BOROUGH OF MADISON AND BOROUGH OF CHATHAM, Petitioners-Appellants, v. NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND NEW JERSEY INFRASTRUCTURE BANK, Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-000970-22 On Appeal From: New Jersey Department of Environmental Protection and New Jersey Infrastructure Bank Docket Nos.: 20-01/S340715-07A & 20-01/S340715-07B

PETITIONERS-APPELLANTS BOROUGH OF MADISON AND BOROUGH OF CHATHAM'S AMENDED BRIEF

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PRELIMINARY STATEMENT

This case involves a challenge to the unilateral alteration of an established loan funding ratio post-closing. Petitioners-Appellants Borough of Madison ("Madison") and Borough of Chatham ("Chatham")(collectively "Petitioners") are members of the Madison-Chatham Joint Meeting ("Joint Meeting"), which is a public entity that exists to provide, maintain, and operate a sewerage system and treatment facility for Madison and Chatham. Respondents New Jersey Department of Environmental Protection ("DEP") and New Jersey Infrastructure Bank (collectively "Respondents") administer the New Jersey Environmental Infrastructure Financing Program ("NJEIFP") to provide funding to local government units for projects such as Petitioners' facility upgrade project ("Project").

In April 2019, each Borough executed a note to procure short-term funding from Respondents, with an additional short-term loan executed in November 2021. Each of the April 2019 notes contained an identical definition that the loan would be funded 75% by the "Fund Portion" and 25% by the "I-Bank Portion." The Fund Portion is funded with DEP funds and does not accrue interest, while the I-Bank Portion accrues a market interest rate. As the short-term loans were in fact funded entirely with DEP funds, it is Petitioners' position that the respective portions were undoubtedly intended to be applied to Petitioners' long-term

loans. It specifically states in the NJEIFP publication for the year in which the notes were executed – "Due to the enhancements to the Short-Term Financing Program, long-term loans are largely mechanisms to refinance previously issued short-term loans for construction and P&D activities. With limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans . . ." Petitioners budgeted for the Project in accordance with the 75% "Fund Portion"/25% "I-Bank Portion" funding ratio. In February 2020, the construction contract for Petitioners' project was certified by the DEP.

Petitioners were subsequently advised that a 50% "Fund Portion"/50% "I-Bank Portion" funding ratio would be applied to Petitioners' long-term loans, due to the certification of the construction contract for Petitioners' Project in fiscal year 2020. This unilateral alteration of the contractually established loan funding ratio by Respondents would result in substantially higher interest costs to Petitioners, totaling over $1 million. Accordingly, Petitioners challenged Respondents' unilateral action so that their taxpayers would not be forced to finance this significant difference that Respondents have unlawfully and unfairly shifted to Petitioners. In March 2022, the Hon. Gail M. Cookson, A.L.J. issued an Initial Decision recommending that the 50% "Fund Portion"/50% "I-Bank Portion" be applied to Petitioners' long-term loans. Each Respondent issued Final Decisions adopting

Judge Cookson's recommended Initial Decision with modifications. At least part of these decisions were based upon the blatantly false and/or demonstrably incorrect representation by Respondents that the short-term notes provided that "up to" 25% of the principal of the short-term notes would be funded by the New Jersey Infrastructure Bank, when the short-term notes utilized "equal to" language. Thus, it is evident that Respondents misrepresented facts because their position is legally untenable.

The following will demonstrate that in light of the plain language of the unambiguous funding ratio term in each of the April 2019 short-term notes, in conjunction with the NJEIFP publication and another borrower's note executed in order to procure short-term funding from NJEIFP that glaringly omitted the "I-Bank" and "Fund Portion" definitions one year after Petitioners' notes as extrinsic aids for interpretation purposes (and common sense), the self-serving Final Decisions issued by Respondent DEP and New Jersey Infrastructure Bank should be overturned as arbitrary, capricious, or unreasonable.

PROCEDURAL HISTORY/STATEMENT OF FACTS

The Procedural History and Statement of Facts will be discussed together as they are interrelated. Petitioners are members of the Joint Meeting, which is a public entity organized pursuant to N.J.S.A. § 40:63-68, *et seq*. as a public body corporate and politic, duly created and validly existing pursuant to the laws of the State. The Joint Meeting is an entity that exists to provide, maintain, and operate a sewerage system and treatment facility for Madison and Chatham; it is not authorized to incur debt obligations. [963a; 112a; 139-140a]. Each Borough owns and maintains its respective sewer collection facilities, while the Joint Meeting owns, operates and maintains the Molitor Water Pollution Control Facility ("Facility") and trunk sewer. [166a].

To address aging infrastructure, reduce the chemical cost of complying with new effluent limits for Total Phosphorus (TP) and to enhance the reliability of permit compliance and resiliency at the current permitted flow, the Joint Meeting proposed several upgrades to the Facility including: Replacement of the mechanically cleaned influent screen, primary effluent pumps, oxidation channel aerators, grit removal equipment, reroofing two existing buildings, construction of a new effluent filtration facility with low-lift pumps, and installation of a second belt filter press ("Project"). [121a; 149a; 167a; 646a]. In 2018 and 2019, Petitioners' bond counsel (Steven L. Rogut, Esq.) assisted

Petitioners in obtaining short-term financing from Respondents, who collaborate to administer the NJEIFP for each Borough to contribute towards their respective share for the Project. [966a; 191a].

The NJEIFP provides funds to local government units and private water systems to ensure that the State's water infrastructure is properly constructed to State and Federal standards. These projects are critical in protecting public health, water quality, and the state's natural resources as well as supporting economic growth. [419a]. The main objectives of the NJEIFP [are] to:

- Provide capital for water and wastewater infrastructure renewal to protect public health and the environment for multiple generations of New Jersey citizens;
- Continue serving as the Garden State's premier source of environmental infrastructure financing through self-sustaining, efficient and transparent programs;
- Establish and efficiently manage a permanent source of funding for clean water and drinking water infrastructure projects;
- Provide project financing at a much lower cost than program participants could achieve individually thereby passing substantial savings on to New Jersey taxpayers and rate payers; and

- Increase access to capital markets for those participants that find it difficult or expensive on their own, due to lower credit ratings or a lack of familiarity with debt financing.

[428a].

On April 5, 2019, Madison executed a note in the amount of $4,770,000, and Chatham executed a note in the amount of $2,730,000 representing the contemplated Project costs. [966a; 78a; 90a]. Respondents prepared all of the note terms. The April 5, 2019 notes contained the following identical terms in the Definitions Section.

> **"Fund Portion"** means, on any date, an amount equal to seventy-five percent (75%) of the Principal of the Loan on such date, exclusive of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee, which NJDEP Loan Origination Fee shall be financed exclusively from the I-Bank Portion.
>
> **"I-Bank Portion"** means, on any date, an amount equal to the aggregate of (i) twenty-five percent (25%) of the Principal of the Loan on such date, exclusive of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee, plus (ii) one hundred percent (100%) of that portion of the Principal of the Loan

that is allocable to the NJDEP Loan Origination Fee.

[966a; 109a; 137a].

"Interest" is defined in each of the notes as "the interest charged on the outstanding Principal of the Loan at a rate of (a) with respect to the I-Bank Portion of the Principal, the applicable I-Bank Portion Interest Rate and (b) with respect to the Fund Portion of the Principal, 0.00% and payable by the Borrower to the I-Bank (i) on the Maturity Date or (ii) with respect to any optional prepayment or acceleration of the Loan pursuant to the terms of this Note, on the date of such optional prepayment or acceleration, as the case may be." [110a; 138a]. "Maturity Date" is defined in each note as "April 5, 2021, or (i) such earlier date as shall be determined by an Authorized Officer of the I-Bank in his or her sole discretion, which date shall be determined by such Authorized Officer of the I-Bank to be the date of the closing for the Anticipated Financing Program (subject, in all events, to the rights and remedies of the I-Bank pursuant to, respectively, the provisions of Section 6 hereof and the provisions of Section 7 hereof in furtherance of the enforcement by the I-Bank of all covenants obligations of the Borrower hereunder, including, without limitation and in particular, the covenant obligation of the Borrower set forth in Section 3(a) hereof), or (ii) such later date (subject to the then-applicable limits of the Act) to be

determined by an Authorized Officer of the I-Bank in his or her sole discretion, pursuant to a written certification thereof, as acknowledged and approved by an Authorized Officer of the Borrower." Id.

In Petitioners' bond counsel's (Steven L. Rogut, Esq.) decades of experience assisting public entities in obtaining financing through the NJEIFP, the ratio of loan funding provided to public entities for a project's short-term loan has always been converted into the project's long-term loan funding ratio without an accompanying construction contract certification from the borrower until the present dispute arose. [964a].

The introduction to the NJEIFP's January 2019 publication (which was the NJEIFP publication effective immediately prior to execution of Petitioners' notes) provides in pertinent part:

> **SY2020 Financing Program**
>
> The majority of NJEIFP projects are initially financed through the I-Bank's short-term loan program which currently offers zero percent financing during the construction phase . . . The program generally converts a short-term loan to a long-term loan upon construction completion offering sum-certain long-term financing which eliminates supplemental funding needs, mitigates IRS compliance issues, and minimizes interest costs

> for borrowers as they pay interest only on funds needed for the project and only on the amount of funds utilized from the time of draw.
>
> The majority of the projects that received short-term loans in recent years will receive long-term loans funded 75% with DEP funds at 0% interest and 25% with I-Bank AAA market rate funds, consistent with recent financing programs. On average, these participants will save over 40%, or $400,000 in interest costs per $1.0 million borrowed over 30 years compared to financing their projects independently.

[964-965a; 972a].

The NJEIFP's January 2019 publication further states (in pertinent part):

> SHORT-TERM FINANCING
>
> While the terms of the financing, including Principal Forgiveness, are established at the time of the short-term loan, they are contingent upon a project receiving long-term financing . . . In an effort to reduce transaction costs, each project's short-term loan can be for the entire estimated cost of the project, but the commitment of funds is limited to the approved planning and design costs.

> The agreement is then amended to reflect subsequently approved costs, e.g. construction contract at the time of authorization to award.
>
> LONG-TERM FINANCING
>
> Long-Term Loans are generally issued upon completion of project construction (demonstrated through submitted requisitions). *Due to the enhancements to the Short-Term Financing Program, long-term loans are largely mechanisms to refinance previously issued short-term loans for construction and P&D activities.* **With limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans**: for example, credit worthiness approval; Division of Local Government Services approval; the State's commitment of long-term funding at the time of certification of each operable project segment; and the applicability of all program benefits (e.g. principal forgiveness).

[965-966a; 974-976a (emphasis added)].

Petitioners' bond counsel certified:

> It has been consistently understood by borrowing public entities that the loan funding ratio established in the note documents would not change

> when the long-term financing occurred. In accordance with the NJEIFP's past practice and the unequivocal language contained in its January 2019 publication, Petitioners reasonably expected that the loan funding ratio set forth in their respective notes would remain the same for the long-term financing of the Project. Borrowers, such as Petitioners, have historically relied on the funding ratio established in the note documents to project their future debt service budgeting for the long-term financing.

[966-967a].

As evidence that the April 2019 notes establish a particular loan funding ratio, Petitioners produced a note executed by the Township of Scotch Plains in April 2020 (precisely one year after Petitioners) to procure financing from the NJEIFP. [1003-1015a]. Notably absent from the note executed by the Township of Scotch Plains one year after Petitioners' notes were the "Fund Portion" and "I-Bank Portion" definitions that established a specified ratio of funding for Petitioners' Project. [967a; 1005a].

On July 11, 2019, the engineering contract between the Joint Meeting & Kleinfelder in the amount of $596,240 for construction oversight services was reviewed and found acceptable by Respondent DEP. [130a; 158a]. On October 7, 2019, Respondent DEP provided

authorization for the Joint Meeting to advertise the Project for bids. [175-176a]. On January 27, 2020, Respondent DEP authorized the Joint Meeting to award a contract to CMS Construction, Inc. of Plainfield, New Jersey in the amount of $7,215,000. [180-181a]. On February 18, 2020, Respondent DEP certified the Project. [184a].

Following certification of the Project, Petitioners were advised that the 75% Fund Portion/25% I-Bank Portion loan ratio established by the April 2019 notes would not be honored for long-term funding, but would instead consist of the State Fiscal Year 2020 loan funding ratio of 50% Fund Portion/50% I-Bank Portion due to the certification of the Project's construction contract in February 2020. [967a].

Petitioners were not accorded notice that the 75%/25% loan funding ratio would be altered for long-term funding if the Project's construction contract was not certified by a specific deadline. Id. If sufficient notice of Respondents' planned unilateral change to the long-term loan funding ratio had been bestowed upon Petitioners, Mr. Rogut would have recommended that they expedite the bidding process to ensure that the Project's construction contract was certified prior to any purported deadline to obtain the more favorable funding terms. Id.

In March 2020, Mr. Rogut participated in several discussions with Eugene Chebra, who serves as the Assistant Director of the

NJDEP Municipal Finance and Construction Element. Id. Mr. Chebra is responsible for the administration of the Clean Water and Drinking Water State Revolving Fund programs. [968a]. On March 27, 2020, Mr. Chebra advised that he discussed the possibility of revising the long-term loan funding ratio that would be provided to Petitioners. Id. Although Mr. Chebra seemed sympathetic to the additional financing costs that will be incurred by Petitioners, he advised that since there were several other projects being funded by the NJEIFP (with much higher project costs than the Petitioners) in a similar situation, Respondents could not provide the anticipated 75%/25% loan funding ratio to Petitioners because "doing so at this point would have consequences." [968a; 1017a].

On April 16, 2020, Madison Borough Administrator Raymond M. Codey, Esq. contacted Kerry Kirk Pflugh, who serves as the DEP Director of the Office of Local Government Assistance to inquire whether the DEP would reconsider and abide by the loan terms reflected in the parties' agreement. [77a]. Mr. Codey stated (in pertinent part):

> Can you please give me an update on the Infrastructure Bank (IB) loan terms for the Madison Chatham Joint Meeting previously discussed . . . The issue is the unilateral change by the IB from a 75% 0% / 25% low interest loan to a 50% 0% / 50%

> low interest after the construction loan closed in April 2019. The initial loan terms (75/25) were specifically detailed in the fully executed loan documents as well. This unilateral change in the loan terms will cost both towns over $1,200,000.00 in additional interest. [sic] over the loan term.

[77a].

On the same date, Ms. Pflugh responded (in pertinent part):

> There have been many discussions in the program on this issue and unfortunately the conclusion remains that [the] Madison and Chatham package will be offered at the 50/50 DEP/I-Bank ratio for the financing of this project and not at the requested 75/25 ratio. The program apologizes for any miscommunication on the policy but any reversal of this policy for Madison/Chatham would have broader programmatic impacts. Many other projects in this exact same position were aware of this policy, understood it and have not objected. We realize that this is not the determination that you were looking for . . .

[76a].

On October 2, 2020, Respondents issued their Initial Decision advising that their position remained that the interest term for a long-term loan would consist of a 50% low-interest loan from the I-Bank and a 50% zero-interest loan from the DEP. [191-197a]. On October 16, 2020, Petitioners requested an Adjudicatory Hearing. [669-672a]. On October 29, 2020, Respondent DEP acknowledged Petitioners' hearing request; Respondent New Jersey Infrastructure Bank acknowledged Petitioners' hearing request on November 2, 2020. [664-668a]. Petitioners' hearing request was subsequently referred to the Office of Administrative Law ("OAL"). [660-663a]. On July 2, 2021, the OAL executed a Stipulation and Order consolidating the two pending matters into a single action. [71-73a].

On August 20, 2021, Petitioners moved for summary decision. On October 21, 2021, Respondents cross-moved for summary decision. On November 4, 2021, Petitioners borrowed an additional $2,000,000 from Respondents to finance the Project. [1266-1309a]. The principal amount of the Madison loan increased from $4,770,000 to $6,042,000, and the principal amount of the Chatham loan increased from $2,730,000 to $3,458,000. Id. Notably, the November 4, 2021 notes lack the 75% Fund Portion and 25% I-Bank Portion loan funding ratio contained in the April 5, 2019 notes. [1262a]. Prior to the issuance of a ruling from Judge Cookson, Petitioners preserved their objection to the unfavorable interest rate term being

unilaterally implemented by Respondents, and requested that Judge Cookson issue a ruling with respect to the applicable funding ratio for the additional loan. [1332-1333a].

On November 4, 2021, the parties also executed a side letter agreement in order to effectuate the additional $2,000,000 loan. [1311a]. The side letter provides in pertinent part:

> In connection with the Refinancing, each of Madison and Chatham shall issue a new, refinancing CFP note (each, a "Note") to the I-Bank, that will serve to refinance, replace and cancel the prior, respective note issued thereby to the I-Bank on April 5, 2019. The parties hereto acknowledge and agree that the issuance of each Note by the respective Borrower and the I-Bank's purchase of each Note from the respective Borrower, in the form and pursuant to the terms thereof, shall not constitute on the part of the parties hereto an admission, waiver, or relinquishment of any claims, defenses, or rights pursuant to *Borough of Madison and Borough of Chatham v. NJDEP and New Jersey Infrastructure Bank*, OAL Docket No. EER 03753-2021N, now pending before the Administrative Law Judge Cookson.

Id.

On March 10, 2022, oral arguments were presented before the Hon. Gail M. Cookson, A.L.J. On March 17, 2022, the Hon. Gail M. Cookson, A.L.J. issued an Initial Decision granting Respondents' cross-motion for summary decision, and determining that the 50% "Fund Portion"/50% "I-Bank Portion" was the appropriate ratio applied to Petitioners' long-term loans. [1a-27a]. Judge Cookson ruled in pertinent part:

> At issue here are the [P]etitioners' potential long-term loans and, specifically, the applicable funding ratio as between the market rate I-Bank Loan and the zero-interest NJDEP Fund Loan. In the nature of a construction loan that rolls over into a mortgage, an infrastructure authority borrower does not receive long-term funding until after construction completion. Only when the long-term loan closing occurs at the long-term loans memorialized in two separate loan agreements, one with I-Bank (Trust Loan) and one with NJDEP (Fund Loan), reflecting the financing terms established at the time of construction contract certification. On the basis of the clear language of all of the relevant laws, regulations and documents, I **CONCLUDE** that such terms, including the funding ratio as between I-Bank and NJDEP, are strictly

dependent on the specific State fiscal year during which the borrower receives the construction contract certification . . .

The version of the Notes at issue here is consistent with the notes used in years prior and subsequent to SFY2019 in that it defines how interest will be calculated on a short-term note and does not address the long-term funding ratio. The short-term notes are drafted to reflect all possible funding sources and attendant interest rate scenarios for all Short-Term Program participants, including petitioners. There is absolutely no relationship between these definitions and the funding ratios of the anticipated long-term financing; nor is there a genuine ambiguity in the finance documents. I **CONCLUDE** that there is no need for me to reach [P]etitioners' argument that I must utilize the contractual interpretation tools of extrinsic evidence or holding any ambiguity "against the drafters." Cf. Orange Township v. Empire Mtg. Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001).

> In order to comply with the terms of the SFY2019 Authorizing Resolution, all of the SFY2019 Short-Term notes, including [P]etitioners' Notes, provide that up to twenty-five (25%) percent of the principal of the short-term notes may be made by the I-Bank from interest-bearing sources that would require the I-Bank to impose interest costs on borrowers. It is correct that prior to July 1, 2021, 100% of [P]etitioners' Notes were funded with non-interest bearing sources; however, as of July 1, 2021, the "I-Bank Portion" of the "Principal" of all outstanding short-term notes from SFY2019, including Petitioners' Short-Term Notes, began to bear interest as provided pursuant to the terms of such Short-Term Note and the Authorizing Resolution.

[16-18a].

On June 23, 2022, Petitioners permanently financed their long-term loans through the NJEIFP. [1247-1258a]. As part of the closing, the parties executed a side letter agreement similar to the one executed for the additional $2,000,000 loan, which states in pertinent part:

> With construction now complete, each Borrower is participating in the New Jersey Water Bank Spring Pool for SFY 2022. In connection therewith, on the date hereof, each Borrower is converting its short-term CFP loan evidenced by its Note to long-term loans (the "Long-Term Conversion") pursuant, in each case, to each of (i) a 25% I-Bank market rate loan funded with proceeds from the I-Bank's tax-exempt bonds, (ii) a 25% I-Bank market rate direct loan made from funds available to the I-Bank (i.e., non-bond proceeds) with the interest rate applicable thereto equal to the interest rate on the companion I-Bank loan (i.e., the rate on the I-Bank's tax-exempt bonds), and (iii) a 50% zero interest rate fund loan from the Department. The parties hereby acknowledge and agree that each Borrower's participation in the Long-Term Conversion shall not constitute on the part of the parties hereto an admission, waiver, or relinquishment of any claims, defenses, or rights pursuant to the Administrative Claim.

[1247-1248a].

Respondents DEP and New Jersey Infrastructure Bank issued Final Decisions affirming and modifying Judge Cookson's Initial Decision on September 12, 2022 and October 28, 2022, respectively. [35-54a; 28-31a]. Although Respondent DEP is the agency with the predominant interest as per the Order dated July 2, 2021 [71-73a], Respondent New Jersey Infrastructure Bank also issued five comments addressing Respondent DEP's Final Decision. [30-31a]. With respect to Respondent DEP's usage of an "updated" funding ratio, Respondent New Jersey Infrastructure Bank's Final Decision disingenuously states, "[t]o clarify, there never existed an original ratio, as the long-term funding ratio was not set until the NJDEP's construction certification in February 2020. In fact, the SFY2019 long-term financing ratio of 75% DEP / 25% I-Bank never applied to this project." [31a].

On November 30, 2022, Petitioners filed their appeal. [1366a]. On January 10, 2023, Respondent DEP submitted a motion to file an amplification of its Final Decision as within time to address the comments in Respondent New Jersey Infrastructure Bank's decision. [55-58a]. On January 23, 2023, this Court granted Respondent DEP's motion. [59a]. On January 30, 2023, Respondent New Jersey Infrastructure Bank submitted a similar motion to file an amplify for the purpose of expressing its agreement with Respondent DEP's amplification. [32-33a]. On March

6, 2023, this Court granted Respondent New Jersey Infrastructure Bank's motion. [34a].

Crucial to the Court's consideration here is the fact that Petitioners could not anticipate that Respondents would attempt to unilaterally alter the loan funding ratio after their construction loan for the full cost of the Project had already closed. [1264-1265a]. If Petitioners' taxpayers are forced to shoulder the increased interest obligations resulting from Respondents' arbitrary and capricious action in altering the established loan funding ratio, they will sustain a severe economic impact. [1326-1329a]. Petitioners have already suffered devastating financial consequences due to the COVID-19 pandemic. [1327a; 1329a]. Although Petitioners accepted Respondents' calculations of $829,700 over the life of the thirty-year anticipated loans at 1.57% interest in additional interest charges for Petitioners' initial loans due to the funding ratio change, with the additional $2 million loan the additional interest costs to Petitioners' taxpayers are over $1 million. [14a]. As such, Petitioners are attempting to preclude Respondents from shifting any purported financial burden that may have been the underlying basis for their unilateral adjustment of the established loan funding ratio onto Petitioners' taxpayers, as the funding ratio for Petitioners' Project was already clearly agreed upon.

LEGAL ARGUMENT

I. THIS COURT SHOULD REVERSE RESPONDENTS' FINAL DECISIONS AS RESPONDENTS' UNILATERAL ALTERATION OF THE LONG-TERM LOAN FUNDING RATIO WAS ARBITRARY, CAPRICIOUS, OR UNREASONABLE (The decisions below are contained within appendix pages 1a-31a and 35a-54a)

A) The Requisite Standard of Review is Arbitrary, Capricious, Or Unreasonable

The standard for this Court's review of an administrative decision is well-established. A.M. v. Monmouth Cty. Bd. of Social Svcs., 466 N.J. Super. 557 (App. Div. 2021) held:

> An administrative agency's decision will be upheld unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record. The burden of demonstrating that the agency's decision was arbitrary, capricious or unreasonable rests upon the party challenging the administrative action. If substantial credible evidence supports an agency's conclusion, a court may not substitute its own judgment for the agency's even though the court might have reached a different result. **Nevertheless, if our review of the record shows that the agency's finding is clearly mistaken, the decision is not entitled to judicial deference**.

Id. at 565 (emphasis added, citations and quotations omitted). This Court has admonished that courts are not only privileged but required to overturn arbitrary and capricious agency action. In re Zurbrugg Memorial Hospital's 1995 Medicaid Rates, 349 N.J. Super. 27, 35 (App. Div. 2002) (citing Worthington v. Fauver, 88 N.J. 183, 204 (1982); Drake v. Department of Human Servs., 186 N.J. Super. 532, 536 (App. Div. 1982)). In Worthington, the New Jersey Supreme Court determined:

> The ["arbitrary and capricious"] test is essentially one of rational basis. Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is (valid) when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.

Id. at 204-05 (citation and quotations omitted).

B) Standard Applied to Case Facts

This case presents a textbook example of an administrative agency action that was arbitrary, capricious, or unreasonable, especially since Respondents submitted a false (or at a minimum blatantly incorrect) certification to the Office of Administrative

Law to support their post hoc interpretation of the April 5, 2019 notes. Madison and Chatham executed notes in the amount of $4,770,000 and $2,730,000 respectively, which represented both construction and planning/design costs for the Project. [107a; 135a]. There is a lack of any basis for this Court to allow Respondents to unilaterally impose different terms from the unambiguous note terms - - "'Fund Portion' means, on any date, an amount equal to seventy-five percent (75%) of the Principal of the Loan on such date . . ." and "'I-Bank Portion' means, on any date, an amount **equal to** the aggregate of twenty-five percent (25%) of the Principal of the Loan on such date . . ." [109a; 137a, emphasis added]. Although these terms are extremely specific with respect to the 75% "Fund Portion"/25% "I-Bank Portion" ratio to be applied, Judge Cookson mistakenly accepted Respondent New Jersey Infrastructure Bank's Chief Financial Officer Lauren Kaltman's representation [1138a] that Petitioners' notes "provide that up to twenty-five (25%) percent of the principal of the short-term notes may be made by the I-Bank from interest-bearing sources that would require the I-Bank to impose interest costs on borrowers." [17a, emphasis added]. The above demonstrates that the "up to" language was improperly added by Respondents in arguing their position, as the relevant language unequivocally reads "an amount equal to the aggregate of twenty-five percent (25%) of the Principal . . ." [109a; 137a]. Every word within a contract matters, and this Court

must prohibit Respondents from retroactively altering the language from "equal to" to "up to" in order to skirt their obligations to Petitioners. Moreover, if Respondents' position is accepted that would effectively allow them to adjust the funding ratio as they unilaterally deem appropriate, which is clearly not what the parties borrowed for, and that would "fly in the face" of the goals of NJEIFP to allow public entities to properly budget for the financing costs of qualifying projects at the outset.

These terms were solely prepared by Respondents, and Petitioners relied upon this loan funding ratio to project their future debt service budgeting for long-term financing of the Project. See 967a ("Borrowers, such as Petitioners, have historically relied on the funding ratio established in the note documents to project their future debt service budgeting for the long-term financing"). Notably, Respondent DEP's Final Decision states - - "The definitions are adopted by the I-Bank's Board of Directors for all short-term notes in a given fiscal year. While the definitions of 'Fund Portion' and 'I-Bank Portion' in Petitioners' Notes reference a funding ratio (up to 75 percent zero-interest DEP Loans and up to 25 percent interest-bearing I-Bank Loans), Petitioners cannot rely on those definitions to create binding terms for their long-term loans." [45a]. Once again the "up to" language is not what is reflected in Petitioners' notes; the notes in fact reflect "**equal to**" language. Importantly, there

is a lack of any language in the notes that Respondents prepared indicating that a borrower should not rely upon those "Fund Portion" and "I-Bank Portion" definitions for their long-term loan funding ratio, notwithstanding the undisputed fact that the short-term loans were solely funded with DEP funds (and thus were 100% "Fund Portion"). [9a; 39a].

The introduction to NJEIFP's January 2019 publication specifically provides, "[t]he majority of the projects that received short-term loans in recent years will receive long-term loans funded 75% with DEP funds at 0% interest and 25% with I-Bank AAA market rate funds, consistent with recent financing programs." [964-965a; 970-972a]. In fact, the 75% "Fund Portion"/25% "I-Bank Portion" ratio had remained consistent for many years (since 2012). Most importantly, the January 2019 publication specifically provides that "the terms of the financing, including Principal Forgiveness, are established at the time of the short-term loan . . ." and "[w]ith limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans . . ." [965a; 975a-976a]. Respondents could not simply alter their obligations for an already binding agreement through issuance of a subsequent publication(s). If Respondents wished to modify a term of the executed notes, an amendment was required pursuant to the following regulation:

N.J.A.C. § 7:22-3.20 [Fund loan agreement amendments]

> (a) The Department shall require a Fund loan agreement amendment to change principal provisions of a Fund loan agreement where the Department determines that project changes substantially alter the objective or scope of the project or time of performance of the project or any major phase thereof, **or to change substantially a term or condition of the Fund loan agreement**.

(emphasis added).

Petitioners' bond counsel certified, "[i]n my 34 years of experience assisting public entities in obtaining financing through the Program, **the ratio of loan funding provided to public entities for a project's short-term loan has always been converted into the project's long-term loan funding ratio without an accompanying construction contract certification from the borrower until the present dispute arose.**" [964a](emphasis added). Petitioners' bond counsel further certified:

> It has been consistently understood by borrowing public entities that the loan funding ratio established in the note documents would not change when the long-term financing occurred. In accordance with the Program's past practice and the unequivocal language contained in its January 2019 publication, Petitioners reasonably expected that

> the loan funding ratio set forth in their respective notes would remain the same for the long-term financing of the Project. Borrowers, such as Petitioners, have historically relied on the funding ratio established in the note documents to project their future debt service budgeting for the long-term financing.

[966-967a] (emphasis added).

Petitioners' bond counsel also certified that Petitioners were not accorded with notice that the 75%/25% loan funding ratio would be altered for long-term funding if the Project's construction contract was not certified by a specific deadline, and that he would have recommended that they expedite the bidding process to ensure that the Project's construction contract was certified in time for Respondents' purported deadline to obtain more favorable funding terms if sufficient notice of the unilateral change had been provided. [967a]. However, in prior instances in which the Program determined that prevailing financial conditions warranted the alteration of the requisite financing terms for a project's short and long term funding, substantial advance notice was in fact furnished to each public entity that would likely be affected by such a change in financing terms. [964a]. Notably, Petitioners' bond counsel further certified - - "As Petitioners could not anticipate that Respondents would attempt to

unilaterally alter the loan funding ratio after their construction loans for the full cost of the Project had already closed, Petitioners reasonably expected that the long-term funding ratio for the Project would consist of the 75% Fund Portion/25% I-Bank Portion loan ratio established by the April 5, 2019 notes." [1264-1265a].

If Respondents had at least provided notice of the change to the loan funding ratio in the event that Petitioners did not certify the construction contract by a date certain, this dispute likely could have been avoided. Respondents will argue that Petitioners were accorded notice by way of a public hearing for changes to the Program that transpired before Petitioners' notes containing a specific loan funding ratio was even executed. See 22a ("On December 19, 2018, NJDEP posted a notice of an open public comment period and on January 9, 2019, held a public hearing for changes to the Program, including to the interest ratio for the long-term component of the Program"). However, Petitioners lacked any reason to be involved in said public hearing at that juncture, and same plainly cannot constitute sufficient notice of the modification to Petitioners when Petitioners had a specific loan funding ratio term already in effect that they had no reason to believe would be unilaterally altered. Respondents' position apparently is that they knew that the funding ratio would change effective January 2020, but did not believe that it was important

enough to insert language in Petitioners' notes placing them on notice of the imminent change in the event that the construction contract is not certified by the commencement of fiscal year 2020. As Respondents failed to impart notice of the deadline so that Petitioners could still receive the benefit of such a crucial term of their respective agreements, this Court should not allow Respondents to skirt their legally binding funding obligations to Petitioners at the 75% "Fund Portion"/25% "I-Bank Portion" rate. Lastly, Mr. Chebra indicated that Respondents considered the possibility of continuing to provide Petitioners with the agreed upon rate "but concluded that doing so at this point would have consequences," while Ms. Pflugh indicated that it "would have broader programmatic impacts." [1017a; 76a]. Petitioners' bond counsel's understanding is that Respondents were concerned that they would be unable to divert funding from Petitioners' Project (and similar projects) to other unrelated projects. [968a]. Respondents cannot be permitted to simply avoid their legal obligations to Petitioners due to their preferred utilization of the monies for other purposes.

In sum, Respondents' decision to alter the funding ratio, resulting in Petitioners' taxpayers to incur a higher interest rate for said Project funding post-closing was mistaken and not entitled to any judicial deference here. Respondents' Final Decisions were at least partially based upon their false

representation and/or demonstrably incorrect belief that Respondents' notes provide for a funding ratio "up to" a certain percentage of the Principal, while Petitioners' notes utilize the language "equal to" a certain percentage of the Principal as discussed above. Therefore, Respondents' actions in imposing less favorable loan terms upon Petitioners for reasons that are irrelevant to the terms of Petitioners' executed April 5, 2019 notes, and without a loan agreement amendment in violation of N.J.A.C. § 7:22-3.20 was arbitrary, capricious, or unreasonable. The April 5, 2019 notes prepared by Respondents clearly established a loan ratio of 75% "Fund Portion" and 25% "I-Bank Portion" for short-term funding; Petitioners reasonably relied upon the unambiguous terms of the April 5, 2019 notes in conjunction with the NJEIFP guidance providing that all relevant Program terms and conditions are established at the time of issuance of short-term loans when budgeting for the Project. The interest rate to be applied is undoubtedly the most important term and condition of the loans at issue, and it is common sense that same cannot be unilaterally adjusted by a lender once a binding agreement is in effect. It clearly was Respondents' obligation as the drafters to prominently clarify within the notes precisely what any purported "limited exception" to the most important term and condition would consist of. Accordingly, Petitioners have satisfied their burden to demonstrate that Respondents' retroactive alteration of the

crucial loan term from 75% "Fund Portion"/25% "I-Bank Portion" to 50% "Fund Portion"/50% "I-Bank Portion" was clearly arbitrary, capricious, or unreasonable, and thus this Court should reverse Respondents' Final Decisions and reinstate said term for all of the Project's financing.

II. RESPONDENTS' FINAL DECISIONS MUST BE REVERSED AS THEY CLEARLY BREACHED THE TERMS OF THE ALREADY EXECUTED APRIL 5, 2019 NOTES (The decisions below are contained within appendix pages 1a-31a and 35a-54a)

The crux of Petitioners' argument is that Respondents breached the parties' binding agreement to provide all funding for the Project at the 75% "Fund Portion"/25% "I-Bank Portion" ratio established by the April 5, 2019 notes. See 966a; 109a; 137a. The law is clear that the elements of a breach of contract cause of action are as follows:

> [F]irst, that the parties entered into a contract containing certain terms; second, that the plaintiff did what the contract required the plaintiff to do; third, that the defendant did not do what the contract required the defendant to do, defined as a breach of the contract; and fourth, that the defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff.

Goldfarb v. Solimine, 245 N.J. 326, 338 (2021); Woytas v. Greenwood Tree Experts, Inc., 237 N.J. 501, 512 (2019); Globe Motor Co. v. Igdalev, 225 N.J. 469, 482 (2016).

With respect to the first element of a breach of contract claim (the parties entered into a contract containing certain

terms), it is undisputed that on April 5, 2019 each Petitioner executed a valid agreement with Respondents entitled "NOTE RELATING TO: THE CONSTRUCTION FINANCING LOAN PROGRAM OF THE NEW JERSEY INFRASTRUCTURE BANK." [977-1002a]; N.J.A.C. § 7:22-3.15(b) ("The Fund loan agreement shall be executed by the applicant within such period of time and pursuant to such terms and conditions as the Department may determine"). Each note contains an unambiguous term with respect to the 75% "Fund Portion"/25% "I-Bank Portion" loan funding ratio that could not be unilaterally altered by either party, and required an amendment to do so. See N.J.A.C. § 7:22-3.20(a). With respect to the second element of a breach of contract claim (the plaintiff did what the contract required the plaintiff to do), it is undisputed that Petitioners have complied with all of their contractual obligations.

With respect to the third element of a breach of contract claim (the defendant did not do what the contract required the defendant to do), Respondents clearly failed to abide by their contractual obligations. The loan funding ratio is a critical term of the April 5, 2019 notes for a total sum of $7,500,000, which could not be retroactively changed by Respondents at a later date as it was intended to apply to both short-term and long-term financing. The NJEIFP's January 2019 publication states in pertinent part- - "[L]ong-term loans are largely mechanisms to refinance previously issued short-term loans for construction and

P&D activities. With limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans." [965a; 976a]. There is not a "limited exception" that is conceivably applicable to the present facts. Assuming *arguendo* that there was possibly a "limited exception" to the most important Program term and condition not being applied to Petitioners' long-term loans, an unfavorable construction against Petitioners such as this must be scrutinized by this Court and rejected accordingly. Micheletti v. State Health Benefits Comm'n, 389 N.J. Super. 510, 525 (App. Div. 2007) ("As with other insurance contracts, terms of the State benefits contracts excluding or limiting coverage are to be scrutinized with care. If the language supports two interpretations, the one favoring coverage is to be adopted"). In Micheletti, this Court further noted from this Court's precedent that the New Jersey State Health Benefits Program is no different from other insurance contracts that exclusionary language is strictly interpreted. Id. In 2020, Petitioners were advised that the 75% "Fund Portion"/25% "I-Bank Portion" loan ratio established by the April 2019 notes would not be honored for long-term funding, but would instead consist of the State Fiscal Year 2020 loan funding ratio of 50% "Fund Portion"/50% "I-Bank Portion" due to the certification of the Project's construction contract in February 2020. This unilateral change without a loan agreement

amendment plainly demonstrates that Respondents did not do what the contract required Respondents to do.

The standard that this Court should apply in determining whether Respondents breached the terms of the notes is well-established. The Court is required to examine the plain language of the contract and the parties' intent, as evidenced by the contract's purpose and the surrounding circumstances. Highland Lakes Country Club & Community Ass'n v. Franzino, 186 N.J. 99, 115 (2006). The Court should examine the document as a whole and "should not torture the language of a contract to create ambiguity." Schor v. FMS Financial Corp., 357 N.J. Super. 185, 191 (App. Div. 2002) (citation omitted). Schor further held, "[a] party that uses unambiguous terms in a contract cannot be relieved from the language simply because it had a secret, unexpressed intent that the language should have an interpretation contrary to the words' plain meaning." Id. at 191. Cumberland Cty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 496 (App. Div.); cert. denied, 177 N.J. 222 (2003) held that where the terms of a contract are clear, the court must enforce the contract as written (and that the contract should not be interpreted to render one of its terms meaningless), but that the terms of the parties' written agreement may be explained or supplemented by evidence of their course of dealing. See also Barr v. Barr, 418 N.J. Super. 18, 32 (2011) (holding that where a contract ambiguity

exists, a court may look to extrinsic evidence as an aid to interpretation).

In the case at bar, the April 5, 2019 notes contain a clear and unambiguous term of a 75% "Fund Portion"/25% "I-Bank Portion" loan funding ratio for Petitioners' Project. There is no reason for this Court to interpret the notes any differently from their explicit terms that the parties intended to abide by. However, the tribunal below twisted the language of the notes which provided for each respective portion that would be funded "equal to" a certain percentage to instead provide that it could be funded "up to" a certain amount, which finding was adopted by Respondents as same was to their substantial benefit. [17a]. The matter in dispute is whether this loan funding ratio was intended to apply to all future long-term funding for the Project. Both the Fund Portion and I-Bank Portion definitions in Section 1 contain the unmistakable language "on any date," which demonstrates the parties' intent and this Court should not render meaningless. See 966a; 109a; 137a. The course of dealing between public entities such as Petitioners who proceed to procure long-terms loans after receiving short-term loans from Respondents is consistent, in that the short-term loan rates established in the note documents have remained the same for long-term financing. See 966-967a.

Indeed, the guaranteed loan rate for long-term financing is the primary benefit of obtaining such loans from the NJEIFP for

qualifying projects. Petitioners' bond counsel certified, "[i]t is cost-effective for a municipality to pay these significantly higher costs of obtaining short-term funding from the Respondents only if they receive the subsidized lower interest rate offered by Respondents' long-term financing program." [1264a]. Extrinsic aids show that the ratio set forth in the notes was plainly intended to apply to long-term loans for the Project, as demonstrated by the NJEIFP's January 2019 guidance- "Due to the enhancements to the Short-Term Financing Program, long-term loans are largely mechanisms to refinance previously issued short-term loans for construction and P&D activities. With limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans: for example, credit worthiness approval; Division of Local Government Services approval; the State's commitment of long-term funding at the time of certification of each operable project segment; and the applicability of all program benefits (e.g. principal forgiveness)." [965-966a; 976a]. Petitioners emphasize that none of the exceptions that would permit Respondents' unilateral modification of the terms and conditions of future long-term Project funding from Petitioners' short-term notes apply to the circumstances here.[1]

[1]Respondents rely upon the "commitment of long-term funding at the time of certification of each operable project segment" language. [976a].

Petitioners provided a Township of Scotch Plains note executed one year later as another extrinsic aid that demonstrates the applicability of the loan funding ratio reflected in Petitioners' April 5, 2019 notes. [1004-1015a]. In clear contrast from Petitioners' April 5, 2019 notes, the note executed by the Township of Scotch Plains to procure financing from the NJEIFP lacks the "Fund Portion" and "I-Bank Portion" definitions in Section 1. [967a; 1005a]. Neither Judge Cookson nor Respondents considered Petitioners' proffered extrinsic evidence as to the parties' intention with respect to the loan funding ratio's applicability to Petitioners' long-term loans in 2019. "Where an ambiguity appears in a written agreement, the writing is to be strictly construed against the party preparing it." Schor, supra at 193 (quoting Orange Township v. Empire Mortgage Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001)). It is not disputed that Respondents drafted the notes at issue.

It was evidently Judge Cookson's opinion that different rules of contract interpretation should be applied to the present dispute merely because Respondents are highly regulated entities. Judge Cookson ruled in pertinent part:

> While there is no caselaw directly on point, I am guided by what the Appellate Division has stated with respect to a comparison on private insurance to governmental insurance benefits:

> The Program language should not be approached exactly as one would approach the language of a commercial insurance policy. Since the "mental illness" benefit limitation is prescribed by statute, Program language following the statute should not automatically be construed against the profferer as a contract of adhesion. Instead, the limitation should be interpreted and applied in accordance with legislative intent and in furtherance of statutory goals.
>
> [Heaton v. State Health Benefits Com'n, 264 N.J. Super. 141, 151 (App. Div. 1993).] . . . I CONCLUDE that there is no need for me to reach [P]etitioners' argument that I must utilize the contractual interpretation tools of extrinsic evidence or holding any ambiguity "against the drafters." Cf. Orange Township v. Empire Mtg. Serv., Inc., 341 N.J. Super. 216, 227 (App. Div. 2001).

[16-17a]; see also 46a- "As noted by ALJ Cookson, the Appellate Division has previously found that an agency's broadly applicable program language should be approached differently than language issued in a commercial context." Respectfully, Judge Cookson's ruling completely ignores the next section of this Court's Heaton decision:

By undertaking that very consequential role in the financial security of public employees and their families, the State also undertakes to play fair with them. **Hidden or unfair reservations in insurance policies are ignored because they do not reflect the reasonable expectations of the parties.** (citations omitted). Because of the significance of health insurance to public employees and their families, and the Legislature's undertaking to furnish insurance and determine its scope, one of the goals of the Legislature must have been to assure the fair and even-handed application of Program provisions, and the avoidance of crabbed interpretations of ambiguous terms.

The reasonable expectations of both the State and the insured public employees are reached in large part after a consideration of the scope of the protections offered by the commercial insurance market. If Program provisions compatible with the statute appear to furnish protection consistent with the offerings of the commercial insurance market, those provisions should be interpreted in a consistent manner. **Thus, judicial interpretations of coverage provisions of**

commercial insurance contracts should guide, if not control, interpretation of Program provisions.

Heaton, supra at 151-52 (emphasis added); see also Micheletti, supra at 523. Micheletti also held (in pertinent part) - - "The Program language is not to be read in the same light as a commercial insurance policy as a contract of adhesion, *but is to be interpreted and applied with its legislative intent and purpose as well as the reasonable expectation of the State employees for whom it provides medical benefits . . .* As with other insurance contracts, terms of the State benefits contracts excluding or limiting coverage are to be scrutinized with care. *If the language supports two interpretations, the one favoring coverage is to be adopted.*" Id. at 524-25 (emphasis added).

Here, Respondents' utter failure to include exclusionary language within Petitioners' April 5, 2019 notes with respect to the applicability of the loan funding ratio to Petitioners' long-term financing (when the short-term funding ratio was 100% "Fund Portion"/0% "I-Bank Portion") warrants this Court's reversal of Respondents' Final Decisions. If Respondents did not prepare the terms of the notes in accordance with their budgetary obligations, that omission must be construed to Respondents' detriment rather than Petitioners. To the extent that there is any ambiguity within the notes and/or the January 2019 NJEIFP publication, New Jersey law requires that ambiguity to be construed in Petitioners' favor.

City of Orange Township, supra at 227 (determining that since a form contract was used, any ambiguity should be construed against the lender).

In light of the above, the terms of the parties' valid contracts for Project financing are clear that 75% of the funds would be provided from Respondent DEP, and 25% would be provided from Respondent New Jersey Infrastructure Bank. Therefore, this Court should not find that Respondents intended some other secret intent to apply to the clear and unambiguous terms set forth in the April 5, 2019 notes. To the extent that any ambiguity exists as to whether the note terms would apply to long-term funding, the ambiguity is explained by Petitioners' bond counsel's August 6, 2021 certification [963-968a] and the January 2019 NJEIFP publication [102-104a], which is the only relevant publication to the notes executed in April 2019. The Court should not interpret the terms of the notes differently than any other binding contract between a lender and borrower. A commercial lender would undoubtedly be precluded from unilaterally adjusting a similar critical term of an executed agreement. Moreover, Respondents drafted the terms of the April 5, 2019 notes. Any purported ambiguity to the language utilized in said notes must be strictly construed against Respondents, not Petitioners. Likely due to the fact that Respondents recognized their drafting "mistake" and that any purported ambiguity in the language of the notes must legally

be construed again their position, they blatantly misrepresented that the terms of the notes provide that "up to" 25% of the Principal would be funded by Respondent New Jersey Infrastructure Bank, when the notes in fact utilize the language "equal to." [1138a]. Accordingly, Petitioners have satisfied the third element for a breach of contract cause of action, in that Respondents have unlawfully refused to abide by their funding obligations reflected in the notes.

With respect to the fourth element of a breach of contract claim (the defendant's breach, or failure to do what the contract required, caused a loss to the plaintiff), Petitioners had relied upon the 75% "Fund Portion"/25% "I-Bank Portion" ratio to ascertain their anticipated total costs of the Project. [967a]. Respondents' failure to abide by the established loan funding ratio and unilaterally changing same to a 50% "Fund Portion"/50% "I-Bank Portion" funding ratio will result in increased financing costs of over $1 million to Petitioners. [968a]. As such, Respondents' breach will undoubtedly cause a significant loss to Petitioners' taxpayers in the form of additional interest payments.

In sum, Petitioners respectfully request this Court to reverse Respondents' Final Decisions and remedy Respondents' breach of the loan funding ratio established in the April 5, 2019 notes by ordering that all loans drawn for the Project will be financed at the 75% "Fund Portion"/25% "I-Bank Portion" rate.

CONCLUSION

Based upon the foregoing, Petitioners-Appellants Borough of Madison and Borough of Chatham respectfully request that the Court reverse the Final Decisions of Respondents DEP and New Jersey Infrastructure Bank in their entirety, and reinstate the 75% "Fund Portion" and 25% "I-Bank Portion" funding ratio term for all of the Project's long-term financing.

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Dated: July 11, 2023

BOROUGH OF MADISON AND BOROUGH OF CHATHAM, Appellant, v. NEW JERSEY INFRASTRUCTURE BANK AND NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, Respondent.	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000970-22 Civil Action ON APPEAL FROM FINAL AGENCY DECISIONS

BRIEF OF RESPONDENTS NEW JERSEY INFRASTRUCTURE BANK AND NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
Dated: September 5, 2023

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PRELIMINARY STATEMENT

At issue here is the relative amount of funding provided by the Department of Environmental Protection (DEP) and the New Jersey Infrastructure Bank (I-Bank) (collectively "the Water Bank"), i.e. the "funding ratio," for the Borough of Madison and Borough of Chatham's long-term Water Bank loans. The funding ratio dictates the interest rates supplied by each State agency to the loans.

On appeal is the I-Bank and DEP's Final Decisions concluding that the Long-Term Program funding ratio applicable to Madison and Chatham's Water Bank loans for a water pollution control project is as follows: 50% DEP funding at zero-interest and 50% I-Bank funding at market rate interest. Madison and Chatham contend that the I-Bank and DEP unilaterally changed the Long-Term Program funding ratio and argue that a ratio of 75% zero-interest and 25% market rate interest should apply. As their brief illustrates, Madison and Chatham fundamentally misunderstand the Water Bank Financing Program and seek a funding ratio which never applied to any funding for their project, nor to any other similarly situated Water Bank project. As required by the statutes, program documents, and regulations, I-Bank and DEP reasonably determined the Long-Term Program funding ratio applicable to Madison and Chatham's project. The funding ratio Madison and Chatham pursue is inconsistent with the

heavily regulated Water Bank Financing Program and would force I-Bank and DEP to implement a funding ratio contrary to the law. DEP and I-Bank's decisions should be affirmed.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

I. Overview of the Water Bank Financing Program

The I-Bank and DEP jointly operate the New Jersey Environmental Infrastructure Financing Program (the "Water Bank Financing Program" or "Water Bank"). The relative roles and responsibilities of the I-Bank and DEP are laid out in an Interagency Agreement. (Pa1097-1107). The Water Bank provides low-cost financing packages for eligible environmental infrastructure projects through two financing programs: (i) the Short-Term Construction Financing Program (the "Short-Term Program") and (ii) the Long-Term Base Financing Program (the "Long-Term Program"). (Pa1019; Pa1131-1132). There are two primary sources of Water Bank Financing for water pollution control projects: the Clean Water State Revolving Fund (CWSRF) and proceeds of I-Bank bonds. The CWSRF is managed by DEP in accordance with federal requirements and the CWSRF federal grant to the DEP from the United States Environmental Protection Agency (EPA). Fundamentally, this dispute centers

[1] Because the procedural history and facts are closely related, they are combined for efficiency and the court's convenience.

on the funding ratio, namely the amount of DEP CWSRF money versus the amount I-Bank bond or other money that will fund Madison and Chatham's long-term loans; differing interest rates accompany each.

The Water Bank's policies are set each State Fiscal Year (SFY). This includes the financing terms and conditions for short-term and long-term loans, established by statutorily required documents: the Intended Use Plan (IUP), the January Report[2], and the Financial Plan (also referred to as the May Report) (collectively, the "Water Bank Financing Program Documents").

The DEP is responsible for developing and submitting the IUP and the January Report each year to the EPA and the State Legislature. For each SFY, the DEP Commissioner develops (i) a Priority System and (ii) a Project Priority List, which establish the funding policies of the Water Bank. 33 U.S.C. § 1386(c); N.J.S.A. 58:11B-20(a); N.J.A.C. 7:22-3.7 and -4.7; (Pa573; Pa1019-1020). The DEP develops an IUP, including the criteria and method for distributing Water Bank funds and federal grant funds, and outlines the goals of the program. The DEP also develops the Priority System and Project Priority List, and includes them in the IUP. As a prerequisite for the DEP's receipt of

[2] DEP submits the Priority System, ranking criteria, priority list, and funding polices for environmental infrastructure projects to be financed by the Water Bank to the State Legislature in January for the upcoming SFY (the "January Report"). N.J.S.A. 58:11B-20.

its CWSRF capitalization grant award, the IUP must be prepared annually and is subject to public comment and review before it is submitted to the EPA.

The Priority System establishes a ranking methodology which prioritizes the projects eligible for financial assistance through the Water Bank. N.J.A.C. 7:22-3.7(a), -4.7(a). The Project Priority List identifies and "presents the projects initially eligible for funding." Ibid. The IUP details how the State will use the federal funds, establish Project Priority Lists, and ultimately review and approve projects for funding. N.J.A.C. 7:22-3.7(a), -4.7(a); 33 U.S.C. § 1386(c). Each SFY, the Proposed Priority System, IUP, and Project Priority List are the subject of at least one public hearing and one public comment period. N.J.A.C. 7:22-3.7(b) and -4.7(b). DEP publishes the Proposed Priority System, IUP, and Project Priority List for public comment. (Pa1019). After the public comment period, DEP submits the IUP, containing the final Priority System and the Project Priority List, to the EPA for approval. N.J.A.C. 7:22-3.7(a); 33 U.S.C. § 1386(c).

The I-Bank is responsible for developing and submitting to the State Legislature a financial plan (the Financial Plan or the May Report) on or before May 15th of each year, designed to implement financing of projects on: (1) the clean water project priority list, which may be identified for a short-term loan or a long-term loan in the future; and (2) the clean water project eligibility list,

which includes all projects that have been identified for long-term funding. N.J.S.A. 58:11B-20, -21 and -21.1. The Financial Plan must include the anticipated rate of interest, or methodology to calculate such, for both the Short-Term Program and the Long-Term Program. N.J.S.A. 58:11B-21. The State Legislature must approve the Financial Plan by way of a concurrent resolution, and then enact separate appropriation bills for the I-Bank and DEP.[3] N.J.S.A. 58:11B-22; N.J.S.A. 58:11B-20(a)(2).

A. Short-Term Financing Program

Under N.J.S.A. 58:11B-9(d), the I-Bank is authorized to enter into short-term or interim loans for projects identified and "eligible for approval" under N.J.S.A. 58:11B-20 and 58:11B-9(d). See also N.J.S.A. 58:11B-20 (discussing the "Interim Clean Water Financing Program"). While DEP is not authorized to enter into short-term loans, it may nonetheless provide CWSRF funding for the

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[3] E.g., 2019 appropriations:
L. 2019, c. 192 and c. 193
njleg.state.nj.us/2018/Bills/PL19/192_.PDF
njleg.state.nj.us/2018/Bills/PL19/193_.PDF
2020 appropriations:
L. 2020, c. 48 and c. 49
njleg.state.nj.us/2020/Bills/PL20/48_.PDF
njleg.state.nj.us/2020/Bills/PL20/49_.PDF
2021 appropriations:
L. 2021, c. 21 and c. 22
njleg.state.nj.us/2020/Bills/PL21/22_.PDF
njleg.state.nj.us/2020/Bills/PL21/21_.PDF

loans. DEP also reviews the projects.

After a project is listed in the January Report priority list, the DEP must certify a project as eligible before an applicant may receive a short-term loan from the I-Bank. N.J.S.A. 58:11B-9(d). For short-term project financing, DEP certification is required of either: (1) an engineering contract for funding the planning and design phase of a short-term loan to be followed by certification of a construction contract before the construction phase is funded; or (2) a construction contract for a construction-only short-term loan. All projects must receive certification of a construction contract to be eligible for long-term Water Bank financing. The certification of the engineering contract signifies that the contract meets certain requirements of the CWSRF and Water Bank Financing Program, including procurement requirements, while certification of the construction contract signifies that the contract meets all the requirements of the CWSRF and Water Bank Financing Program. (Pa209-210). Significantly, long-term funding ratios are determined upon construction contract certification. (Pa685).

The Short-Term Program is structured as a note purchase program whereby the borrower issues, and the I-Bank purchases, a promissory note, which establishes and secures the borrower's loan repayment obligation to the I-Bank. (Pa1133). Interest on the Short-Term note is established in accordance

with the terms contained in the Financial Plan, the I-Bank's authorizing resolution for the Short-Term Program for each State fiscal year, and the borrower's Short-Term Note. (Pa209). The borrower is not required to pay principal or interest (if applicable) until conversion to long-term financing (or the short-term note reaches maturity). (Pa209). Participation in the Short-Term Program is in anticipation of the subsequent qualification for, and receipt of, long-term financing from the Water Bank Financing Program. N.J.S.A. 58:11B-9(d). Per the Financial Plan, long-term financing is available for projects which completed construction with limited exceptions. (Pa218 ; Pa220; Pa690).

Relevant here, Madison and Chatham's Short-Term Notes were written in accordance with the Short-Term Program for SFY19, the year in which the short-term loan was closed. Section (2)(b) of each Short-Term Note sets forth the respective Madison and Chatham's representations that the issuance of the Short-Term Note is "for the purpose of financing the Costs of the Project." (Pa112; Pa140). The exhibits attached to the Short-Term Notes evidence the amount approved by the DEP against which Madison and Chatham could draw down funds. (Pa109; Pa63; Pa1022). These exhibits were updated at various stages of the Project. (Pa120-134; Pa148-162; Pa175-185).

Section 3(a) of each Short-Term Note sets forth the respective covenants for Madison and Chatham, in which each municipality agrees that it will

undertake and complete the conditions precedent, identified by I-Bank, relating to participation in the "Anticipated Financing Program" in order to qualify for an "Anticipated Long Term Loan." (Pa113; Pa141). The "Anticipated Financing Program" is defined as "the financing program of I-Bank, pursuant to which I-Bank will issue its I-Bank Bonds for the purpose of financing, on a long-term basis, the Project and other projects of certain qualifying borrowers." (Pa108; Pa136). "Anticipated Long Term Loan," is defined as "the long-term loan made by I-Bank to the Borrower from the proceeds of its I-Bank Bonds, as part of the Anticipated Financing Program." Ibid.

Section 4(a) of each Short-Term Note details how "[t]he I-Bank will effectuate the Loan to the Borrower by making one or more disbursements to the Borrower after receiving a Loan Disbursement Requisition" which has been approved by an authorized officer of the I-Bank. (Pa115; Pa143). "Loan" is defined in Section 1 as "the loan of the Principal, made by I-Bank to the Borrower to finance or refinance a portion of the Cost of the Project, [a]s evidenced by this Note." (Pa103; Pa138)

Section 4(a) goes on to provide: "On the Maturity Date, the Borrower shall repay the Loan to the I-Bank in an amount equal to: (i) the Principal; (ii) the Interest; (iii) the Administrative Fee, if any; and (iv) any other amounts due and owing pursuant to the provision of this Note." (Pa115; Pa33; Pa143).

As set forth therein, the interest that may accrue on a Short-Term Note is based on the source of funds used for the Principal of the Short-Term Note: I-Bank Funds or DEP funds. "Interest" is defined in Section 1 of each Short-Term Note as "[t]he interest charged on the outstanding Principal of the Loan at a rate of (a) with respect to I-Bank Portion of the Principal, the applicable I-Bank Portion Interest Rate and (b) with respect to the Fund Portion of the Principal, 0.00%, and payable by the Borrower to I-Bank (i) on the Maturity Date . . . ." (Pa110; Pa138). The "Principal" means "the principal amount of the Loan . . . ." (Pa111; Pa139). The "Loan" means the loan of the Principal, made by the I-Bank to the Borrower to finance or refinance a portion of the Cost of the Project, as evidenced by this Note." (Pa110; Pa138).

The I-Bank may use various funding sources for the short-term loans, including I-Bank's own operating or borrowed funds and DEP CWSRF funds (also known as "the Fund"). This is reflected in the terms of the Short-Term Notes. The I-Bank Portion of the Principal of the Short-Term Notes bears interest at the "I-Bank Portion Interest Rate" which includes both a zero-interest scenario and a market-rate scenario. (Pa1137-1138). The Fund Portion of the Principal of the Short-Term Note bears zero interest. Thus, under the Short-Term Notes, the I-Bank could make up to 25% of the Short-Term loan from I-

Bank's interest-bearing sources, while between 75% and 100% of each loan would be made from zero-interest funds from DEP and/or I-Bank sources. Ibid.

B. Long-Term Program Financing

As noted above, the funding ratio for long-term loans as between the I-Bank and DEP is strictly dependent on the State fiscal year that the borrower receives the construction contract certification and the funding policies in the Water Bank Program Financing Documents for that State fiscal year. (Pa209; Pa685). After construction contract certification and once construction has commenced, the DEP Commissioner may include a project on the project eligibility list for long-term funding by the Water Bank. Under N.J.S.A. 58:11B-20, the DEP Commissioner must develop a clean water project eligibility list for long-term funding by the Water Bank which includes the aggregate amount of funds to be authorized for these purposes. N.J.S.A. 58:11B-20. On or before May 15th of each year, I-Bank must submit the Financial Plan and the clean water project eligibility list for the ensuing State Fiscal Year to the State Legislature. N.J.S.A. 58:11B-20 and -21. To become effective, the Financial Plan must be adopted by concurrent resolution of the Legislature and the project eligibility list must be introduced in the form of legislative appropriations bills and approved by the Legislature on or before July 1 of each year. N.J.S.A. 58:11B-20(b) and -22. An additional clean water

project eligibility list in the form of an appropriations bill may be submitted to the Legislature by October 15 of each year. N.J.S.A. 58:11B-20(a)(2).

Generally, a borrower will not close on its long-term loans until after construction completion. (Pa238; Pa430; Pa828; Pa838). The long-term loans are memorialized in two separate loan agreements, one with the I-Bank (Trust Loan) and one with DEP (Fund Loan), reflecting the financing terms established at the time construction contract certification are finalized when the long-term loan closing occurs. (Pa699; Pa882).

II. Dispute over the Long-Term Funding

A. Madison and Chatham's Short-Term Loans

In October 2018, both Madison and Chatham[4] applied to the Water Bank to obtain short-term funding for their Molitor Water Pollution Control Facility ("MWPCF" or the "Project").

In accordance with the process detailed above, the Project was identified on the 3rd Amended Project Priority List for SFY 2019 submitted to the State Legislature in January 2019. (Pa68; Pa468; Pa470). That same month, Madison and Chatham requested planning and design funding through the Short-Term Program as part of their Short-Term Notes. (Pa8-9; Pa120-126; Pa148-156).

[4] The "Madison-Chatham Joint Meeting" was formed to operate the MWPCF, but has no borrowing authority. As such, each municipality had to apply separately to the Water Bank for its loans.

On March 29, 2019, DEP certified the engineering contract relating to the planning and design for the proposed Project. (Pa1125-1126). Such costs were to be reimbursed based on DEP's approval of actual project invoices for planning and design services. (Pa123; Pa151). Pursuant to the SFY2019 Financial Plan, the planning and design phase funds of a Short-Term Program loan became available to an applicant upon: (1) DEP's certification that the proposed project is eligible under the CWSRF program (upon satisfaction of all Water Bank Program requirements), (2) confirmation that the applicant meets creditworthiness standards, (3) DEP's certification of the engineering contract, and (4) receipt of New Jersey Division of Local Governmental Services approval. (Pa209-210; Pa686).

On April 5, 2019, after DEP's certification of their engineering contract, Madison and Chatham issued their Short-Term Notes, in the aggregate amount of $7,500,000, with $4,770,000 allocated to Madison and $2,730,000 to Chatham. (Pa107-162). Madison and Chatham then started to receive funding only for that portion of the total loan applicable to the planning and design phase. (Pa9; Pa120-126; Pa148-156). Between April 2019 and August 2019, Madison and Chatham and DEP worked together to ensure the Project complied with all Water Bank technical requirements under N.J.A.C. 7:22. (Pa195; Pa1021). The DEP issued: its Environmental Decision Document on August 5, 2019,

approving the environmental planning information for the Project, an authorization to advertise the construction contract on October 10, 2019,and an authorization to award the construction contract on January 27, 2020, and then DEP certified Madison and Chatham's construction contract on February 18, 2020. (Pa164-173; Pa174-178; Pa180-184; Pa184-Pa185; Pa195; Pa1022). In accordance with the terms of the Financial Plan, Madison and Chatham's long-term financing terms were established upon construction contract certification. (Pa184-185; Pa196; Pa209; Pa685; Pa1024). After construction contract certification, the exhibits to the Short-Term Notes for Madison and Chatham were updated in April 2020 allowing Madison and Chatham to begin submitting requisitions and receiving disbursements under their Short-Term Notes for construction costs. (Pa1023).

The funding ratio in SFY2019 was different than that in SFY2020. (Pa210; Pa585-587; Pa690). Borrowers whose construction contract certifications occurred in SFY2019 were eligible for Water Bank long-term loans consisting of (a) 75% as a zero-interest loan from DEP, and (b) 25% as a market-rate loan from I-Bank. (Pa210; Pa235; Pa536; Pa828). Madison and Chatham, and any other borrowers whose construction contract certifications occurred in SFY2020, were eligible for long-term loans consisting of (a) 50% as a zero-interest loan from DEP, and (b) 50% as a market-rate loan from I-

Bank. (Pa586-587; Pa690). Both the January Reports and the Financial Plans for SFY2019 and SFY2020 establish that the date of construction contract certification is the operative date for determining the borrower's long-term financing terms. (Pa209; Pa225; Pa685; Pa687).

On April 16, 2020, Raymond M. Codey, Madison Borough Administrator, contacted Kerry Kirk Pflugh, DEP Director of the Office of Local Government Assistance, to discuss the process for converting Madison and Chatham's Short-Term Notes into long-term funding. (Pa12). Pflugh advised that the long-term financing ratio was being offered at "50/50 DEP/I-Bank ratio for the financing of this project and not the requested 75/25 ratio." (Pa12-13). In response to the emails dated April 16 and April 30, 2020, the I-Bank and DEP issued its Joint Decision Letter, pursuant to N.J.A.C. 7:22-4.45(a) and -3.45(a), dated October 2, 2020. (Pa13; Pa190-198). The Decision Letter concluded that:

> [T]he long-term financing terms that would apply if Applicants' short-term CFP Loans were converted to long-term loans are those stated in the SFY2020 Water Bank Financing Program Documents: 50% low-interest long-term loan from the I-Bank and 50% zero interest long-term loan from the Department. The Water Bank Financing Program Documents are clear that engineering contract certification does not count for establishing the terms and conditions of long-term financing. Rather, construction contract certification is the operative date for setting long-term financing terms.
>
> [Pa197.]

Madison and Chatham were advised of the right to appeal the Decision Letter, pursuant to N.J.A.C 7:22-4.45 and -3.45. (Pa197-198). By letter dated October 16, 2020, Madison and Chatham requested an Adjudicatory Hearing challenging the Decision Letter. (Pa656-657). The I-Bank and DEP referred Madison and Chatham's hearing request to the Office of Administrative Law (OAL) as two separate matters. (Pa648-672). By stipulation dated July 2, 2021, the two matters were consolidated, with DEP as the predominant-interest agency, under EER 03753-2021N. (Pa2).

The parties cross-moved for summary decision based on undisputed facts of record. (Pa3). Madison and Chatham's submission included a certification from Steven L. Rogut, Esq., their bond counsel, along with various attachments. (Pa963-1017). The I-Bank and DEP included certifications of Gene Chebra, Assistant Director of the Municipal Finance and Construction Element within the Division of Water Quality in the DEP, and Lauren Kaltman, I-Bank's Chief Financial Officer, with attachments. (Pa1018-1126; Pa1127-1236).

On November 4, 2021, Madison and Chatham borrowed an additional $2,000,000 to finance the Project, bringing the total of the short-term loan to $9,500,000. (Pa12). During the pendency of the OAL proceeding, the parties structured Madison's and Chatham's long-term financing in a manner that

preserved both parties' positions. (Pa1330-1339). The final long-term financing terms will be dependent on the outcome of the appeal. Ibid.

B. Initial Decision

On March 17, 2022, Administrative Law Judge (ALJ) Gail M. Cookson issued an initial decision granting summary decision in favor of the I-Bank and DEP, finding that the long-term financing ratio of 50/50 was applicable. (Pa1-27). The ALJ found that "[the I-Bank and DEP] have clearly demonstrated that their joint decision and announcement that Madison and Chatham's long-term financing, if and when it goes into effect, will bear the more standard 50/50 ratio once again and uniformly applicable to Program participants [so the Decision Letter] was correct as a matter of law." (Pa24). In determining the applicable funding ratio, the ALJ concluded that "the funding ratio as between I-Bank and [DEP], [is] strictly dependent on the specific State fiscal year during which the borrower receives the construction contract certification." (Pa16). Drawing a comparison, the ALJ found "in the nature of a construction loan that rolls over into a mortgage, an infrastructure authority borrower does not receive long-term funding until after construction completion." Ibid.

In assessing the Water Bank Financing Program Documents, the ALJ found that:

> Long-term financing eligibility is subject to the borrower's timely satisfaction of all applicable conditions precedent to long-term conversion, including construction certification . . . . Furthermore, even after these conditions have been satisfied, the Fund Loan and I-Bank Loan must still receive the State Legislature's prior approval before the projects may obtain long-term financing. N.J.S.A 58:11B-20.
>
> [Pa16 (emphasis added).]

In response to Madison and Chatham's claim that the definitions in the Short-Term Note somehow reflected an agreement on long-term loan terms, the ALJ explained that the definitions contained in the Short-Term Notes "are drafted to reflect all possible funding sources and attendant interest rate scenarios for all Short-Term Program participants, including Madison and Chatham." (Pa17). "There is absolutely no relationship between these definitions and the funding ratios of the anticipated long-term financing; nor is there a genuine ambiguity in the finance documents." Ibid.

The ALJ found their "bare reliance on the definition section of the Short-Term Program Notes is unpersuasive." (Pa16). "In other words, Madison and Chatham are bootstrapping one generality on top of another without reference to any contractual term guaranteeing them a particular long-term funding ratio." (Pa19). The ALJ determined "Madison and Chatham are simply wrong that the generic definitions drafted into the Short-Term Program Notes must be

construed against [the I-Bank and DEP] and bind them on the anticipated long-term loans funding ratios." (Pa24). She rejected Madison and Chatham's argument about extrinsic evidence and ambiguity. (Pa17).

The ALJ also found unpersuasive Madison and Chatham's claim of lack of notice because of "every regulatory document." (Pa20). Indeed, public notice of the potential upcoming change in the funding ratio was "first provided in the IUP dated November 13, 2017." (Pa22; Pa1020; Pa1121-1123). Then, a public hearing was noticed and occurred on December 6, 2017. [5] (Pa22). And finally, on December 19, 2018, DEP posted a notice of an open public comment period and, on January 9, 2019, held a public hearing concerning changes to the Program.[6] (Pa22; Pa599; Pa619; Pa1020-1021). The ALJ found that DEP proposed to change the funding ratio package from the 75% DEP zero-interest loan / 25% I-Bank market-rate loan to a 50% DEP zero-interest loan / 50% I-Bank market-rate loan. (Pa23; Pa619; Pa1020).

What's more, on March 28, 2019, the SFY2020 IUP and the Project Priority List were finalized and "emailed directly to [Madison and Chatham]", as well as all interested townships, reflecting the change to the 50% DEP zero-

[5] Madison and Chatham did not attend the hearing nor submit any comments. (Pa1020).

[6] Madison and Chatham again did not attend the public hearing nor comment on the proposal. (Pa599-601; Pa1021).

interest loan /50% I-Bank market rate loan funding ratio for SFY 2020. (Pa23; Pa583-584; Pa587; Pa1021; Pa1025-Pa1030). And, the I-Bank's Financial Plan for SFY 2020, submitted in May of 2019, approved by the Legislature on June 27, 2019, and posted on the I-Bank's website also reflected this change to the funding ratio for SFY2020. (Pa690).

Madison and Chatham also claimed "that they were never advised that their loan funding ratio would be determined as of the State fiscal year within which their construction contract was certified." (Pa22). The ALJ rejected this argument, observing

> there was no requirement that they receive a personalized invitation from the [I-Bank and DEP] to apply for construction certification by a certain date, even assuming they were ready for such certification. The primary principal [sic] at issue in this dispute is that "ignorance of the law is no excuse." It was always readily determinable, knowledge of which must be assumed or imputed to [P]etitioners, that the construction certification date was the critical moment on the issue of long-term loan finance terms. Moreover, every stage of preparation after their engineering contract certification and before their construction certification also took place in SFY 2020, so there can be no argument that "if only" they had been certified before February 2020 the ratio would have been more favorable.
>
> [Pa21.]

On September 12, 2022, DEP issued its final decision, adopting the ALJ's initial decision with factual modifications, expanding and clarifying facts contained in the initial decision, (Pa35-54). On October 28, 2022, I-Bank issued its final decision, adopting the ALJ's legal determination with factual modifications, expanding and clarifying facts contained in the initial decision. (Pa28-31).

Madison and Chatham appealed. Pursuant to Rule 2:5-1(d), on January 10, 2023, DEP filed an amplification as within time. (Pa55-59). The Commissioner clarified his discussion of the Short-Term Note, stating that "the reference to 'updating the ratio' was not a reference to updating any ratio applicable to the short-term loans (short-term Notes) issued to each [Petitioner] because no ratio was ever established in the short-term Notes or at any time prior to the certification of the construction contract for Madison and Chatham's project in February 2020." (Pa57-58). On February 1, 2023, the I-Bank filed its amplification as within time. (Pa34). The I-Bank concurred that the Short-Term Note did not establish any funding ratio for long-term financing. (Pa32-33).

ARGUMENT

POINT I

BECAUSE MADISON AND CHATHAM'S CONSTRUCTION CONTRACT WAS CERTIFIED IN SFY 2020, THE I-BANK AND DEP CORRECTLY DETERMINED THE LONG-TERM LOAN FUNDING RATIO IS 50/50.

The DEP and I-Bank's decisions about Madison and Chatham's long-term funding ratios are consistent with governing law and are supported by the record. "Courts have but a limited role to play in exercising judicial review over the actions of other government agencies." Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor, 125 N.J. 567, 595 (1991); Gerba v. Bd. of Trs., Pub. Emps.' Ret. Sys., 83 N.J. 174, 189 (1980). An administrative agency's determination is presumptively correct, and on review of the facts, a court will not substitute its own judgment for the agency's where the agency's findings are supported by sufficient credible evidence. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962). Thus, if a court "is satisfied after its review that the evidence and the inferences to be drawn therefrom support the agency head's decision, then it must affirm even if the court feels that it would have reached a different result." Campbell v. New Jersey Racing Comm'n, 169 N.J. 579, 587 (2001) (citing Clowes v. Terminix Int'l, Inc., 109 N.J. 575, 588 (1988))

This court also "afford[s] substantial deference to an agency's interpretation of a statute that the agency is charged with enforcing." Richardson v. Bd. of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 196 (2007) (citing R & R Mktg., LLC v. Brown-Forman Corp., 158 N.J. 170, 175 (1999)). Such deference is particularly apropos here where the DEP and I-Bank administer complex and specialized programs because they bring "experience and specialized knowledge to [their] task of administering and regulating a legislative enactment within [their] field of expertise." Piatt v. Police & Firemen's Ret. Sys., 443 N.J. Super. 80, 99 (App. Div. 2015) (quoting In re Election Law Enforcement Comm'n Advisory Op. No. 01-2008, 201 N.J. 254, 262 (2010)). Thus, a party who challenges the validity of an agency's administrative decision "bears a heavy burden of . . . demonstrating that the decision was arbitrary, unreasonable or capricious." In re Tax Credit Application of Pennrose Props. Inc., 346 N.J. Super. 479, 486 (App. Div. 2002); accord Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011). Madison and Chatham cannot shoulder that burden.

Here, the I-Bank and DEP decisions comport with applicable law and are based on substantial credible evidence in the record. For all project sponsors with short-term loans outstanding for planning and design, the I-Bank and DEP were required to offer the 50/50 funding ratio for the Long-Term Program for

construction contracts certified in SFY2020. The ALJ correctly analyzed this matter, and the I-Bank and DEP reasonably adopted her initial decision with factual modifications. The SFY2019 Financial Plan expressly states that "[f]or [short-term loans] issued upon certification of engineering contracts, long-term financing terms are established upon certification of the construction contract." (Pa20). The SFY2020 Financial Plan is consistent with this articulation of this program rule. Madison and Chatham received Short-Term loans issued upon certification of their engineering contract for planning and design in April 2019. (Pa10). As such, under both the SFY2019 Financial Plan as well as the SFY2020 Financial Plan, Madison and Chatham's long-term financing terms were established upon certification of the construction contract. (Pa13).

It is undisputed that Madison and Chatham's construction contract was certified on February 18, 2020, during SFY2020. (Pa12). As such, the terms of Madison and Chatham's long-term loans are governed by the SFY2020 Water Bank Financing Program Documents. (Pa23-24). Accordingly, upon Short-Term Note conversion, Madison and Chatham were required to receive a long-term financing package consisting of a 50% zero-interest loan from DEP and a 50% market-rate loan from the I-Bank. Thus, DEP and the I-Bank's decisions comport with the process established by the Legislature and the governing Water Bank Financing Program Documents, including the Financial Plans approved by

the Legislature. Naturally, the terms and definitions applicable to the long-term loans could not have been established when the short-term loans were executed, because that execution occurred prior to construction contract certification, legislative approval, and eligibility for long-term loans. (Pb 2; 9; 10).

Madison and Chatham point to the SFY2020 January Report for the proposition that the "majority of projects that received short-term loans in recent years will receive long-term loans funded 75% with DEP funds at 0% interest and 25% with I-Bank AAA market rate funds." (Pb27). This is so because even though the long-term funding ratio had changed in SFY2020 to a 50/50 ratio, all outstanding short-term loans which had a construction contract certified prior to SFY2020 would receive the long-term loan funding ratio of the fiscal year of construction contract certification. Because short-term loans have maturities up to three full fiscal years for construction, most outstanding short-term loans at that time were construction contract certified prior to SFY2020, under program years which offered a 75/25 ratio. Madison and Chatham lacked construction contract certification until SFY2020; thus, they received that fiscal year's 50/50 funding ratio consistent with the SFY2020 Financial Plan.

Madison and Chatham also point to a section of the SFY2019 January Report in support of their claim that long-term loan financing terms were established when they issued their Short-Term Notes to I-Bank. (Pb9-10). "With

limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans: for example, credit worthiness approval; Division of Local Government Services approval; the State's commitment of long-term funding at the time of certification of each operable project segment; and the applicability of all program benefits (e.g. principal forgiveness)." (Pa84). Madison and Chatham read a selected phrase outside the context of the entire paragraph referenced as well as the entirety of the pertinent Water Bank Program Financing Documents.

Madison and Chatham focus on the beginning of the sentence, which provides that "[w]ith limited exception, all relevant [Water Bank Financing] Program terms and conditions are established at the time of the issuance of short-term loans . . . ." (Pb35-36; Pa840). However, this paragraph goes on to state that "long term funding" is committed at the time of certification of each operable segment. (Pa11; Pa225). An "operable segment" is defined in the Water Bank Financing Program Documents as "at least one project component that is capable of independent operation and tes[t]ing." Ibid. Only the construction components of a project are "capable of independent operation and testing." (Pb11). Thus, only the construction components of a project, and not engineering and design services, can be operable segments as engineering and design services are not capable of independent operation and testing.

The Water Bank Financing Program Documents explicitly provide that the long-term financing terms, including the ratio of funding as between DEP and I-Bank, are established when a construction contract is certified. Pa135 n.1. As discussed above, Madison and Chatham's construction contract was certified in SFY2020, and as such, the SFY2020 long-term funding ratio applies. The agencies' decisions should be affirmed.

POINT II

THE SHORT-TERM NOTES COULD NOT HAVE GUARANTEED A LONG-TERM FUNDING RATIO BECAUSE LEGISLATIVE APPROVAL OF THE PROJECT FOR LONG-TERM FINANCING AND APPROPRIATION OF LONG-TERM LOAN FUNDS HAD NOT OCCURRED AT THE TIME THE SHORT-TERM LOANS WERE ISSUED.

Madison and Chatham argue that the Short-Term Notes guaranteed them long-term funding at a specified ratio. But, not only was there no ratio for long term funding set forth in the Short-Term Notes, as discussed in Point III below, there was no legislative approval for long term-funding at the time the Short-Term Notes were issued. Critically, legislative approval of projects for long-term funding and the appropriation of monies for such purpose is required before the I-Bank and DEP can provide such long-term funding.

N.J.S.A. 58:11B-21 requires that a Financial Plan be submitted to the Legislature for both Short-Term loans and Long-Term loans. The Financial Plan must include, among other things, "a list of loans to be made to local government units or private persons, including the terms and conditions thereof and the anticipated rate of interest per annum and repayment schedule therefor . . ." Ibid.

N.J.S.A. 58:11B-22 provides:

> a. [I-Bank] shall submit the financial plan required pursuant to section 21 of P.L.1985, c. 334 (C.58:11B-21) to the Secretary of the Senate and the Clerk of the General Assembly on the same day on or before May 15 of each year. The Secretary and the Clerk shall cause the date of submission to be entered upon the Senate Journal and the Minutes of the General Assembly, respectively.
>
> b. Unless the financial plan as described in the submission is approved by adoption of a concurrent resolution of both houses within the time period prescribed in this subsection, the financial plan shall be deemed disapproved and [I-Bank] shall not undertake any of the proposed activities contained therein...."
>
> [Ibid. (emphasis added).]

So, "on or before May 15 of each year" the Financial Plan submitted to the Legislature must "set forth a clean water project eligibility list for long-term funding by the trust and shall include the aggregate amount of funds to be authorized for these purposes." N.J.S.A. 58:11B-20(a)(2). "The clean water project eligibility list shall consist of clean water project priority list projects

certified by the department that have commenced construction and demonstrated a high likelihood of construction completion on or before the end of the ensuing fiscal year." Ibid. Under N.J.S.A. 58:11B-22, once the Financial Plan is submitted, it is subject to legislative "approv[al] by adoption of a concurrent resolution" or "the financial plan shall be deemed disapproved."

Following the Financial Plan's submission to the Legislature, "on or before July 1 of each year, the Legislature shall approve an appropriations act containing the clean water project eligibility list . . . which act shall include the authorization of an aggregate amount of funds of the trust to be expended for long-term loans and guarantees for the specific projects, including the individual amounts therefor, on the list." N.J.S.A. 58:11B-20(b). In addition, "[o]n or before October 15 of each year the trust may submit an additional clean water project eligibility list, to be introduced in each House in the form of legislative appropriations bills, . . . for their respective consideration." N.J.S.A. 58:11B-20(a)(2).

Further, N.J.S.A. 58:11B-20(c) mandates that the I-Bank "shall not expend any money for a long-term loan or guarantee during a fiscal year for any wastewater treatment system project unless the expenditure is authorized pursuant to an appropriations act . . .". The power to appropriate money lies exclusively with the Legislature. N.J. Const. art. IV,§1,¶1 and art. VIII,§2,¶2;

CWA v. Florio, 130 N.J. 439, 451 (1992); Camden v. Byrne, 82 N.J. 133, 148(1980); Karcher v. Kean, 97 N.J. 483, 489 (1984); City of East Orange v. Palmer, 52 N.J. 329, 337 (1968); Fitzgerald v. Palmer, 47 N.J. 106, 108(1966); Gallena v. Scott, 11 N.J. 231, 238-39 (1953). The Legislature's power over appropriations is absolute and our Supreme Court has found "there can be no redress in the courts" to compel a legislative appropriation. Camden, 82 N.J. at 141 (finding under the New Jersey Constitution, it was not a court's role to resolve conflicting claims between the state and governmental subdivision over entitlement to funds when only the Legislature can make appropriations).

Here, Madison and Chatham received no long-term funding guarantee nor was such long-term funding even possible when the Short-Term Notes were issued because the Legislature had not yet approved the project for long-term funding much less appropriated funds for such purpose. In May 2020, the SFY21 Financial Plan was submitted to the Legislature and adopted by concurrent resolution ACR183/SCR115; it identified Madison and Chatham on the project's eligibility list (ready for long-term financing).[7] N.J.S.A. 58:11B-20, -21 and 21.1. On July 1, 2020, the Legislature appropriated funding for Madison and Chatham's long-term loans. L. 2020, c. 48 and c. 49.[8]

[7] State Fiscal Year 2021 Financing Program Year Financial Plan, May 2020

In contrast, the funding for Madison and Chatham's short-term loans became possible upon on its inclusion in the Project Priority List for SYF 2019 contained in the January Report. L. 2018, c. 84 as amended by L. 2019, c. 30. In April 2019, there was an appropriation available to fund their short-term loans, but not long-term financing. L. 2018, c. 84 and c. 85.

Accordingly, there could have been no commitment for long-term funding at the time of the short-term loans, because no concurrent resolution approved the Financial Plan identifying Madison and Chatham's project on the project's eligibility list and no funds had been appropriated for their long-term loans. A finding otherwise would contravene not only statutory requirements, but also ignore our constitutional framework and the balance of powers.

POINT III

THE SHORT-TERM NOTES DO NOT CONTAIN AN AGREEMENT REGARDING LONG-TERM FUNDING TERMS.

Madison and Chatham's assertion the I-Bank and DEP should not be permitted to unilaterally change the terms of their Short-Term Notes is, as the ALJ found, "simply wrong." (Pa24). It is wrong because: 1) there were no terms governing long-term financing in their Short-Term Notes, and 2) the I-Bank and DEP faithfully applied the Water Bank program's long-term financing requirements to Madison and Chatham in the same way they were applied to all

other program borrowers. The terms Madison and Chatham claim the I-Bank and DEP changed did not exist in the Short-Term Notes and were not permissible under the governing Water Bank Financing Program Documents. Moreover, while DEP funds may be provided to I-Bank to fund Short-Term loans, only I-Bank is authorized to make the Short-Term loans, as was the case here. As such, there was no agreement of any kind between DEP and these borrowers when the short-term loans were made.

A. Madison and Chatham Wrongly Seek to Apply Interest Calculation Provisions of the Short-Term Note to Their Long-Term Financing.

As they did below, Madison and Chatham allege that "each note contains an unambiguous term with respect to the 75% Fund Portion/25% I-Bank Portion loan funding ratio . . . which was intended to apply to both short-term and long-term financing." (Pb35). They rely on the certification of their bond counsel, alleging that "the loan funding ratios established in the note documents would not change when the long-term financing occurred." (Pb28). As support, Madison and Chatham point to the defined terms: "Fund Portion," "I-Bank Portion," "I-Bank Portion Interest Rate," and "Interest." (Pb32-33).

Madison and Chatham reliance on these terms is misguided as the terms in the Short-Term Notes do not govern the long-term funding ratio upon conversion of the Short-Term Notes to long-term financing. Rather, these terms

on their face relate only to the interest to be charged on the Short-Term Notes themselves. Specifically, Section 4(a) of the Short-Term Notes explains that on the Maturity Date, the borrower must repay, among other things, the Principal and Interest on the Note. (Pa115; Pa143). Importantly, the interest due on the Short-Term Note was dependent on the source of funds used for the Short-Term Note, namely I-Bank Funds or DEP Funds. "Interest" is defined in Section 1 of the Short-Term Notes, and to determine the Interest due on the Short-Term Note, the terms "Fund Portion," "I-Bank Portion" and "I-Bank Portion Interest Rate," also defined in Section 1, must be used. (Pa150; Pa138).

These definitional terms refer only to the calculation of any interest that is charged on the outstanding principal of the short-term loan evidenced and secured by each Short-Term Note, and not to the conversion of such Short-Term Note to potential long-term funding at some indeterminate point in the future. (Pa1135-1136).[9] Those terms apply to the interest due on the Short-Term Notes. They have no bearing on the loans issued through the Long-Term Program, and

[9] Madison and Chatham also argue that as "evidence that the April 2019 notes establish a particular funding ratio," this court should look to a completely different note with a completely different borrower (Scotch Plains) entered into a year after Madison and Chatham's Short-Term Notes (a different program year with different governing Water Bank Financing Program Documents) and that note has some bearing on the matter at hand. (Pb11). It does not. The issues presented here relate solely to Madison and Chatham and the terms of their Short-Term Notes.

Madison and Chatham can point to no provision of their Short-Term Notes that supports their contention that these interest rate terms are "intended" to apply to both short-term and long-term financing.

Ostensibly to divert attention from the lack of support for their interpretation of the terms used in the Short-Term loan documents, without clear explanation, Madison and Chatham resort to claiming that the I-Bank and DEP submitted a "false certification" in the OAL relating to the Short-Term Note. (Pb24-25). But nothing in any certification presented by the I-Bank or DEP is false or incorrect. In any event, this allegation was not raised until now, and so it is not properly before the court.

Still, Madison and Chatham's claims of malfeasance relating to references of "up to" twenty-five percent instead of "equal to" twenty-five percent are unfounded. (Pb 26-27). The Department and I-Bank agree that the Short-Term Notes state the "I-Bank Portion" means an amount "equal to" twenty-five percent of the Short-Term loan. Kaltman's Certification acknowledged this. (Pa1136). Kaltman's certification goes on to explain that there are three potential sources of funding for the Short-Term program: certain I-Bank funds would bear 0% interest while the two other sources of I-Bank funds would bear interest at market rates. (Pa1137). As such, she notes, that "up to" 25% of the Short-Term loan funds may be from interest-bearing sources. (Pa1138). Far

from a misrepresentation of the terms of the Note, it is simply an acknowledgement that some of the I-Bank funding sources could come from 0% interest funding and some may come from market-rate interest bearing sources, and up to 25% of that I-Bank Portion could come from interest-bearing sources. Kaltman also explained that it is possible for 100% of the loan to come from non-interest-bearing sources (i.e. 75% from the 0% interest Fund Loan Portion and 25% from 0% interest I-Bank sources). (Pa1138). Again, none of this has any bearing on the long-term funding ratio, and is relevant only to the interest accrued on the Short-Term Note.

B. There Has Been No Breach of Contract.

This matter arose initially as a hearing request on a Joint Decision of DEP and the I-Bank setting forth the long-term funding ratio at issue here and not a breach of contract suit initiated in a non-administrative forum. Madison and Chatham argue that if the I-Bank and DEP unilaterally changed terms, it must have breached the terms of the April 5, 2019 notes. (Pb34-45). This argument must be cast aside because as discussed above, the April 5, 2019 notes did not establish the long-term loan financing terms, so DEP and the I-Bank could not have breached a provision that did not exist. As the I-Bank and DEP explained in their Final Decisions – no long-term financing terms existed in the Short-Term Note. This is simply not a situation where the I-Bank and DEP unilaterally

changed the long-term financing terms. Ultimately, Madison and Chatham's breach of contract argument is another example of their circular reasoning, which is built upon their profound misunderstanding of the terms of the Short-Term Notes.

Under N.J.S.A. 25:1-5(f), loans in excess of $100,000 and made by a person whose business it is to extend credit or loans falls under the statute of frauds and must be in writing. See Raiczyk v. Ocean Cnty. Veterinary Hosp., 377 F.3d 266, 270 (3d Cir. N.J. 2004). Further, any long-term loans must be memorialized in new and separate documents. These new and separate agreements, also known as the Fund Loan Agreement and the I-Bank Loan Agreement, which do not exist until a borrower converts a short-term loan to a long-term loan, establish the loan funding ratio for the long-term loans. Since Madison and Chatham's Short-Term Program loans were not converted to long-terms loans in SFY2019, no long-term written loan agreements existed at that time. As such, there can be no breach of contract.[10]

[10] For the same reasons, the arguments raised by Madison and Chatham pertaining to N.J.A.C. 7:22-3.20 "Fund loan agreement amendments" are irrelevant. (Pb27-28). Not only did I-Bank and DEP not change the terms of the Short-Term Note, these rules pertain to "Fund Loans," which are the long-term DEP loans. (Long-term I-Bank loans are referred to as "Trust Loans.") Madison and Chatham's Short-Term Note is not a long-term DEP loan and thus these rules are inapplicable here.

The I-Bank and DEP followed the laws governing the Water Bank and adhered to the terms of the Water Bank Financing Program Documents. Their final decisions should be affirmed.

POINT IV

THE CHANGE IN FUNDING TERMS WAS PROPERLY NOTICED.

Madison and Chatham assert that they were not provided with notice of the change of the long-term funding ratio. (Pb30-31). The record demonstrates otherwise. (Pa20). The ALJ found that "every regulatory document gave notice to [Madison and Chatham] of the trigger that would determine the terms of the long-term loans that were 'anticipated' but not yet executed" (specifically referring to the Financial Plan/May Report). Ibid. The ALJ also found that "it was always readily determinable, knowledge of which must be assumed or imputed to Madison and Chatham, that the construction certification date was the critical moment on the issue of long-term loan finance terms." (Pa29). Madison and Chatham's ignorance cannot serve to reshape the manner in which financing terms for the Long-Term Program are determined.

While the ALJ pointed out that there was no requirement to provide Madison and Chatham a "personalized invitation" explaining the change in program terms, the program, in fact, emailed both a notice of the IUP change

with a link to the IUP itself. Madison and Chatham thus received notice, as required by N.J.A.C. 7:22-3.7(b) and -4.7(b). What's more, the public was provided with notice of the proposed change on multiple occasions. The first notice of a possible change to the 50/50 ratio was on November 13, 2017, when the I-Bank and DEP posted notice of a public comment period and advised applicants that "the Program is also considering a change to the base program shares for the FFY19/SFY20 program to return to the financing package wherein 50% of the allowable project costs are provided from DEP and the remaining allowable project costs financed by [I-Bank]." (Pa1123). Then, the I-Bank and DEP held a public hearing on December 6, 2017. (Pa1120).

The SFY2020 IUP established the changes in the funding ratio. (Pa587). It provided for long-term funding at 50% market rate interest financing from the I-Bank, and 50% zero-interest financing from DEP. (Pa586-589). This was a change from the financing terms in the SFY2019 IUP, which provided a funding ratio of 25% market rate interest financing from the I-Bank, and 75% zero-interest financing from DEP. (Pa536). The proposed SFY2020 IUP included these changes to the 50/50 loan funding ratio and was subject to both public comment and a hearing. Thus, Madison and Chatham had ample notice that the funding ratio would be changing for all program participants who had short-term loans outstanding for planning and design but had not yet received construction

certification. The ratio changed from a 75% DEP zero-interest/ 25% I-Bank market rate interest in SFY2019 to a 50% DEP zero-interest /50% I-Bank market rate interest in SFY2020. That Madison and Chatham assumed that the change did not pertain to them is of no moment.

Indeed, on December 19, 2018, the Notice of Public Comment for the proposed changes to the funding packages was posted on DEP's website. (Pa599; Pa619-620; Pa1020). The December 2018 Notice advised that "[t]he DEP and [I-Bank] have proposed several changes to the CWSRF program for FFY2019/SFY20 in recognition of concerns that the CWSRF Programs face [] a potential shortage of available funds to meet projected future needs at the current rate." (Pa619-620). This Notice further provided that changes would be made to the funding packages from the 75% DEP zero-interest / 25% I-Bank market rate to a 50% DEP zero-interest / 50% I-Bank market rate. (Pa619). On January 9, 2019, a public hearing was held to discuss the funding changes to the SFY2020 IUP. (Pa1021).

The public also received notice in January 2019, when the SFY2020 January Report was published on the I-Bank's website, that the funding ratio would be changed for SFY2020. (Pa420-421). Notices of the funding ratio change were also published on DEP's website in the SFY2020 IUP in March

2019 as well as the I-Bank's website in conjunction with the May Report for SFY2020. (Pa586-587; Pa690).

Besides public notice, Madison and Chatham also received direct notice of changes to the funding ratio via email. (Pa1021). On March 28, 2019, the Project Priority List, the SFY2020 IUP and all relevant documentation were sent to interested townships—including Madison, Chatham, and the Madison-Chatham Joint Meeting via email. Ibid. Finally, all documents related to the IUP and Project Priority List for the Water Bank were also posted on the DEP website and easily accessible. (Pa1020). Madison and Chatham had ample notice of the changes, and DEP's and the I-Bank's final decisions should be affirmed.

CONCLUSION

For these reasons, the I-Bank and DEP's determinations regarding the long-term loan funding ratio should be affirmed.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

By: _____
Jeffrey Padgett
Deputy Attorney General

Dated: September 5, 2023

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October 3, 2023

Via Electronic Case Filing
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Re: Borough of Madison and Borough of Chatham v. NJDEP and New Jersey Infrastructure Bank
Docket No. A-000970-22
On Appeal From: New Jersey Department of Environmental Protection and New Jersey Infrastructure Bank Docket Nos. 20-01/S340715-07A & 20-01/S340715-07B
Petitioners-Appellants' Amended Reply Brief

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Dear Honorable Judges of the Appellate Division:

Our firm represents Petitioners-Appellants Borough of Madison ("Madison") and Borough of Chatham ("Chatham") (collectively "Petitioners") in the above referenced matter. Kindly accept this letter brief as Petitioners' reply to Respondents' appellate brief in lieu of a more formal brief. The issue before the Court is simple – Whether it was arbitrary, capricious, or unreasonable for Respondents to unilaterally alter the express and unambiguous loan funding ratio term contained in the notes after the construction loans were already executed? The following in conjunction with the salient facts and legal arguments advanced in Petitioners' opening brief unequivocally demonstrate that Respondents' action satisfies this standard, and thus should be overturned by this Court. In re Zurbrugg Memorial Hospital's 1995 Medicaid Rates, 349 N.J. Super. 27, 35 (App. Div. 2002) (holding that arbitrary and capricious action by an administrative agency must be overturned). It is common sense that a lender cannot unilaterally alter established terms of a binding contract post-closing. We also enclose Petitioners' supplemental appendix [1373-1377a].

In the event that this Court should affirm Respondents' Final Decisions and condone Respondents' arbitrary and capricious action, Petitioners' taxpayers will sustain a devastating financial impact. [1326a; 1328a]. Petitioners accepted Respondents' calculations of $829,700 over the life of the 30 year loan at 1.57%

interest in additional interest charges for Petitioners' initial loans due to the funding ratio change from 75% DEP/25% I-Bank to 50% DEP/50% I-Bank. See 195a, FN14. However, Petitioners' loans subsequently increased to $9.5 million. Petitioners respectfully request that the Court preclude Respondents from shifting any purported financial burden that may have been the underlying basis for their unilateral adjustment of the established loan funding ratio onto Petitioners' taxpayers. Therefore, Petitioners respectfully request that this Court reverse Respondents' Final Decisions so that such a travesty is properly averted.

LEGAL ARGUMENT

I. THE NOTES CLEARLY INTENDED TO PROVIDE FOR THE APPLICABLE FUNDING RATIO FOR RESPONDENTS' LONG-TERM LOANS TO PETITIONERS

It is undisputed that the April 5, 2019 notes effectuating the underlying loans provide for a specified loan funding ratio for the Project. N.J.A.C. § 7:22-4.6 [Terms of the loans from the Trust] mandates in subsection (e) - - "The specific terms and conditions of the Trust loan shall be incorporated in the Trust loan agreement to be executed by the Trust and recipient." In accordance with the regulation, the specific funding ratio term was determined for Petitioners' loans upon the execution of the loan documents, not at the time of construction contract certification and/or the time when Petitioners were permitted to draw particular funds. See State v. New Jersey Law Enforcement Supervisors Ass'n, 2017 WL 2437173, *4 (App. Div. 2017), cert.

denied, 230 N.J. 618 (2017) (concluding that the use of the word "shall" in an administrative regulation affords no discretion and thus the regulation is mandatory). The crux of Respondents' argument is that the funding ratio clearly set forth in Petitioners' April 2019 notes were only intended to apply for short-term loans in contrast from long-term loans. Once again these crucial contractual terms provide as follows:

> **"Fund Portion"** means, on any date, an amount equal to seventy-five percent (75%) of the Principal of the Loan on such date, exclusive of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee, which NJDEP Loan Origination Fee shall be financed exclusively from the I-Bank Portion.
>
> **"I-Bank Portion"** means, on any date, an amount equal to the aggregate of (i) twenty-five percent (25%) of the Principal of the Loan on such date, exclusive of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee, plus (ii) one hundred percent (100%) of that portion of the Principal of the Loan that is allocable to the NJDEP Loan Origination Fee.
>
> **"Interest"** means the interest charged on the outstanding Principal of the Loan at a rate of (a) with respect to the I-Bank Portion of the Principal, the applicable I-Bank Portion Interest Rate and (b) with respect to the Fund Portion of the Principal, 0.00% and payable by the Borrower to the I-Bank (i) on the Maturity Date or (ii) with respect to any optional prepayment or acceleration of the Loan pursuant to the terms of this Note, on the date of such optional prepayment or acceleration, as the case may be.

[979a; 992-993a].

The fallacy of Respondents' argument is evident by the fact that if these terms were only meant to apply to short-term loans, the I-Bank Portion/Fund Portion and the "Interest" language reflecting that the "applicable I-Bank Portion Interest Rate" charged on the outstanding Principal would not appear in these documents, as short-term loans are provided free of interest. The January 2019 New Jersey Environmental Infrastructure Financing Program guidance reads in pertinent part:

> **All short-term loans are currently funded with DEP funds**. As the demands have increased, the program continues to evaluate the ability to support the I-Bank's short-term loan program with DEP funds. Loans sourced with DEP funds are currently 100% interest free. If the I-Bank uses private funds to finance a portion of the short-term loans, the Program will pass the cost of those funds through to Program borrowers.

[975a]; see also 972a ("The majority of NJEIFP projects are initially financed through the I-Bank's short-term loan program which currently offers zero percent financing during the construction phase"). As the April 2019 notes in fact contain a specified loan funding ratio that is funded both by the I-Bank and DEP rather than exclusively by the DEP, if this Court accepted Respondents' interpretation that would render the above terms totally meaningless. See Cumberland Cty. Improvement Auth. v. GSP Recycling Co., 358 N.J. Super. 484, 496 (App. Div.); cert. denied, 177 N.J. 222 (2003) (ruling that a contract should not be interpreted to render one of its terms meaningless). In granting a motion for summary judgment and finding that certain terms would be rendered meaningless in the policy, the New

Jersey Supreme Court held, "a basic principle of contract interpretation is to read the document as a whole in a fair and common sense manner." Hardy v. Abdul-Matin, 198 N.J. 95, 103 (2009) (citing DiProspero v. Penn, 183 N.J. 477, 496-97 (2005)); see also Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014); Cypress Point Condominium Ass'n v. Adria Towers, L.L.C., 226 N.J. 403, 415 (2016).

In this case, the only plausible, common sense interpretation is that each of the above definitions were crafted so that they would apply to the long-term financing of Petitioners' Project. See 229a ("Long-Term loans are available for allowable project costs and consist of an interest-bearing loan component from the I-Bank, and a zero-percent interest loan component from the DEP or otherwise subject to principal forgiveness as referenced herein"). Respondents cannot provide a cogent explanation as to why they included the 75%/25% funding ratio if it would not be applicable to the long-term loans at issue, especially in light of N.J.A.C. § 7:22-4.6(e). Importantly, Respondents omitted the above funding ratio when issuing loans to public entities in 2020. See 1004-1005a. If Respondents did not wish to have the loan funding ratio reflected in Petitioners' notes to apply for long-term financing upon the time of execution of same, their failure to make that distinction within the documents must be construed to their detriment. Cf. Hardy, supra at 104 (holding that the lack of similar "reasonable belief of knowledge" language in the personal injury protection exclusion as included in the uninsured motorist exclusion

was ample evidence that a reasonable belief or knowledge was not part of the personal injury protection requirements). Since the notes contain a specified loan funding ratio (and interest provision) that would be rendered meaningless if only applied to a short-term loan, the "fair and common sense" interpretation is that the 75% Fund Portion/25% I-Bank Portion ratio was clearly intended to apply to Petitioners' long-term loans.

Furthermore, the relevant section of the Program materials provides (in pertinent part):

> **LONG-TERM FINANCING**
>
> Long-Term Loans are generally issued upon completion of project construction (demonstrated through submitted requisitions). **Due to the enhancements to the Short-Term Financing Program, long-term loans are largely mechanisms to refinance previously issued short-term loans for construction and P&D activities. With limited exception, all relevant Program terms and conditions are established at the time of issuance of short-term loans**: for example, credit worthiness approval; Division of Local Government Services approval; the State's commitment of long-term funding at the time of certification of each operable project segment; and the applicability of all program benefits (e.g., principal forgiveness).

[976a (emphasis added)]. The loan funding ratio is the most important term and condition of the notes.

If Respondents wished to have the above "certification of each operable project segment" language from the Program materials serve as the starting point for when the loan funding ratio explicitly set forth in the April 2019 notes would be

triggered instead of the date of issuance, it was their obligation to insert such language within the notes and prominently define such language similar to the other critical terms. Respondents' assertion that they can disregard the expressly defined loan funding ratio by way of language buried in their Program materials is absurd and legally untenable. Additionally, to the extent that Respondents seek to rely upon any guidance from the Fiscal Year 2020 Program materials in support of their argument that the long-term funding ratio had not yet been agreed upon by the parties, this Court's consideration of same would clearly violate common sense precepts in light of the notes' execution in April 2019 and the Fiscal Year 2020 materials' issuance in May 2019. See 674a. The financing terms in effect during State Fiscal Year 2020 are irrelevant to the terms established by Petitioners' April 2019 notes, as State Fiscal Year 2020 commenced on July 1, 2019. Thus, Respondents were powerless to alter the binding terms of notes executed during the 2019 Fiscal Year.

As stated in Petitioners' moving brief, this Court can take judicial notice that Respondents drafted the 2019 notes. See N.J.A.C. § 7:22-3.15(a) ("The Department shall prepare and transmit the Fund loan agreement to the applicant"). While the loan funding ratio is clear and unambiguous, in the event that the Court should find any ambiguity as to whether this critical term should apply to long-term funding, this ambiguity must be construed against Respondents and not Petitioners. See Lor-

Mar/Toto, Inc. v. 1st Constitution Bank, 376 N.J. Super. 520, 536 (App. Div. 2005) (holding that any ambiguity must be construed against the bank as the drafter of the document); New York State Higher Education Svcs. v. Lucianna, 284 N.J. Super. 603, 608 (App. Div. 1995) ("Where an ambiguity exists, we ordinarily construe a written agreement against the preparer, here the bank and guarantor"); In re Kennedy Mortgage Co., 23 B.R. 466, 473 (Bankr. D.N.J. 1982) (finding that if there is any ambiguity in the document, it must be construed against the Bank as the drafter of the document); Schor v. FMS Financial Corp., 186 N.J. 185, 193 (App. Div. 2002) (deciding that where an ambiguity appears in a written agreement, the writing is to be strictly construed against the party preparing it). Moreover, we note that in the insurance context, the law in New Jersey is that coverage provisions are interpreted broadly to view losses in a manner that bring them within the policy's coverage, and to construe exclusions and limitations narrowly. Bardis v. Stinson, 444 N.J. Super. 227, 239 (App. Div. 2014) (citing Progressive Cas. Ins. Co. v. Hurley, 166 N.J. 260, 272-74 (2001)). In Bardis, the Appellate Division concluded, "And to the extent the policy terms at issue here are ambiguous, long-accepted principles of interpretation applicable to insurance contracts require us to construe this policy language against the drafter, in favor of the insured, and in accordance with the insured's reasonable expectations." Id.

In the present case, Petitioners always expected that the 75% Fund Portion/25% I-Bank Portion loan funding ratio would apply to their future long-term loans for the Project. [967a; 1264-1265a]. As it is undisputed that Respondents solely drafted the April 2019 notes, to the extent that there is any purported ambiguity as to whether the unmistakable loan funding ratio should apply to long-term loans, this purported ambiguity must be construed in favor of Petitioners and against Respondents. Therefore, Petitioners respectfully request that this Court reverse Respondents' decisions below and order that the 75% Fund Portion/25% I-Bank Portion ratio be applied to all long-term funding for the Project.

II. RESPONDENTS' ARGUMENT WITH RESPECT TO THE REQUIREMENT OF LEGISLATIVE APPROVAL MUST NOT BE CONSIDERED BY THIS COURT BECAUSE IT WAS NOT ARGUED BELOW

Respondents' Point II argument heading reads, "The short-term notes could not have guaranteed a long-term funding ratio because legislative approval of the project for long-term financing and appropriation of long-term funds had not occurred at the time the short-term loans were issued." [Rb26]. Respondents' argument asserts in pertinent part, "[h]ere, Madison and Chatham received no long-term funding guarantee nor was such long-term funding even possible when the Short-Term Notes were issued because the Legislature had not yet approved the project for long-term funding much less appropriated funds for such purpose." [Rb29]. Respondents' argument must not be considered by this Court as it was not

raised below. Review of Respondents' opposition brief below demonstrates that they previously included the statutes discussed within their Point II section as background discussion, but failed to argue that approval of Petitioners' project by the Legislature was required before the funding ratio could be guaranteed. [1374-1376a]. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973) (internal quotation and citation omitted) (ruling that it is a well-settled principle that our appellate courts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest); State v. Legette, 227 N.J. 460, FN1 (2017) (declining to consider an argument raised by the State for the first time on appeal). Respondents clearly could have raised the issue in their Point II argument to the tribunal below. As this issue neither relates to the jurisdiction of the Office of Administrative Law nor concerns a matter of great public interest, this Court should refuse to consider it.

In the event that the Court should consider Respondents' Point II argument notwithstanding their failure to assert it below, this Court should reject same as it misses the mark. By executing the short-term notes, Petitioners' Project was already eligible for long-term funding. See 225a ("**Execution of a Construction Loan**

preserves a project component's eligibility for Long-term funding"). The statute cited in Respondents' brief provides in pertinent part:

> b. The Senate Environment and Energy Committee and the Assembly Environment and Solid Waste Committee shall, either individually or jointly, consider the legislation containing the clean water project eligibility list, and shall report the legislation, together with any modifications, out of committee for consideration by each House of the Legislature. On or before July 1 of each year, the Legislature shall approve an appropriations act containing the clean water project eligibility list, including any amendatory or supplementary provisions thereto, which act shall include the authorization of an aggregate amount of funds of the trust to be expended for long-term loans and guarantees for the specific projects, including the individual amounts therefor, on the list.
>
> c. The trust shall not expend any money for a long-term loan or guarantee during a fiscal year for any wastewater treatment system project unless the expenditure is authorized pursuant to an appropriations act as provided in the provisions of this section, or as otherwise set forth in an appropriations act.

N.J.S.A. § 58:11B-20.

In this case, Petitioners contend that they locked in the long-term funding ratio upon execution of the April 5, 2019 notes at issue; thus they were already eligible for long-term funding on that date. Respondents clearly committed to provide long-term funding to Petitioners under the circumstances presented here, and they were well-aware that Petitioners always intended to procure long-term loans from the Program. See 1264a ("Moreover, borrowing public entities such as Petitioners are statutorily required, pursuant to Chapter 71 of the Public Laws of New Jersey of

2017, to determine when adopting the applicable bond ordinance whether they will receive long-term funding from Respondents v. other third-party sources. The calculations of long-term funding costs required by such statute utilize the long-term funding ratio in effect at the time of the calculations, which is generally several years before the procuring of the funding. Also evidencing Petitioners' consistent intention to obtain long-term funding from Respondents is the fact that Petitioners availed themselves of the ability to not make a down payment on their bond ordinances, which is permissible only to municipalities choosing long-term funding from Respondents"). The loan funding ratio was established upon execution of the notes that established all of the loan terms, not when Petitioners would draw funds.

In sum, Respondents' Point II argument should not be considered here as it was not argued below. In the event that the Court proceeds to consider Respondents' Point II argument notwithstanding their failure to raise this issue below it should be rejected, since legislative approval was plainly not required for the 75% Fund Portion/25% I-Bank Portion ratio to be triggered as of April 5, 2019.

III. RESPONDENTS' PURPORTED NOTICE TO PETITIONERS IS NOT A VALID DEFENSE TO THEIR ARBITRARY AND CAPRICIOUS ACTION

Respondents allege that form letters relating to their program (which do not contain any information pertaining to the loan funding ratio of Petitioners' Project) [See 1026-1027a & 1029-1030a], along with the December 19, 2018 Notice of

Public Comment and the website posting constituted sufficient notice to Petitioners. See also 1123a [Excerpt of SFY2018 Intended Use Plan] ("Please note that the Program is also considering a change to the base program shares for the FFY19/SFY20 program to return to the financing package wherein 50% of the allowable project costs are provided from the Department and the remaining allowable project costs financed by NJEIT"). However, Petitioners did not have any reason whatsoever to believe that Respondents intended to alter the loan funding ratio after the closing of their April 5, 2019 notes. Since Petitioners did not have any reason to believe that they would be affected by the proposed change in loan funding ratio from 75% DEP/25% I-Bank to 50% DEP/50% I-Bank, there was no reason for Petitioners to express any objection when the proposed change was contemplated.

Mr. Rogut certified that based upon his 34 years of experience, "[i]n prior instances in which the Program determined that prevailing financial conditions warranted the alteration of the requisite financing terms for a project's short and long term funding, substantial advance notice was furnished to each public entity that would likely be affected by such a change in financing terms." [964a]. Here, Petitioners were never advised before the change that their loan funding ratio would be detrimentally affected if their construction contract was not certified as of a particular date. Therefore, even if Respondents' notice theoretically complied with

the requirements of the Administrative Procedure Act in order to alter the loan funding ratio for any new loans to be issued, the notice was clearly defective for the purpose of changing the funding ratio for loans that were already executed. It would be legally unsound to allow for an agreed upon binding term between a lender and borrower to be unilaterally changed by the lender; Petitioners respectfully request that this Court apply its common sense with respect to this issue. Accordingly, Respondents' Point IV arguments claiming that the purported notices allowed them to change the long-term financing for Petitioners' Project are without merit.

CONCLUSION

Based upon the foregoing and Petitioners' opening brief, Petitioners respectfully request that the Court reverse Respondents' Final Decisions below and order that the established loan funding ratio of 75% Fund Portion/25% I-Bank Portion be utilized for all long-term loans on Petitioners' Project.

Respectfully submitted,

s/ Bradley D. Tishman
Bradley D. Tishman