel operation is a matter of no concern to anyone except the Division and the licensee, affecting no one but these two parties——in short, a narrow, "executive" action devoid of broader policy implications. With this claim, the Division impliedly likens its issuance of an annual operating license to, say, the Department of Health's issuance of a medical license. The implicit analogy is a false one.

89. The difference between the two situations stems from the fact that the practice of medicine (like the practice of other professions and occupations) is not illegal; rather, only the unlicensed practice of medicine is illegal. In contrast, gambling——unlike the practice of medicine——is generally illegal, and there is no license which authorizes its holder to engage in the unrestricted practice of gambling. Instead, the legislature has legalized (within constitutional limitations), and subjected to strict regulation, some discrete types of gambling, which are permitted to occur as exceptions to the criminal prohibitions against such activities. Thus, only licensed or otherwise specifically authorized gambling activities are legal; all other gambling activities are illegal.

90. With these differences in mind, it will be seen that a medical license grants its holder a warrant to engage in the wide range of activities comprising the practice of medicine. Such a license does not merely make an exception to the prohibition against the unlicensed practice of medicine; it eliminates the prohibition. In contrast, the combination of a pari-mutuel wagering permit and annual operating license effectively legalizes, for the holder of such grants of authority, the specific gambling activity specified therein. The licensing documents do not eliminate the prohibitions

against gambling found in chapter 849 and elsewhere; they merely make a narrow exception to such prohibitions.

91. Petitioners' position, in a nutshell, is that the Division's decision to issue an annual operating license to Gretna Racing has had the effect of legalizing a new type of pari-mutuel pool, i.e., Gretna-style barrel match racing, which is not plainly and unambiguously authorized under the Act. Either this proposition is true, or its negation is. No third possibility exists. If the affirmative proposition is true, then the Division's decision clearly manifests a statement of general applicability having the force and effect of law. Conversely, if pari-mutuel wagering on BMR is clearly lawful under chapter 550, then the Division merely has implemented existing law, and its decision to issue a license to Gretna Racing is devoid of policy implications vis-à-vis pari-mutuel wagering.

92. Thus, the outcome of this case potentially hinges on the answer to the question of whether, through the plain meaning of the Act's relevant provisions, the legislature has legalized BMR as a pari-mutuel pool. Behind this question lies an important threshold matter, which is: Does the legislature have the power to legalize pari-mutuel wagering on Gretna-style barrel match races? If the legislature is forbidden, under the constitution, from legalizing this type of pari-mutuel pool, or

if the scope of the legislature's power in this regard is even fairly debatable, then, to remove chapter 550 farthest from constitutional infirmity, the pertinent statutes should be construed as not having legalized pari-mutuel wagering on BMR, unless no other reasonable interpretation is possible. Tyne v. Time Warner Entm't Co., 901 So. 2d 802, 810 (Fla. 2005); Del Valle v. State, 80 So. 3d 999, 1012 (Fla. 2011)(statute should not be given a meaning that would undermine its constitutional validity, where another reading is possible).

93. The constitutional question arises from article X, section 7 of the Florida Constitution (1968), which provides as follows:

> Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state.

94. This prohibition of lotteries was adopted by the people in 1968 when the 1885 Florida Constitution was overhauled. Not long after the 1968 Constitution took effect on January 7, 1969, the Florida Supreme Court examined article X, section 7 in Greater Loretta Improvement Association v. State ex rel. Boone, 234 So. 2d 665 (Fla. 1970). The issue there was whether a bingo statute enacted in 1967 was constitutional. The court held that it was, for reasons that are not important here.

Of interest is the court's explication of the lottery ban, about which the court wrote:

> Those activities comprehended as "pari-mutuel pools" were recognized as lotteries but those in existence and lawful under the case law or legislative statutes prior to January 7, 1969, were "grandfathered in" as exceptions to the prohibition. "Pari-mutuel pools" is a term applied to horse racing, jai alai, and dog racing and certainly includes bingo by definition.
>
> * * *
>
> Obviously, the makers of our 1968 Constitution recognized horse racing as a type of lottery and a "pari-mutuel pool" but also intended to include in its sanction those other lotteries then legally functioning; namely, dog racing, jai alai and bingo. All other lotteries including bolito, cuba, slot machines, etc., were prohibited.

Id. at 671-72 (emphasis added).

95. The dissenting opinion included the following information regarding the drafting history of article X, section 7:

> The Constitution Revision Commission initially drafted the lottery prohibition to read: "All lotteries are prohibited." The House version changed this to read, "Lotteries are hereby prohibited in this State." But the Senate preferred that the prohibition read, "Lotteries, other than pari-mutuel pools authorized by law as of the effective date of this Constitution, are hereby prohibited in this State." Ultimately, the Senate and the House adopted the Senate version along with an addition of the words, "the types of," suggested by

> Circuit Judge Taylor, so that the final prohibition adopted by the people in general election read: "Lotteries, other than *the types of pari-mutuel pools authorized by law* as of the effective date of this constitution, are hereby prohibited in this State."

Id. at 686-87 (Carlton, J., dissenting).

96. "It is a familiarly accepted doctrine of constitutional law that the power of the Legislature is inherent, though it may be, and frequently is, limited by the Constitution. The legislative branch looks to the Constitution not for sources of power but for limitations upon power." State ex rel. Green v. Pearson, 14 So. 2d 565, 567 (Fla. 1943); State ex rel. Cunningham v. Davis, 166 So. 289, 297 (Fla. 1936)("The test of legislative power is constitutional restriction; what the people have not said in their organic law their representatives shall not do, they may do."). Thus, article X, section 7 is a limitation upon the legislature's broad discretion to regulate and control pari-mutuel wagering and gambling under its police powers,[21] which prohibits the legislative expansion of pari-mutuel wagering beyond the types of pari-mutuel pools that were grandfathered-in in 1968 under the narrow exception to the general constitutional ban on lotteries.

97. The Division and Intervenor argue——and the undersigned agrees——that the lottery ban does not "'lock[] down' all aspects

of pari-mutuel wagering to exactly what was authorized in the 1967-1968 statutes or in the 1968 version of the Racing Commission's rules." Resp. to the Order Re Off'l Recog'n, Etc., at 9. The legislature clearly enjoys the full range of its police powers in relation to the types of pari-mutuel pools that were lawfully in existence when the 1968 Constitution took effect; if it wanted to, the legislature could, for example, prohibit and criminalize pari-mutuel wagering on any or all of them. It is therefore unremarkable that, as the Division and Intervenor observe, "the current statutes and rules authorize certain wagering activities within the general ambit of horse racing, dog racing and jai alai that had not actually occurred before 1968." Id. at 9-10. In contrast to the Division's recognition via licensure of BMR as a legitimate pari-mutuel event, however, all of the innovative wagering activities of the previous 45 years were introduced through statutes or formal rules. None of these earlier innovations, unlike the one at issue, raised the question of whether, in the absence of a newly adopted statute or rule, the preexisting plain language of chapter 550 would authorize the introduction of a new practice into the pari-mutuel wagering industry.

98. Rather than preventing all innovation, what article X, section 7 does is preclude the legislature from legalizing other types of pari-mutuel pools, besides the ones that were lawfully

in existence in 1968. Thus, to give some obvious examples, the legislature could not allow pari-mutuel wagering on car races, boat races, or boxing because, clearly, none of these would be a type of pari-mutuel pool that was authorized as of January 1969.

99. Whether BMR constitutes a type of pari-mutuel pool lawfully in existence in 1968 is a more difficult question to answer. This is because while BMR——unlike, say, boxing——can be located within the genus of horseracing, it nevertheless seems to be as distinct from thoroughbred horse racing, harness horse racing, and traditional quarter horse racing as each of those types of horseracing is distinct from the other. On that basis, BMR could reasonably be viewed as a separate species of horseracing rather than a mere variation within a species and therefore arguably not one of the types of pari-mutuel pools authorized by law as of January 7, 1969.

100. In 1968, chapter 550 recognized two kinds of horse race: "running horse races" and "harness horse races." See, e.g., § 550.05(2), § 550.02(1), Fla. Stat. (1967). Two types of permit were available, which authorized, respectively, running horse racing with thoroughbreds and horse racing in harness. Quarter horse racing permits were not then available, but harness horse racing permitholders were allowed to conduct up to three quarter horse races per day "upon the race track of the ratified permit holder" in lieu of three horse races in harness.

§ 550.066, Fla. Stat. (1967). Quarter horse races could also be run (under certain conditions) "at and upon the race track of any holder of a ratified permit to conduct running horse [i.e., thoroughbred] races . . . ." § 550.33(1), Fla. Stat. (1967). Thus, the three types of pari-mutuel pools involving horseracing authorized by law as of January 1969 were thoroughbred horse racing, horse racing in harness, and——as an ancillary event—— quarter horse racing in the traditional format.

101. BMR is a unique contest. It is like the forms of horseracing on which pari-mutuel wagering was authorized in 1968 in that it involves horses engaging in a competition of speed. It is, however, unlike those forms of horseracing in significant respects. In 1968, for example, all of the horse races upon which pari-mutuel wagering was authorized took place at and upon either the racetrack of a thoroughbred horse race permitholder or the racetrack of a harness horse race permitholder——a racetrack, in other words, whose raison d'être was to provide the course for thoroughbred horse races or harness horse races. As of January 7, 1969, the use of such a racetrack for quarter horse racing was secondary to its primary purpose. Thus, when conducted as a pari-mutuel activity, quarter horse races always took place on a racetrack that had been built to accommodate, and was mainly used for, thoroughbred horse racing or harness horse racing in the traditional format, with multiple horses

starting from a single starting gate and proceeding en masse toward a common finish line.

102. In 1968, none of the types of horse race on which pari-mutuel wagering was authorized took place, as BMR does, upon a pair of adjacent one-horse obstacle courses formed by duplicate arrangements of barrels placed inside separate fenced-in arenas situated eight feet apart from each other. As of January 1969, none of the pari-mutuel pools involving horseracing took place at a racing plant that could not accommodate horse racing in the traditional format, whereas BMR is conducted at a facility at which traditional horse races cannot be run.

103. As an obstacle race in which riders on horseback perform in pairs upon twin one-horse obstacle courses, BMR is sui generis. In this respect, BMR is easily as distinguishable from the traditional horse races on which pari-mutuel pools were authorized in 1968 as any of them is from each other. Given that the law in 1968 distinguished between thoroughbred horse racing, harness horse racing, and traditional quarter horse racing, it is reasonable by the same underlying logic to view BMR as belonging to a separate species of horse race——a class having the same relative position as the three types of traditional horse races in a "taxonomic hierarchy" of equestrian contests. Considering that, for a pari-mutuel pool involving

horseracing to have been authorized by law in 1968, either a type-specific permit (in the cases of thoroughbred and harness horse racing) or a type-specific statutory warrant (for quarter horse racing on a flat track) was required, it would be easy to conclude that pari-mutuel wagering on BMR was not lawful in 1968. Adding the observation that "Gretna-style" barrel match races cannot be run "upon the race track" of a thoroughbred racing permitholder or a harness horse racing permitholder, as quarter horse races were required to be as of January 1969, makes the conclusion almost inevitable.

104. Moreover, if BMR is regarded as a distinctive class of contest, rather than a mere variation of thoroughbred, harness, or quarter horse racing, then——given that BMR (unlike the other contests just mentioned) was not in existence as a pari-mutuel pool at the time the voters approved the 1968 Constitution——it does not appear that this type of activity would come within the exception to the prohibition of lotteries set forth in article X, section 7. Certainly, in view of the fact that BMR was unknown as a pari-mutuel wagering event in this state as of November 1968, it can hardly be said that the electors had such contests in mind when they voted to grandfather-in existing horseracing contests as exceptions to the lottery ban. Cf. State, ex rel. Hollywood Jockey Club, Inc. v. Stein, 182 So. 863, 872 (Fla. 1938)(Night racing was unknown

when the statue legalizing racing was enacted, and therefore "it can hardly be said that the Legislature in passing the Act had in mind the legalizing of night horse racing, even though the statute did not expressly prohibit it[.]").

105. The question of the legislature's authority to legalize pari-mutuel wagering on BMR boils down to whether the exception in article X, section 7 is given a liberal interpretation or a strict construction. The liberal, or expansive, view would hold that horseracing was categorically grandfathered-in, so that the legislature retains broad discretion under its police powers to legalize or prohibit pari-mutuel wagering on all types of horseracing, including types of horseracing unknown as pari-mutuel activities in 1968. The strict construction, in contrast, would hold that only those types of horseracing in existence, and upon which pari-mutuel wagering was authorized in 1968, were grandfathered-in under the 1968 Constitution, and therefore the legislature is powerless to legalize gambling on other types of horseracing.

106. This is not the time or the place, however, for an authoritative determination of whether the legislature is without power to legalize pari-mutuel wagering on BMR. The question has been discussed here, not because it needs to be decided, but because its existence needs to be recognized and understood, as a reminder that the legislature——and likewise the

Division——operate within certain boundaries when approving pari-mutuel wagering events. The constitutional limitation on the legislature's authority to legalize pari-mutuel activities must be kept in mind when reading the Act, for the Act is a product of the legislature's exercise of the bounded authority over pari-mutuel wagering which the constitution has saved for it.

107. The legislature presumably was cognizant of the lottery ban when it enacted the relevant statutes and therefore intended that the language used be understood as obedient to the organic law. Absent a clear legislative expression to the contrary, therefore, the assumption when reading that Act should be that the legislature did not intend to push the envelope with ordinary terms such as "horse race," but rather meant for each such term to be given a plain and literal meaning that keeps the statutes safely within constitutional limits.

108. Additionally, a due regard for the will of the people of this state who ratified the 1968 Florida Constitution constrains the undersigned to ascertain the plain meaning of the term "horse race" and its variants with reference to the horseracing contests that were being held in Florida at the time of such ratification, i.e., November 1968. The electors who voted to prohibit lotteries while grandfathering-in the several kinds of pari-mutuel pools then legally in existence reasonably would have understood and expected "horseracing" to mean the

particular types of horse races on which betting, at that time, was legal.

109. For these reasons, the term "horseracing" as used in chapter 550 should be understood, in its plain and literal sense, to refer only to those types of horse races that the electors of 1968 would readily have recognized as horse races on which pari-mutuel wagering was allowed. Because, as a matter of undisputed fact, BMR did not exist as a pari-mutuel activity in 1968, it is concluded that BMR is not an activity falling within the plain and literal meaning of the term "horseracing" as used in the Act.

110. This understanding of the Act's plain meaning is reinforced by its definition of the term "quarter horse." Section 550.02(28), Florida Statutes, provides as follows:

> "Quarter horse" means a breed of horse developed in the western United States which is capable of high speed for a short distance and used in quarter horse racing registered with the American Quarter Horse Association.

111. The parties sharply disagree about the meaning of this definition. Petitioners assert that the clause "registered with the American Quarter Horse Association" modifies the nearest antecedent, i.e., "quarter horse racing." Thus, Petitioners argue, a horse is not a quarter horse (under the statutory definition) unless it is used in AQHA-registered

races. Taking the argument a step farther, Petitioners contend that a race is not a "quarter horse race" unless the race has been registered with AQHA.

112. Intervenor asserts that the "registered with" phrase modifies the noun "horse" at the beginning of the definition. Thus, Intervenor argues that a horse which is listed in AQHA's breed registry is a quarter horse, regardless of whether the horse ever races in an AQHA-registered race.

113. That the "quarter horse" definition is grammatically challenged is plain to see. Intervenor's reading, however, is rejected as incorrect. This is because forcing the final phrase "registered with . . ." to relate all the way back to "horse"—— which is not even the sentence's object, but rather part of the prepositional adjective phrase modifying the object, namely "breed"——gives the sentence a strained and ungrammatical construction, while violating ordinary notions of syntax. To make Intervenor's construction work, one must imagine the words *one of* in front of "a breed", a comma instead of an "and" between the words "distance" and "used", and the conjunction "and" before "registered." That much imagination constitutes a rewrite.

114. In contrast, comprehending the "registration clause" as a modifier of the last antecedent ("quarter horse racing") is easy, for such an understanding is not only semantically

reasonable but also consistent with conventional rules of grammar and syntax. Petitioners' reading of the registration clause, therefore, is correct. Their arguments about where this leads, however, take the definition too far.

115. One of the difficulties with the definition is its somewhat ambiguous use of the relative pronoun "which." The term plainly refers to "breed of horse" but leaves some uncertainty as to whether the specific referent is "breed" or "horse." The grammatical structure of the sentence indicates that the referent should be "breed," but the language which follows seems better to describe a horse than the collection of horses that the breed comprises.

116. Under the grammatically preferred reading, where the referent is "breed", the definition explains that the quarter horse *breed* has three essential attributes: (a) the breed was developed in the western U.S.; (b) the breed is capable of high speed for a short distance; and (c) the breed is used in AQHA-registered quarter horse races. This would mean that, under the statutory definition, an individual horse could be one of the subject breed even if it were incapable of sprinting or never used in AQHA-registered quarter horse races.

117. The alternative reading, which is grammatically awkward but semantically plausible, understands the pronoun "which" as an inexact substitute for "horse." This

interpretation effectively implies the words *one of* at the beginning of the definition, so that the meaning is: "Quarter horse" means *one of* a breed, etc. Under this interpretation, the relative restrictive clauses introduced by the term "which" provide conditions for recognition as a member of the breed; specifically, to be called a "quarter horse," an animal must (a) be capable of sprinting and (b) be used in AQHA-registered races. If either (a) or (b) were not true for a given horse, then, under this interpretation of the statutory definition, the horse would not be a quarter horse.

118. Note, however, that this latter definition, which is the reading most favorable to Petitioners, does not itself dictate (as Petitioners would have it) that a race must be AQHA-registered to be a quarter horse race under chapter 550. If all the horses in a non-registered race were at other times being used in AQHA-registered races, then they would still be quarter horses, and, for that reason, the non-registered race could still be considered a quarter horse race, as far as the definition is concerned. On the other hand, if none of the horses in a non-registered race were ever used in AQHA-registered races, then (and to that extent) Petitioners' argument that such non-registered race cannot be considered a quarter horse race would have purchase.

119. This particular argument need not be decided here because the undersigned concludes that the correct reading of the definition requires that the relative pronoun "which" be understood as referring to the noun "breed." Thus, the definition tells, among other things, that the quarter horse breed is used in AQHA-registered quarter horse races. Whether a given horse participates in such races, therefore, is not determinative of whether that horse is a quarter horse. Further, by logical extension, whether a given race is registered with AQHA is not determinative of whether that race is a quarter horse race for purposes of chapter 550.

120. The foregoing conclusion does not mean or imply, however, that the definition's reference to AQHA-registered races is insignificant or irrelevant to the questions at hand. To the contrary, the undersigned regards the specific reference to AQHA-registered races as a valuable clue to the legislative understanding of what quarter horse racing entails. Indeed, that the legislature mentioned participation in AQHA-registered races as a definitive attribute of the quarter horse breed is especially revealing because this does not strike the undersigned as an attribute that most people would regard as essential.

121. The upshot is that the statutory definition of "quarter horse" provides solid support for the conclusion that

the plain meaning of the term "quarter horse race" as used in chapter 550 should be informed by an understanding of what an AQHA-registered race is like. This does not mean that a race must be registered with AQHA to be a quarter horse race. It means, rather, that when the legislature used the term "quarter horse race," it had in mind AQHA-registered races. Thus, a race that could have been registered with AQHA, but was not, would be a quarter horse race. A race that could not have been registered with AQHA, however, might not be a quarter horse race within contemplation of chapter 550, unless in material respects it resembles the kind of race that is registrable with AQHA.

122. AQHA does not recognize BMR as a type of quarter horse race. BMR does not resemble the traditional quarter horse races that AQHA does recognize. BMR therefore does not come within the plain meaning of the term "quarter horse race" as used in the Act.

123. The Division's issuance of an operating license to Gretna Racing unmistakably implemented and unambiguously communicated a significant new policy, which is that BMR is a licensable pari-mutuel wagering activity. It is possible that the Act does not prohibit such an administrative expansion of pari-mutuel wagering. It is evident, however, from the plain and unambiguous language of the Act, that the legislature has not clearly authorized pari-mutuel wagering on BMR. The policy

behind Gretna Racing's license, therefore, is the Division's own policy, reflective of the Division's interpretation of the Act, and its effect is to legalize gambling on a brand-new type of pari-mutuel pool——an effect which does not follow naturally from the plain and literal meaning of the Act's operative language.

124. A policy which allows pari-mutuel wagering to be conducted on a previously unrecognized activity by deeming that activity to be "quarter horse racing" is without question a statement of general applicability having the force and effect of law. Florida administrative law does not allow an agency to establish such a policy stealthily by the issuance of expedient licenses; this is equally true whether the policy is highly controversial or widely praised. To be legal and enforceable, a policy which operates as law must be formally adopted in public, through the transparent process of the rulemaking procedure set forth in section 120.54. In sum, the Division's policy of licensing the conduct of pari-mutuel wagering on BMR, on the ground that BMR is legally equivalent to quarter horse racing, constitutes an unadopted rule. As such, it violates section 120.54(1)(a).

125. There is an alternative, albeit related, approach to analyzing the Division's underlying policy decision, which focuses on the extent to which the Division, in the run-up to the issuance of Gretna Racing's license, necessarily redefined

the term "horse race" and its variants. The parties have debated this point from the standpoint of the plain statutory language, arguing about whether the Division has stretched the literal meaning of the operative terminology. In the undersigned's judgment, the parties have paid insufficient attention to the definition the Division previously gave the term "horse race" in its administrative rules, for if the Division effectively has amended that definition, it has produced an unadopted rule.

126. The Division has not, by rule, directly defined the term "horse race" per se, but it has effectively given the term a definition in rule 61D-2.001, the substance of which is located in the respective definitions of "race" and "contest." Rule 61D-2.001(5) defines the term "race" as "a contest for purse, stakes or entry fees, on an approved course, and in the presence of duly appointed racing officials." (Emphasis added.) The term "contest," in turn, "means a race or game between horses, greyhounds, or players for purses, stakes, or reward on any licensed race course or fronton and conducted in the presence of judges or stewards." Fla. Admin. Code R. 61D-2.001(15).

127. Based on a combination of the interrelated definitions of "race" and "contest" in rule 61D-2.001, it is clear that the Division, by rule, has defined the term "horse

race" to mean a contest [of speed[22]] between horses on an approved course, i.e., any licensed race course.[23] This definition will be referred to as the "Promulgated Definition."

128. Under Promulgated Definition, plainly, all of the horses (plural noun) participating in the race must be engaged in a single contest, which contest needs to take place on "an" approved course, such a course being, more specifically, a "licensed" race course. The indefinite article "an" indicates a single noun, albeit not a particular one; therefore, the expression "an approved course" means one and only one course, which may be any one of the approved courses. Likewise, the adjective "any" is unambiguously used in the definition to mean one or another of the indicated kind, namely licensed courses, without further restriction. Thus, the term "any licensed race course" refers to one, and only one, of the available licensed race courses, but it does not specify a particular licensed race course, thereby signifying that whichever one of them is selected will satisfy the definition.

129. Because the rule's definitions of "race" and "contest" clearly communicate that there can be but one race course per contest, and that the contest comprises all of the horses in the race, it is clear that, for a horse race to exist, the race course on which the horses compete must be, for any given contest, one and the same course, and that the horses,

collectively, must compete on that particular course. In other words, there can be but one race course, per race, for all of the horses in that race.

130. The Promulgated Definition, moreover, provides that a horse race is a contest "between" horses. The preposition "between" indicates that the contest is a joint engagement or common action in which the competing horses perform together on a race course shared by them all at once. A race "between" horses, therefore, is a contest pitting horse against horse that takes place during the same span of time, beginning for all with a single starting signal and ending when the last horse crosses the finish line. The horses must perform simultaneously, not sequentially, which means that they are connected, not only by the fact of being opponents, and not only by the fact of competing on the same race course, but also temporally. A contest between horses on one race course joins the horses both in space and time. Under the Promulgated Definition, in short, there can be but one start for all of the horses in a given race, which race continues without interruption until the last horse finishes, ending the contest.

131. Thus, from the Promulgated Definition can be derived the following criteria for deciding whether a particular contest is a horse race for purposes of chapter 550: In a contest to determine which horse is the fastest, there must be one start

and one course per race for all horses in the race, which ends when the last horse finishes.

132. Because the number of licensed horseracing tracks in Florida is small (only eight at the time of this writing[24]), each racing plant is highly visible, as are the types of races run at them——races which, being the object of betting, would put the various participants in jeopardy of criminal prosecution were it not for the pari-mutuel permits and licenses authorizing the performances. In other words, these licenses give the permitholders and their patrons the legal right to engage in activities that would be crimes if performed outside the premises of a handful of licensed racing plants. Thus, every time the Division issues an operating license to a horse racing permitholder, it publicly identifies a unique venue where gambling on horse racing can take place legally. Further, the Division exercises close regulatory oversight of the races held at licensed pari-mutuel facilities. Division employees called stewards are present at each horse racetrack to enforce the pari-mutuel laws and rules. See § 550.1155, Fla. Stat.; Fla. Admin. Code R. 61D-3.001.

133. Through the issuance of horseracing permits and licenses, and by constantly monitoring the horse races conducted under them, the Division effectively defines the term "horse race" for the public by example. This is because every horse

race run without reproof can fairly be deemed to have enjoyed the Department's sanction, which means that all such races, taken together, comprise a collection of contests denoted by the term "horse race" as used in chapter 550.

134. The licenses issued to Gretna Racing in 2011 and 2012 were particularly meaningful in that they expressed the Division's determination in a matter of first impression that BMR constitutes quarter horse racing for purposes of pari-mutuel wagering in Florida. Although this was the first time that the Division had been called upon to review BMR as a potential pari-mutuel event, the Division's decision to permit gambling on BMR was not a mistake, nor was it tentative or provisional. Rather, this was an intentional, knowing, and informed decision, the product of a deliberative process in which Gretna Racing had been afforded opportunities to explain in detail the type of contest it proposed to stage and ultimately had succeeded in persuading the relevant agency personnel to accede to an interpretation of chapter 550 pursuant to which BMR——a new and never before authorized form of contest on horseback——could be approved as a pari-mutuel wagering activity.

135. Underlying——and manifested in——the licenses issued to Gretna Racing was the Division's conviction that BMR is quarter horse racing for purposes of chapter 550. As the Division's counsel stated at hearing: "[I]t is the division's position

that it is all quarter horse racing, whether it's around barrels or whether traditional . . . straight track 440-yard quarter horse racing . . . ."[25] By issuing annual licenses to Gretna Racing, a quarter horse racetrack permitholder, with knowledge that Gretna Racing intended to conduct BMR meets under these licenses, and by thereafter allowing such performances to take place, the Division has publicly and visibly identified BMR as an example of quarter horse racing, conveying to the public its understanding of the term "horse race." The Division's exemplification of the term "horse race" in this fashion will be referred to as the "Ostensive Definition."

136. In the Joint Prehearing Statement which the Division and Intervenor filed, these parties stipulated that the "longstanding definition . . . in Florida [of] the term 'horseracing' [is] two or more horses engaged in a race or contest against each other or against time regardless of the racecourse configuration over which these horses compete. Racecourse configuration is a decision of racetrack management and not within the rulemaking purview of the Division." This will be referred to as the "Stipulative Definition."

137. The Stipulative Definition——like the Promulgated Definition——is an intensional definition that identifies the attributes of the term being defined. Given the Division's position that BMR is quarter horse racing, it follows that BMR

must be within the extension of the term "horseracing" as defined in the Division's Stipulative Definition. Keeping this in mind while analyzing the Stipulative Definition makes it easier to recognize that the Division is using the term "racecourse configuration" to express an idea very different from that which the words literally convey.

138. As the Stipulative Definition makes clear, the Division considers "racecourse configuration" to be a nonexclusive element of a horse race. Put another way, the Division asserts that any racecourse configuration that pleases the permitholder will do. According to the evidence presented, this is correct, up to a point. To the extent the term "racecourse configuration" refers——at it seems to do——to the size, shape, layout, and length of a single racetrack, the Division has stated a trivial truth, one which is consistent with not only the Promulgated Definition, but also the testimony establishing that the Division has elected not to regulate these matters. Petitioners do not take issue with the notion that individual racetracks are allowed to vary as to size, shape, layout, length, and surface material.

139. What makes BMR novel is not (or not merely) the cloverleaf shape of each course, but the fact that each horse in the race runs on its own obstacle course within a separate arena. Knowing that in BMR each horse performs in a separate

arena on its own course, and further understanding that the Division considers BMR to fall within the Stipulative Definition, it becomes clear that, as the Division uses the term, "racecourse configuration" means more than the shape of the racetrack; it means, additionally, the arrangement of multiple courses at the racing plant or venue. In other words, the term "racecourse configuration" in this context refers not only to the shape and design of a single track upon which all the horses in a race compete, as one reasonably might assume, but also to multiple courses on which, respectively, fewer than the whole number of horses in a race, to a minimum of one, run the race.

140. The Stipulative Definition also insinuates another concept into the intension of the term "horseracing," namely the idea of a race "against time," which the definition distinguishes from a race in which horses compete "against each other." When horses race "against each other," the outcome is determined by the order in which the horses cross the finish line. In a race against time, however, the winner is the horse who completes the course in fastest (shortest) time. Both methods of deciding a race (first to finish and fastest in time) will produce the same outcome in any race wherein the horses run on the same track at the same time, as the Promulgated Definition contemplates. At first blush, therefore, inserting

the notion of a race "against time" into the definition seems innocuous, if not superfluous.

141. But when the contest involves a challenge to do something very quickly, which is the case in an obstacle race "against time," order of finish is not an essential determinant of victory; the clock alone can decide the winner. Therefore, in a race "against time" involving horses, the horses could be run individually, on the same course, at different times; simultaneously on separate courses at the same racing plant, which is how BMR is conducted; or simultaneously, or even at different times, on separate courses located in separate places.

142. In sum, there is more to the Stipulative Definition than meets the eye. Although appearing to be anodyne, when read together with the Ostensive Definition, the Stipulative Definition is substantively radical, for it nullifies the conditions of one start and one course per race for all horses in the race, which the Promulgated Definition imposes. Properly interpreted as the Division intends it to be read, the Stipulative Definition amends the definitions of "race" and "contest" in rule 61D-2.001.

143. The Ostensive Definition is narrower than the Stipulative Definition in that it does not necessarily nullify the condition of one start per race for all horses. In BMR, however, which the Division considers without hesitation to be

horseracing, there is one course per horse for all races, which violates the condition of one course per race for all horses. Therefore, BMR is not a "horse race" within the comprehension of the terms "race" and "contest" as rule 61D-2.001 defines them. The Ostensive Definition amends rule 61D-2.001.

144. Statements, such as the Stipulative Definition and the Ostensive Definition, which amend existing rules are themselves rules by definition. See § 120.52(16), Fla. Stat. Because the Division has not adopted these statements as rules pursuant to section 120.54, they are unadopted rules as defined in section 120.52(20).

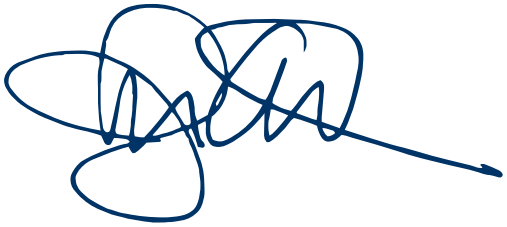
145. The Division made little effort, if any, to overcome the presumptions that rulemaking was feasible and practicable. See § 120.54(1)(a), Fla. Stat. In any event, Petitioners carried their ultimate burden of persuasion, establishing by the greater weight of the evidence that the Division failed to adopt as a rule, when it should have, its generally applicable policy of treating BMR as the legal equivalent of traditional quarter horse racing and, on that basis, deeming BMR a licensable pari-mutuel event. Accordingly, it is concluded that the Division's policy with regard to pari-mutuel wagering on BMR violates section 120.54(1)(a).

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the policy of the Division pursuant to which "Gretna-style" barrel match racing is treated as the legal equivalent of traditional quarter horse racing, so that a quarter horse racing permitholder is able to obtain an annual license authorizing pari-mutuel wagering operations on barrel match racing, is an unadopted rule which violates section 120.54(1)(a), Florida Statutes.

Jurisdiction is retained to conduct further proceedings as necessary to award attorney's fees and costs pursuant to section 120.595(4). It is therefore further ORDERED that Petitioners shall have 30 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) Petitioners shall attach appropriate affidavits (e.g., attesting to the reasonableness of the fees) and essential documentation in support of the claim, such as time sheets, bills, and receipts.

DONE AND ORDERED this 6th day of May, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2013.

ENDNOTES

[1]/ All references herein to Florida Statutes are to the 2012 edition unless otherwise indicated.

[2]/ The two-volume transcript of the oral argument was filed on April 5, 2013.

[3]/ Div. of Pari-Mutuel Wagering v. Fla. Horse Council, Inc., 464 So. 2d 128, 130 (Fla. 1985).

[4]/ A 1986 amendment to the constitution authorized state operated lotteries. See Art. X, § 15, Fla. Const. The Florida Lottery is not at issue in this case.

[5]/ The acronym BMR will be used herein to mean either one of the type of contest described above as a Gretna-style barrel match

race or, more generally, the category of contests described as Gretna-style barrel match racing, whichever the context requires.

[6]/ This is in contrast to a conventional horse running race. In a running race, regardless of the breed of horse, the length or shape of the course, or the number of horses in the contest (provided there are at least two competing), simultaneity of performance on a single track is not merely a cosmetic ingredient but a necessary element of the competition. This is because the primary object is to be the first to cross the finish line, regardless of how long it takes to get there. The goal, in other words, is not to reach the finish line in the fastest time possible, but to reach the finish line ahead of the other horses, which might or might not require the winner to run the race as fast as possible. Being first to finish is the essence of a contest in which excellence is measured in relation to the other competitors, whose performances are fundamentally interdependent, each affecting the others in unpredictable ways.

[7]/ The Division's counsel summed up this contention at hearing by framing the "question ultimately for [the ALJ] to decide [as being] whether . . . barrel racing is excluded under the law and under the statutes." T. 144.

[8]/ That the Act does not expressly forbid BMR is a true but irrelevant point. As § 550.255 makes clear, "[e]very race meeting at which racing is conducted for any stake, purse, prize, or premium, except as allowed by this chapter, is prohibited and declared to be a public nuisance . . . ." In other words, everything not allowed under the Act is forbidden, not the other way around, as the Division asserted at hearing. In approving Gretna Racing's application for licensure, therefore, the Division needed first to decide that BMR is expressly allowed under the Act, not whether it is expressly forbidden.

[9] / T. 254.

[10]/ Although the issue need not be decided here, the foundational notion that the Division is without authority to promulgate a rule defining the term "horse race" is questionable. In Fla. Elec. Comm'n v. Blair, 52 So. 3d 9 (Fla. 1st DCA 2010), the court reversed a final order invalidating a rule which defined the terms "willful" and "willfully" for

purposes of the state's campaign financing laws. The enabling statute conferred upon the commission the specific duty to "consider all sworn complaints filed with it" to determine whether there is probable cause to believe that a willful statutory violation has occurred. Id. at 13. The commission apparently had not been delegated the specific authority to define statutory terms, which was the power it had exercised in making the rule. Nevertheless, the court reasoned that the duty to consider complaints necessarily involved an evaluation of whether the alleged conduct was willful, which in turn necessarily required the commission to interpret and apply the term "willful." Thus, the court found that an evaluation of "willfulness" was a "necessary component" of the consideration of complaints, and therefore that the rule fell within the commission's rulemaking authority. Id. at 13-14. It would not be difficult, based on the rationale of Blair, to conclude that the Division has the authority to define a term such as "horse race." Whether the Division has been delegated rulemaking authority to define "horse race" so as to include BMR is, of course, a separate question whose determination must await the Division's attempt to promulgate such a rule.

[11]/ The undersigned rejects as legally unfounded the artificial distinction between "licensing policy" and other policy. The Administrative Procedure Act does not recognize such a distinction. To the contrary, the APA clearly requires that if an agency formulates a policy that meets the definition of a rule, then the agency must adopt the policy as rule, regardless of whether the policy arose from the process of licensing or out of some other agency activity. See § 120.54(1)(a), Fla. Stat.

[12]/ In other words, the Division claims the authority to define "horseracing" on an as-needed basis for an individual, license-seeking permitholder, while disclaiming the authority to define "horseracing," by rule, for the pari-mutuel wagering industry at large.

[13]/ § 120.60(1), Fla. Stat. ("An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law.").

[14]/ For the 2011/2012 racing season, the purses paid for 42 BMR performances at Gretna Racing's facility totaled $138,703, as compared to $3,840,000 in total purses paid for 32 performances

of traditional quarter horse racing at Hialeah Park. The total handle at Gretna Racing's facility was $45,514 for the 2011/2012 racing season, versus $1,889,688 at Hialeah Park. See Division of Pari-Mutuel Wagering 81st Annual Report, which is available online at http://www.myfloridalicense.com/dbpr/pmw/documents/AnnualReport2011-2012--81st--revised2013-03-29.pdf (last visited Apr. 29, 2013), at 11, 31.

[15]/ T. 1022.

[16]/ The Division argues that because (in the Division's view) it has no authority to promulgate a rule defining "horse race" and its variants, the Division is legally incapable of formulating an unadopted rule expressing such a definition, which makes the Division immune from liability under § 120.56(4). This contention is rejected. An agency's duty to adopt a particular statement is wholly independent of the agency's authority to make that statement a formal rule. Thus, if an agency produces a statement which is a rule by definition, then the agency must adopt that statement as a rule or risk the consequences of being found in violation of § 120.54(1)(a). If the agency lacks the authority to adopt such statement as a rule, then the statement is doubly unlawful, first as an unadopted rule and second as an invalid exercise of delegated legislative authority. In a § 120.56(4) proceeding, however, the central issue is whether the challenged statement is an unadopted rule; its substantive validity is irrelevant for the moment, a matter to be determined in a future rule challenge, after the agency has initiated or completed rulemaking. The Division's position, if accepted, would allow an agency, with impunity, to formulate and apply a statement of general applicability having the effect of law as to a subject for which the legislature has not delegated such authority to the agency; that would be a perversion of § 120.54(1)(a), not to mention the democratic process.

[17]/ The doctrine under which courts sometimes defer to an agency's interpretation of a statute whose provisions the agency is responsible for administering has no place in a § 120.56(4) proceeding. To the extent the Division and Intervenor argue otherwise, such argument is rejected. This is because if the agency has given the statute an interpretive gloss which is not readily apparent from the literal meaning of the law's language, then it has produced a rule that must be formally adopted. Whether the agency's interpretation reflects the best possible reading of the statute or is merely one among several within the

range of possible statutory interpretations is simply irrelevant to the duty of engaging in rulemaking, which arises regardless of the merits of the agency's interpretation. The validity of an agency's statutory interpretation is reviewable in a challenge to a proposed or existing rule, which may be brought after the agency has engaged in rulemaking as required by § 120.54(1)(a). Deference might be appropriate, therefore, in a proceeding to determine the validity of a proposed or existing rule. See Dep't of Prof'l Reg., Bd. of Medical Examiners v. Durrani, 455 So. 2d 515, 517 (Fla. 1st DCA 1984). Because validity is not an issue in this case, the undersigned need not defer to the Division's interpretations of the Act's provisions.

[18]/ Section 120.52(8)(a) concerns the material failure to follow rulemaking procedures; an unadopted rule would be an invalid exercise of delegated legislative authority for that reason.

[19]/ The insight that economic interests can furnish the basis for standing to challenge a proposed or adopted agency rule was not original to the Dental Hygienist decision. See Fla. Medical Ass'n, Inc. v. Dep't of Prof'l Reg., 426 So. 2d 1112, 1115 (Fla. 1st DCA 1983)(palpable economic injuries have long been recognized as a sufficient foundation for standing); Dep't of HRS v. Alice P., 367 So. 2d 1045, 1052 n.2 (Fla. 1st DCA 1979)(agency's cut-off of funds for certain abortions caused fewer women to seek abortions, which substantially affected abortion provider whose income declined as a result of decreased demand).

[20]/ "In all fairness," wrote the court, "to deny the hygienists' standing to challenge unauthorized actions of the Board detrimental to their interests would produce the anomalous result that virtually no one would have such standing. In our view, under the facts presented here, such a result would thwart the purposes of [the statute authorizing challenges to proposed rules.]" Id. at 652.

[21]/ Fla. Gaming Ctrs., Inc. v. West Flagler Assocs., 71 So. 3d 226, 229 (Fla. 1st DCA 2011).

[22]/ The undersigned believes that the term "race" denotes a contest of which speed is an inherent ingredient.

[23]/ This discussion will take for granted that, to be a horse race for purposes of the Act, the contest must be performed for

a purse, stakes, or reward of some kind, and that it must be conducted in the presence of racing officials.

[24]/ The undersigned takes official recognition of the public record of the Division titled Pari-Mutuel Permitholders With 2012-2013 Operating Licenses, which is available online at http://www.myfloridalicense.com/dbpr/pmw/documents/FACILITIESMAP--Internet-hyperlinks.pdf (last visited Apr. 27, 2013).

[25]/ T. 254.

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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.