

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA

Case Number:

LEON COUNTY ENERGY IMPROVEMENT
DISTRICT, LEON COUNTY

Plaintiffs,

vs.

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

Defendants,

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
INTRODUCTION**

1. In the 2010 Florida Legislative Session, the Florida Legislature unanimously adopted HB 7179 providing supplemental authority for “qualifying” improvements to real property. Typically, these programs provide financing to home and/or business owners to complete retrofits or renewable energy projects on property and structures.

2. Specifically, in passing the bill, the Florida Legislature found that all “energy-consuming-improved properties that are not using energy conservation strategies contribute to the burden affecting all improved property resulting from fossil fuel production. Improved property that has been retrofitted with energy-related qualifying improvements receives the

special benefit of alleviating the property's burden from energy consumption." The Florida Legislature also found that "there is a compelling state interest in enabling property owners to voluntarily finance such improvements with local government assistance."

3. Under HB 7179, a local government may incur debt for the purpose of providing financing for a qualifying improvements program and this is payable from revenue received from the improved property or any other revenue source authorized by law. In addition, local governments may levy non-ad valorem assessments to fund the improvements.

4. Leon County formed the Leon County Energy Improvement District on April 13, 2010 under its existing local government home rule powers in Florida law to finance energy efficiency improvements for property owners. Florida's local government home rule powers include establishing and administering housing and conservation programs, Section 125.01(1)(j), F.S. as well as borrowing and expending money, Section 125.01(1)(r), F.S. The Leon County Energy Improvement District was the first such district to form in Florida.

5. Defendants Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage Corporation ("Freddie Mac") have issued advice letters to lending institutions stating that PACE assessments acquiring a priority lien over existing mortgages pose risk to lenders, services and mortgage securities investors and are a key alteration to traditional mortgage lending practice. This position has been upheld by the Federal Housing Finance Agency ("FHFA") which oversees Fannie Mae and Freddie Mac.

6. A lien is a species of property protected by the due process clauses of the United States and Florida Constitutions. Amendment XIV, United States Constitution; Section 9, Art. I, State Const.

7. These actions by Fannie Mae, Freddie Mac and FHFA have effectively stopped the

development and implementation of numerous PACE programs across the nation, including Leon County's, as well as jeopardized grant applications for hundreds of millions of dollars to form and capitalize these programs. Leon County has not only formed the first such program in Florida, the County is also part of a coalition of local governments included in a state grant application to the Department of Energy seeking funds to further implement its existing LEAP program.

8. With this action Leon County seeks judicial intervention to declare the validity of the local government non-ad valorem assessments authorized by the U.S. Constitution and Florida Constitutions as well as federal and state law, that FHFA has exceeded its agency powers in violation of Administrative Procedures Act 5 U.S.C. § 706(2) and the 10th Amendment to the U.S. Constitution; that Fannie Mae and Freddie Mac have engaged in unfair business practices in violation of the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, F.S., and the threat to require onerous mortgage practices in jurisdictions with PACE-type programs violates the U.S. Commerce Clause and Florida law.

JURISDICTION AND VENUE

9. The Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because this action arises under the laws of the United States, 28-U.S.C. § 2201 et seq. to grant declaratory, injunctive and any additional relief pursuant to 28 U.S.C. §§ 2201, 2202 as well as Federal Rules of Civil Procedure 57 and 65.

10. FHFA has made a final administrative determination that is subject to review under the federal Administrative Procedures Act ("APA"). 5 U.S.C. § 702.

11. Leon County and the Leon County Energy Improvement District have suffered injury in fact and face an imminent risk of suffering irreparable injury in the future as set forth herein.

12. Venue is proper in this district pursuant to 28 U.S.C. § 1391(a) and Civil Local Rule 3.1, because a substantial part of the events and omissions giving rise to the claim occurred, and a substantial part of the property that is subject of this action, are situated in this District.

PARTIES

13. Defendant Federal Housing Finance Agency (“FHFA”) is a federal agency created by the on July 30, 2008, when the President signed into law the Federal Housing Finance Regulatory Reform Act of 2008. FHFA is the single regulator for government-sponsored enterprises (“GSEs”) involved in the home mortgage market.

14. Edward DeMarco is the Acting Director of the Federal Housing and Finance Agency and he is sued in that capacity. His principal duties are to oversee the prudential operations of each regulated entity; assuring that they operate in a safe and sound manner; assure each regulated entity complies with rules, regulations, guidelines, and orders issued under the Federal Housing Finance Regulatory Reform Act of 2008 and the authorizing statutes.

15. Defendant, Fannie Mae, is a federally chartered, private corporation, facilitating the secondary market in residential mortgages. Together with Freddie Mac, Fannie Mae owns or guarantees approximately half of the residential loans in the U.S. and Florida. By statute, Fannie Mae has the power to sue and be sued in both state and federal court. 12 U.S.C. § 1723a(a).

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

17. Defendant, Freddie Mac, is a federally chartered, private corporation, facilitating the secondary market in residential mortgages. By statute, Freddie Mac, has the power to sue and be sued in both state and federal court. 12 U.S.C. § 1723a(a).

18. Charles E. Haldeman is the Chief Executive Officer, and a member of the Board of

Directors, for Freddie Mac and he is sued in that capacity.

19. Plaintiff Leon County enacted the Leon County Energy Improvement District by ordinance as a dependent district within the meaning of Chapter 189, F.S. and its place of business is located in Leon County, Florida. The membership of the District's Board is identical to the Board of County Commissioners of Leon County.

20. Leon County is a Florida municipal corporation with the power to sue or be sued. See Art. VIII, § 2(b), Fla. The Leon County Energy Improvement District has the authority to sue under its enabling ordinance.

ASSESSMENTS UNDER FLORIDA LAW

18. The authority to levy special assessments is based primarily on county and municipal home rule powers granted in the Florida Constitution. Sections 1-2, Art. VIII and Section 9, Article X of the Florida Constitution. Additionally, the Florida Supreme Court has expressly ruled that the authority to impose special assessments is embodied in home rule authority for both counties and cities. To make special assessments under Florida law, counties also have general statutory authority under the provisions of Section §125.01(1)(r), (q), F.S. and Article VIII, §1(g) of the Florida Constitution. Special districts derive their authority to levy special assessments through general law or special act.

19. General provisions for the use of special assessments are set forth in Section 197.3631, F.S. and they are defined in FS 197.3632 as "assessments which are not based upon millage and which can become a lien against a homestead permitted in Section 4, Article X of the State Constitution." Florida courts define special assessments as "charges assessed against the property of some particular locality because that property derives some special benefit from the expenditure of the money."

20. Under Florida law, ad valorem tax revenues may be used to provide a general benefit to the community-at-large, but special assessments must be used for specific benefits which can be directly related to the property assessed. The courts have identified a two-part test for establishing a valid special assessment. First, the assessment must provide a "special benefit" to the property assessed and, second, it must be "fair and reasonably apportioned" among the benefited properties.

21. Given these constitutional and statutory powers, local governments may use a variety of revenue sources to fund services and improvements without express statutory authorization, but HB 7179 explicitly authorized local governments to levy non-ad valorem assessments to fund qualifying improvements programs.

22. Florida and Federal law upholds the imposition and prioritization of special assessment liens on mortgaged land. Pursuant to HB 7179, these non-ad valorem assessments constitute a lien of equal dignity to county taxes and assessments. Therefore, statements by Fannie Mae, Freddie Mac and FHFA that these assessments are unlike routine tax assessments and do not have the traditional community benefits associated with taxing initiatives contravene long-standing legal precedent and authority and Florida law.

THE FLORIDA AND LEON COUNTY PROGRAM

21. Before the 2010 Legislative Session had even commenced, Leon County began exploring the formation of this type of program under its broad home rule authority including the power to establish and administer housing and conservation programs, Section 125.01(1)(j), F.S., and to borrow and expend money, Section 125.01(1)(r), F.S.

22. Article VII, Section 10 of the Florida Constitution provides that neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a

joint owner with, or stockholder of, or give, lend or use its taxing power or credit to aid any corporation, association, partnership or person. Pursuant to Article VII, Section 10 Leon County also cannot "lend" money to individual property owners as a traditional loan to finance energy improvements.

23. But, the County does clearly possess authority to impose special assessments, so Leon County began formulating its program based on a special assessment form of financing at the same time HB 7179 was moving through the legislative process.

23. Leon County adopted an ordinance, after a public hearing, forming the Leon County Energy Improvement District on April 13, 2010. On May 27, 2010, Governor Crist signed HB 7179 into law. On July 14, 2010, Leon County formally launched the Leon Energy Assistance Program ("LEAP"), in furtherance of achieving its energy conservation and greenhouse gas reduction goals.

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

25. Eligibility criteria for participants includes: applicant must be the record property owner, property taxes cannot be delinquent in last 5 years, current on mortgage and no bankruptcy or foreclosure, no federal income tax, judgment or similar involuntary lien encumbering the property and the improvements must be reasonable for the scope of the property project and to the property value as approved by the District.

26. Additionally, LEAP requires: an energy audit to be scheduled, the auditor determines opportunities for energy reduction and makes prioritized recommendations, the property owner

must obtain 3 quotes from licensed contractors (quote to include license number and all associated project costs such as materials, equipment, permitting fees, recording fees, audit costs, contingency fees etc.). The program terms are that the interest is based on 10 year treasury note + 1/2%, the financing amount is capped between \$1,000 - \$7,000, maximum repayment is 20 years, projects must be on a qualifying list of improvements, the property owner consents to providing the County access to verify that the improvements have been completed, there is a disclosure in the application regarding the non-ad valorem assessments, the State of Florida Fair Lending Notice is included in the application as required, and the applicant must provide notice to any lender of any adjustment to monthly payments (and maximum principal financed) 30 days prior to entering into the written agreement for the program with the County.

27. A higher financing amount is permitted if that amount is consented to by the mortgage holder and the energy audit shows a demonstrated high level of energy savings or renewable energy produced over the duration of the financing.

28. Almost every "Guideline" that has been published by the Department of Energy ("DOE") (May 7, 2010) has been adhered to in the formation of LEAP. The Guidelines identify a savings to investment ratio (and appropriate financing amounts), and due to the focus of LEAP on energy efficiency, the requirement for an energy audit and the \$7,000 cap on the program, this Guideline is likely met. LEAP also requires that the improvements be reasonable for the scope of the proposed project and the property value addressing the "useful life" Guideline of DOE. LEAP, as does HB 7179, requires lender notice 30 days prior to entering into the program's written agreement. Consistent with HB 7179 unenforceability provision related to the acceleration for mortgage payments and noticing to new purchasers of a property, LEAP addresses these DOE Guidelines as well. The LEAP requirements for valid auditors and post-project inspection

address quality assurance Guidelines. The LEAP requirement that property owners apply rebates towards the payment of the non-ad valorem assessment is also a DOE Guideline incorporated into the program. LEAP requirements for addressing the disclosure of non-ad valorem assessments and the State of Florida Fair Lending Notice addresses further DOE Guidelines. Data collection DOE Guidelines are also included. The only DOE Guideline that has not been incorporated into LEAP yet is the establishment of a debt service reserve fund.

29. Assessments are prepared and collected pursuant to Chapter 197, F.S. of the Florida Statutes, and HB 7179, by the County Property Appraiser just as any other assessment in Leon County.

DEFENDANT'S INTERFERENCE WITH LEON COUNTY'S PROGRAM

30. Fannie Mae and Freddie Mac hold over half of the residential loans in the U.S. With that statistic in mind, it is clear that Fannie Mae and Freddie Mac have underwritten mortgages or refinanced properties with special assessments in Leon County. Services provided by these special assessments include solid waste disposal, fire and rescue services, street improvements, parking facilities and storm water management. Fannie Mae and Freddie Mac have not objected to the placement of these special assessments on mortgages.

31. On May 5, 2010 Freddie Mac issued an "Industry Letter" to Freddie Mac Sellers/Services stating, "an energy-related lien may not be senior to any Mortgage delivered to Freddie Mac." Fannie Mae issued a "Lender Letter" stating, "PACE loans generally have automatic first lien priority over previously recorded mortgages. The terms of the Fannie Mae/Freddie Mac Uniform Security Instruments prohibit *loans* that have senior lien status to a mortgage."

32. On July 6, 2010, FHFA issued a "Statement on Certain Energy Retrofit Loan Programs" stating that they are "unlike routine tax assessments and pose unusual and difficult risk

management challenges” and that they “do not have the traditional community benefits associated with taxing initiatives”. Additionally, FHFA stated, “FHFA urged state and local governments to reconsider these programs and continues to call for a pause in such programs so concerns can be addressed.” Importantly, “They present significant risk to lenders and secondary market entities, may alter valuations for mortgage-backed securities and are not essential for successful programs to spur energy conservation.”

33. The determinations by Fannie Mae, Freddie Mac and FHFA now prevent Leon County and the Leon County Energy Improvement District from using an explicitly authorized, and constitutionally protected, assessment power to achieve a compelling state interest including advancing the energy reduction efforts of LEAP as well as providing economic benefits to participants, job creation and achieving greenhouse gas emission reduction.

34. The determinations by Fannie Mae, Freddie Mac and FHFA in these assessments are “unlike routine tax assessments” and “do not have the traditional community benefits associated with taxing initiatives” and as such cannot take a priority lien position contravene long-standing case law and Florida Statutes. Fannie Mae, Freddie Mac and FHFA have deprived Leon County and the Leon County Energy Improvement District of the lawful power to provide a special benefit to property owners fairly and equitably apportioned for the benefit of its citizens. These actions have also obstructed future participation of property owners and securing capital for LEAP’s implementation.

FIRST CAUSE OF ACTION

(Declaratory Relief)

35. Leon County and the Leon County Energy Improvement District reallege and incorporate by reference the allegations of the preceding paragraphs.

36. Under 28 U.S.C. § 2201 Leon County and the Leon County Energy Improvement District seek a declaration of its rights and duties with respect to the Defendant's determinations that LEAP non-ad valorem assessments are unlike routine tax assessments. Leon County and the Leon County Energy Improvement District seeks a declaration of the following:

- a. LEAP utilizes non-ad valorem assessments and not loans;
- b. Non-ad valorem assessments for LEAP constitute a lien of equal dignity to county taxes and assessments under Florida law;
- c. The determinations of Fannie Mae, Freddie Mac and FHFA in their letters and statements mischaracterize Florida law on assessments and the operation of Fannie Mae and Freddie Mac Uniform Security Instruments;
- d. Lien priority for LEAP non-ad valorem assessments do not contravene Fannie Mae or Freddie Mac's Uniform Security Instruments prohibiting *loans* that have senior lien status to a mortgage.

37. Without judicial declaration, LEAP will be prohibited or eliminated preventing achievement of compelling state interests in energy conservation, economic benefits to citizens, job creation and achieving greenhouse gas emission reduction goals.

◁ SECOND CAUSE OF ACTION

(Administrative Procedures Act, 5 U.S.C. § 551(5), FHFA)

38. Leon County and the Leon County Energy Improvement District reallage and incorporate by reference the allegations of the preceding paragraphs.

39. Under 5 U.S.C. § 551(4), a "rule" is defined as "the whole or a part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy..." Further, 5 U.S.C. § 551(5) requires an agency to follow specific

rulemaking procedures when it formulates, amends or repeals a rule. These procedures generally include: publishing a notice of proposed rulemaking in the Federal Register, giving “interested persons” an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule, incorporating a general statement of its basis and purpose.

40. FHFA’s “Statement” issued is an agency statement of general or particular applicability designed to implement, interpret or prescribe law or policy that was promulgated contrary to specified rulemaking procedures contained in the Administrative Procedures Act.

THIRD CAUSE OF ACTION

(Administrative Procedures Act, 5 U.S.C. §706(2), FHFA)

41. Leon County and the Leon County Energy Improvement District reallege and incorporate by reference the allegation of the preceding paragraphs.

42. An agency actions, findings, and conclusions found to be can be held unlawful and set aside if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; without observance of procedure required by law; unsupported by substantial evidence; or unwarranted by the facts.

43. That FHFA has exceeded its agency powers in violation of Administrative Procedures Act 5 U.S.C. § 706(2) with its determinations that “first liens established by PACE *loans*” (such as LEAP assessments) are “unlike routine tax assessments”, “do not have the traditional community benefits associated with taxing initiatives”, “disrupt a fragile housing finance market” and “are not essential for successful programs to spur energy conservation.”

44. These determinations are arbitrary and capricious, not in accordance with law, contrary to

constitutional right and power (10th and 14th Amendments of the U.S. Constitution), without observance of procedure required by law, are unsupported by substantial evidence and unwarranted by the facts. 5 U.S.C. § 706(2).

FOURTH CAUSE OF ACTION

(Florida Deceptive and Unfair Trade Practices Act, Chapter 501, F.S., Fannie Mae and Freddie Mac)

45. Leon County and the Leon County Energy Improvement District realleges and incorporates by reference the allegations of the preceding paragraphs.

46. Fannie Mae and Freddie Mac, within their Lender/Industry letters dated May 5, 2010 and subsequent to those pronouncements, have engaged and continue to engage in unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce as identified in Section 501.204(1), F.S. Fannie Mae and Freddie Mac's acts or practices have interfered with, and continue to interfere with, property owner's rights and ability to participate in LEAP. These acts or practices include:

- a. Determinations that "an energy-related lien may be senior to any Mortgage delivered to Freddie Mac";
- b. Determinations that PACE programs are an "energy loan program" or a "government-sponsored energy loan" and;
- c. Determinations that Fannie Mae/Freddie Mac Uniform Security Instruments prohibit loans senior lien state to a mortgage.

47. Fannie Mae and Freddie Mac's acts or practices have had the effect of securing an unlawful lien priority for their mortgages over non-ad valorem assessments contravening Florida and Federal law through advertising, distributing and providing Industry and Lender letters to

their mortgage sellers and servicers constituting a violation of the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, F.S.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests this Court:

1. Declare that under Florida law, LEAP is based upon non-ad valorem assessments and not loans, LEAP assessments constitute a lien of equal dignity to county taxes under Florida law and nothing in Fannie Mae or Freddie Mac's Uniform Security Instruments or as reflected in their existing mortgage lending practice and LEAP assessments do not contravene Fannie Mae or Freddie Mac's Uniform Security Instruments prohibiting *loans* that have senior lien status to a mortgage;
2. That FHFA's "Statement" is an agency statement of general or particular applicability designed to implement, interpret or prescribe law or policy that was promulgated contrary to specified rulemaking procedures contained in the Administrative Procedures Act
3. FHFA's determinations are arbitrary and capricious, not in accordance with law, contrary to constitutional right and power (10th and 14th Amendments of the U.S. Constitution), without observance of procedure required by law, are unsupported by substantial evidence and unwarranted by the facts. 5 U.S.C. § 706(2).
4. That the Court issue a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining Fannie Mae or Freddie Mac from taking any adverse action against any mortgagee who is participating or may participate in LEAP, including but not limited to: advertising, distributing and providing letters to their mortgage sellers and servicers constituting a violation of the Florida Deceptive and Unfair Trade Practices Act, Chapter 501, F.S., or any other action having a chilling effect on a Leon County property owner's

participation;

5. That Fannie Mae, Freddie Mac and any other parties who act in concert with them be permanently enjoined from interfering with the Leon County and Leon County Energy Improvement District's LEAP initiative including but not limited to the allegations in this Complaint;

6. That the Court award Plaintiffs their costs, litigation expenses and attorneys fees of this suit incurred; and

7. That the Court grant Plaintiff such other and further relief as may, in the discretion of this Court, be just and proper.

DATED:

SIGNED: