

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

VILLAS ON THE GREEN, LTD.,

Petitioner,

v.

CASE NO. 2002-017
Application No. 2002-178C

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FLORIDA HOUSING FINANCE CORPORATION

FLORIDA HOUSING
FINANCE CORPORATION,

Respondent

_____ /

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on October 10, 2002. On April 17, 2002 (two days after the 2002 Universal Cycle Application ("Application") deadline), Petitioner submitted its Application to Florida Housing Finance Corporation ("Florida Housing") to compete for an allocation of low-income housing credits. Petitioner timely filed a Petition for Reconsideration or in the Alternative, Petition for Formal Administrative Hearing, pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(c), Florida Statutes, and determined that there were no disputed issues of material fact. An informal hearing was held in this case on September 20, 2002, in Tallahassee, Florida, before Florida Housing appointed Hearing Officer, Diane D. Tremor. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and

correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order rejecting the application submitted by Petitioner on April 17, 2002. Petitioner did not submit written argument by the deadline of October 7, 2002.

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

In accordance with the foregoing, it is hereby **ORDERED**:

1. The findings of fact of the Recommended Order are adopted in full as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Final Order.

2. The conclusions of law of the Recommended Order are adopted in full as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Final Order.

3. The Hearing Officer's recommendation that a Final Order be entered rejecting the application submitted by Petitioner on April 17, 2002 is approved and accepted as the appropriate disposition of this case. Accordingly, Petitioner's Application is rejected.

DONE and ORDERED this 10th day of October, 2002.

FLORIDA HOUSING FINANCE
CORPORATION

By: _____


Chairperson

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

Copies to:

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Michael Donaldson, Esq.
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**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

VILLAS ON THE GREEN, LTD.,

Petitioner,

v.

**FHFC CASE NO. 2002-0017
Application No. 2002-178C**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on September 20, 2002.

APPEARANCES

For Petitioner, Villas on the
Green, Ltd.:

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For Respondent, Florida Housing
Finance Corporation:

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EXHIBIT

"A"

FILED
CLERK OF DISTRICT COURT
TALLAHASSEE, FLORIDA
SEP 21 10 45 AM 2002

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue is whether Respondent properly rejected and declined to review and score Petitioner's application because Petitioner failed to file its original hard copy and photocopies of the application by the application deadline date of April 15, 2002.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 and 2. Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. Petitioner sought an allocation of housing tax credits from the Respondent. The award of such credits is made through a competitive process in which applicants apply using a Universal Application Package, which includes instructions and application forms. The Universal Application Package is adopted as a rule and is incorporated by reference in the Respondent's existing Rule 67-48.002(116), Florida Administrative Code.

2. For the first time this year, the Respondent allowed, but did not require, the submission of applications online. However, the Universal Application Instructions provide that, regardless of whether an applicant chooses to submit an application online, all applicants must submit an original hard copy of the printed completed application, including applicable exhibits and the Applicant Certification and Acknowledgment exhibit with an original signature, along with three photocopies of the original hard copy. The online application, the original hard copy and the photocopies must be identical. The instructions further provide that Respondent will first consider the application submitted online, if applicable. However, if all or part of the information in the online application is inaccessible, the instructions provide that Respondent will consider the original hard copy. The instructions provide that Respondent will only consider the exhibits submitted as part of the original hard copy. The Respondent's Executive Director is also authorized by the instructions to require Respondent's staff to consider only the original hard copy of an application if he determines, in his sole discretion, that issues impact the efficiency, reliability or accuracy of the online application process.

3. The Universal Application Instructions state that applications must be "received by the Respondent and clocked in by 5:00 p.m., Eastern Time, on the Application Deadline." The instructions state that Respondent "will reject" any application submittal and "no action will be taken to score the application" if less than one original hard copy and three photocopies of the completed application,

including applicable exhibits, are submitted. The instructions further provide that “failure to submit the Application by the Application Deadline will result in automatic rejection of the Application and no action will be taken to score the Application.” The application deadline was April 15, 2002.

4. The Universal Application Instructions provide that:

Notwithstanding anything in this Application and all instructions in this Application Package to the contrary and except for those items listed in Rule Chapters 67-21.003 and/or 67-48.004, F.A.C., Applicants shall be provided with an opportunity to submit additional documentation and revised pages, as well as other information in accordance with the applicable rules.

5. Petitioner submitted its online application on April 12, 2002. On the same date, April 12, 2002, Petitioner submitted its original hard copy application, three photocopies and its application fee to Federal Express for priority overnight delivery to Respondent by 10:30 a.m. on Monday, April 15th. Through no fault of the Petitioner, this package was not delivered to Respondent by Federal Express until the morning of April 17, 2002.

6. Respondent did not review or score Petitioner’s application on the ground that Petitioner failed to comply with the application deadline requirements.

7. Respondent’s preliminary scoring of other applications was not completed until May 13, 2002.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

The sole issue in this proceeding is whether Petitioner's failure to file hard copies of its application, exhibits and fees with the Respondent on or before the application deadline of April 15, 2002, even though an online version of its application was submitted to Respondent on April 12, 2002, is grounds for rejection of Petitioner's application.

Given the facts that Petitioner in this case elected to submit an online application on or before the application deadline, that the presumably identical hard copies of the application left Petitioner's possession before the application deadline, that Petitioner took reasonable steps to have its application timely delivered to Respondent, that the hard copy application was received by the Respondent less than two full days late, and that Respondent did not complete preliminary scoring until May 13th, thus starting the NOPSE and cure processes, it is more than likely that Petitioner would have gained no competitive advantage over other applicants as a result of the late filing of its hard copy application and exhibits. However, although the result may seem harsh under these specific circumstances, the Respondent is

required to follow its rules with regard to the application process, just as applicants are bound by such rules.

The application instructions clearly provide that even if an applicant elects to file its' application online, it must still submit an original hard copy, exhibits and photocopies by 5:00 p.m. on the application deadline. An applicant's decision to take advantage of the optional opportunity to submit its application online does not relieve it from the obligation to submit its hard copies to the Respondent no later than 5:00 p.m. on the application deadline date.

Petitioner's attempt to draw a distinction between the words "submitted" and "received," both of which are utilized in the application instructions, are unavailing. The instructions clearly delineate the items which must be submitted as an application, and then, they clearly state that "applications must be received by the Corporation and clocked in by 5:00 p.m., Eastern Time, on the Application Deadline." The instructions further state that failure to submit the application by the deadline will result in rejection of the application. Since Petitioner's original hard copy and photocopies were not received by the application deadline, Respondent was required to reject the application.

Petitioner additionally argues that its late filing was "cured" when its hard copies were received by Respondent on April 17, 2002. This argument fails to give proper effect to the mandatory requirements of Rule 67-48.004(14), Florida Administrative Code. That Rule designates those items which "must be included in

the Application and cannot be revised, corrected or supplemented after the Application Deadline.” In other words, a cure of a defect in the application is not allowed if it is intended to provide or supplement any one of the non-curable items listed in Rule 67-48.004(14). Those items include such information as the name of the applicant and the developer, the site for the development, the type of development category, the county, the demographic or area commitment and the total number of units. Obviously, if no application is received by the application deadline, such non-curable information was never provided. Such an omission can not then be revised, corrected or supplemented after the application deadline by a “cure.” To hold otherwise would render meaningless the provisions of Rule 67-48.004(14) and would serve only to encourage applicants to ignore the application deadlines. In addition to the clear language of Rule 67-48.004(14), the application instructions reiterate that additional documentation and revised pages (i.e., “cures”) will be permitted “**except for**” those items listed in Rule 67-48.004.

The cases cited by Petitioner are clearly distinguishable. In Machules v. Department of Administration, 523 So.2d 1132 (Fla. 1988), the Court applied the doctrine of equitable tolling to an instance where an employee erred in filing a grievance instead of a timely appeal. The Court held the doctrine applicable since the employee was misled or lulled into action by his employer and the appeal raised an identical issue raised in the original timely claim filed in the wrong forum. Here, Petitioner makes no claim that it was misled and Petitioner did not timely submit its

application to the wrong forum. Indeed, the evidence demonstrates that Petitioner well knew it was required to assure receipt by the Respondent of its hard copy application before 5:00 p.m. on April 15th.

In Midipact Healthcare Systems, Inc. v. Department of Management Services, DOAH Case No. 00-3900BID (November 21, 2000), an Administrative Law Judge with the Division of Administrative Hearings entered a Recommended Order¹ concluding that a California entity's late-filed response to an Invitation to Negotiate should be accepted and evaluated. The Administrative Law Judge based his decision upon findings that the agency actions in getting the Invitation to Negotiate to the responder were "a contributing factor if not the determinative factor" in the late filing, and also that the agency had the authority to waive minor irregularities. Here, there is no evidence that Respondent could be held responsible in any manner for Petitioner's late filing, and Respondent's rules do not allow it to waive minor irregularities. Indeed, Respondent's rules, as discussed above, specifically require that applications which are not filed by the application deadline may not be cured and must be rejected.

¹ There was no evidence presented as to whether the agency entered a Final Order after this Recommended Order.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's application received by the Respondent on April 17, 2002, be rejected.

Respectfully submitted and entered this 1st day of October, 2002.



DIANE D. TREMOR
Hearing Officer for Florida Housing
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