

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

2401 NW, LLC,

Petitioner,

vs.

Case No. _____

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**PETITION TO DETERMINE THE
INVALIDITY OF EXISTING RULES**

Petitioner, 2401 NW, LLC, (“2401 NW” or “Petitioner”) files this Petition to Determine the Invalidity of Existing Rules of the Florida Housing Finance Corporation (“Florida Housing”), to challenge the validity of Florida Administrative Code Rules 67-60.006(1) and 67-60.009, (referred to collectively “the Rules”) and alleges:

AFFECTED AGENCY

1. The agency affected by this Petition is the Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329. Florida Housing is the designated housing credit agency for the State of Florida under section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility to allocate and distribute low income housing tax credits pursuant to section 420.5099, Florida Statutes.

PETITIONER’S STANDING

2. Petitioner, 2401 NW, LLC, is a Florida limited liability company established to provide multi-family housing and is authorized to do business in the State of Florida. Petitioner’s address is 135 San Lorenzo Avenue, Suite 820, Coral Gables, Florida 33146. For

purposes of this proceeding, however, 2401 NW's mailing address, email address, telephone number and facsimile number are those of its undersigned counsel.

3. On September 19, 2013, Florida Housing issued a Request for Application ("RFA") for low income housing tax credits (or "Housing Credits") to develop affordable housing in Broward, Miami-Dade and Palm Beach Counties. The RFA established certain criteria for the applications. Florida Housing assigned random lottery numbers to applicants, in accordance with the RFA, to establish a priority for funding of qualified applications.

4. On November 12, 2013, 2401 NW timely filed its application for Housing Credits to fund a proposed 90 residential unit project of new construction in Miami-Dade County with 100% of the residential units required to have rents affordable to households earning up to 60% of or less than the area median income. Nine units would serve residents earning 33% or less of the area median income.

5. On January 31, 2014, Florida Housing posted its intent to select Wagner Creek and Allapattah Trace to receive the Housing Credits that 2401 NW also applied for. Florida Housing also posted the scores awarded to the competing applicants and indicated that 2401 NW's application was ineligible for funding for three reasons: (1) there was a construction and permanent financing shortfall; (2) the Principal listed in the application was not a Principal in the developments listed as the basis for developer experience; and (3) the documents submitted with the application did not show that 2401 had control of the site. 2401 NW was assigned a higher lottery number (2) than Wagner Creek (3) or Allapattah Trace (6) and thus will be selected for funding if its application is deemed eligible.

6. 2401 NW timely filed a petition to challenge the denial of its application pursuant to sections 120.57(1) and (3), Florida Statutes. Florida Housing referred the petition to the

Division of Administrative Hearings, which has since consolidated the case with other cases initiated by disappointed applicants for Miami-Dade County Housing Credits. (See DOAH Case numbers 14-1398BID, 14-1399BID, 14-1400BID, 14-1425BID, 14-141426BID, 14-1427BID and 14-1428BID). Petitioner filed an election to proceed under section 120.57(1) in the consolidated DOAH proceeding, as opposed to procedures applicable to bid protest proceedings under section 120.57(3). This request was opposed by Florida Housing which contends that the bid protest procedures of section 120.57(3) now apply to all challenges to Housing Credit decisions under the Rules challenged in this case. This new procedure – argues Florida Housing – prohibits 2401 NW from introducing evidence in a *de novo* formal hearing to cure omissions or errors in its application. Likewise, successful Housing Credit applicant Allapattah Trace moved to dismiss 2401 NW’s petition in the consolidated cases, arguing that the limited *de novo* review applicable to section 120.57(3) bid protest formal hearings does not allow 2401 NW to cure errors or omissions in its application.

7. 2401 NW is substantially affected by the Rules because they prevent it from challenging Florida Housing’s denial of its application for Housing Credits under the procedures that are otherwise applicable under Chapter 120, Florida Statutes and the Uniform Rules of Procedure adopted by the Administration Commission, including its right to a true *de novo* formal hearing involving disputed issues of material fact under section 120.57(1).

INVALIDITY OF THE RULES

8. Section 120.56(3), Florida Statutes, provides that “[a] substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule.” The Petitioner has the burden of proving by a preponderance of the evidence that the rule is an invalid exercise of delegated legislative authority.

9. A rule is an invalid exercise of delegated authority if:

- (a) The agency has materially failed to follow the applicable rulemaking procedures;
- (b) The agency has exceeded its grant of rulemaking authority, citation to which is required;
- (c) The rule enlarges, modifies or contravenes the specific provision of law implemented, citation to which is required;
- (d) The rule is vague, failed to establish adequate standards for agency decision or vest unbridled discretion in the agency; or
- (e) The rule is arbitrary or aprecious.

§ 120.52(8), Fla. Stat.

Rule 67-60.009, Florida Administrative Code

10. Rule 67-60.009 sets forth what Florida Housing contends are the exclusive “Applicant Administrative Appeal Procedures” to challenge the denial of a Housing Credit application:

- (1) Interested parties that wish to protest the terms of any competitive solicitation issued pursuant to this rule chapter may do so pursuant to the procedures set forth in Section 120.57(3), F.S. and Chapter 28-110, F.A.C.
- (2) Applicants not selected for funding under any competitive solicitation issued pursuant to this rule chapter may protest the results of the competitive solicitation process pursuant to the procedures set forth in Section 120.57(3), F.S. and Chapter 28-110, F.A.C.

(3) For the purposes of Section 120.57(3), F.S., any competitive solicitation issued under this rule chapter shall be considered a “request for proposal”.

(4) Applicants initiating administrative proceedings under this rule chapter shall not be required to post a bond.

11. The Rule cites section 420.507(48) as the “rulemaking authority” for the rule, citation to which is required by section 120.54(3)(a)1., Florida Statutes. “Rulemaking authority” means “statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term “rule.” § 120.52(17), Fla. Stat. Section 420.507(48) does not, however, authorize Florida Housing to adopt any rules. Indeed, the terms “rule,” “rule making” or “adopt” do not appear anywhere in section 420.507(48) which states:

To award its annual allocation of low-income housing tax credits, nontaxable revenue bonds, and State Apartment Incentive Loan Program funds appropriated by the Legislature and available to allocate by request for proposals or other competitive solicitation. The corporation shall reserve up to 5 percent of each allocation for high-priority affordable housing projects, such as housing to support economic development and job-creation initiatives, housing for veterans and their families, and other special needs populations in communities throughout the state as determined by the corporation on an annual basis. The corporation shall reserve an additional 5 percent of each allocation for housing projects that target persons who have a disabling condition, as defined in s. 420.0004, and their families. These allocations must prioritize projects or initiatives piloting or demonstrating cost-effective best practices that meet the housing needs and preferences of such persons. Any tax credits or funds not allocated because of lack of eligible projects targeting persons who have a disabling condition shall be distributed by the corporation for high-priority housing projects.

This is not a grant of rulemaking authority. Florida Housing’s failure to cite rulemaking authority for the rule renders the rule invalid for this reason alone, and no further inquiry is necessary. § 120.52(8)(b), Fla. Stat.

12. Florida Housing also failed cite a “law implemented” that provides any authority for the rule. “Law implemented” is “the language of the enabling statute being carried out or interpreted by the agency through rulemaking.” § 120.52(9), Fla. Stat. Florida Housing cites section 420.5099 as the law implemented,¹ but this statute does not address the subject of “Applicant Administrative Appeal Procedures.” Its only reference to an appeal in this provision is found in subsection (4), which provides in pertinent part that “[a]ny applicant disputing... the denial of a request for an allocation may request an appeal to the board of directors of the corporation.” This provision has been interpreted and applied by Florida Housing as authorizing its board of directors to issue final orders based upon recommended orders issued to it pursuant to the Administrative Procedure Act. This statute does not authorize Florida Housing to adopt rules that modify in any way the procedures otherwise applicable to decisions that determine substantial interests under Chapter 120 or the Uniform Rules of Procedure adopted by the Administration Commission.

13. The foregoing citation deficiencies notwithstanding, Florida Housing is not authorized to modify or depart from the procedures applicable to challenges to its Housing Credit decisions under the Administrative Procedure Act. The Administrative Procedures Act presumptively governs the exercise of all authority statutorily vested in the executive branch, including agency decisions governed by statutes which make no mention of the Act. See Gopman v. Department of Education, 908 So. 2d 118 (Fla. 1st DCA 2005). Florida Housing is not authorized to shoe-horn challenges to its Housing Credit allocation decisions into a bid

¹ Other statutes purportedly implemented by the rule are sections 420.5087 and 420.5089, Florida Statutes. These statutes do not relate to applications for Housing Credits and thus provide no authority for the rule in this case.

protest framework simply because it finds these procedures more advantageous to the defense of its decisions. An application for Housing Credits is not a procurement of commodities or services. Absent Florida Housing's unilateral declaration by rule that section 120.57(3) governs, there is no basis to apply bid protest procedures to Housing Credit applications decisions under Florida law.

14. Section 120.57(3), Florida Statutes, provides that “[a]gencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process.” This statute establishes certain minimum procedures that must be provided for in the Uniform Rule of Procedure for bid protest proceedings, including the provision Florida Housing relies upon as justification to abridge 2401 NW’s right to a full *de novo* hearing. See §§ 120.57(3)(a) through (g), Fla. Stat. Assuming, *arguendo*, that Florida Housing was authorized to adopt rules to modify these procedures or, more to the point here, to “borrow” otherwise inapplicable procedures, it must first obtain permission to do so by filing a petition with the Administration Commission. § 120.54(5)(a), Fla. Stat. Florida Housing filed no such petition and has not received authorization from the Administration Commission to adopt the Rules.

Rule 67-60.006(1), Florida Administrative Code

15. Rule 67-60.006(1) provides:

The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the corporation the Application shall not be considered.

16. Rule 67-60.006(1) is an invalid exercise of delegated authority for the same reasons set forth above. Florida Housing cited the same statutes as the rulemaking authority

(420.507(48)) and law implemented (420.5099) for this rule as it did for Rule 67-60.009. These citations are deficient for the reasons set forth above.

17. Moreover, the term “nonresponsive” – a term of art apparently borrowed from the law governing bid protest disputes – does not apply in the Housing Credit application process. The rule does not define “nonresponsive” or establish criteria from which one can determine if an application is nonresponsive. As such, this rule fails to establish adequate standards for agency decisions and confers unbridled discretion in Florida Housing to reject an application for Housing Credits in violation of section 120.52(8)(d), Florida Statutes.

DISPUTED ISSUES OF MATERIAL FACT

18. The disputed issues of material fact include:

(a) Whether the Rules constitute an invalid exercise of delegated legislative authority for the reasons cited herein;

(b) Whether the agency materially failed to follow the applicable rulemaking procedures or requirements set forth in Chapter 120, Florida Statutes;

(c) Whether the agency exceeded its grant of rulemaking authority, citation to which is required by section 120.54(3)(a)1;

(d) Whether the Rules enlarge, modify or contravene the specific provision of law implemented;

(e) Whether the Rules are vague, fail to establish adequate standards for agency decision or vest unbridled discretion in the agency; and

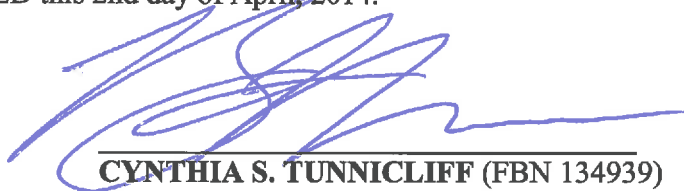
(d) Whether the Rules are arbitrary and capricious and not supported by logic and reason.

ULTIMATE FACTS UPON WHICH PETITIONER RELIES

19. The ultimate facts on which Petitioner relies are that the Rules are an invalid exercise of delegated legislative authority under sections 120.52(8)(a) through (e) for the reasons set forth in paragraphs 8 through 17 above.

WHEREFORE, Petitioner respectfully requests that the Rules be declared invalid and void and that Petitioner be granted such other and further relief as deemed appropriate.

RESPECTFULLY SUBMITTED this 2nd day of April, 2014.



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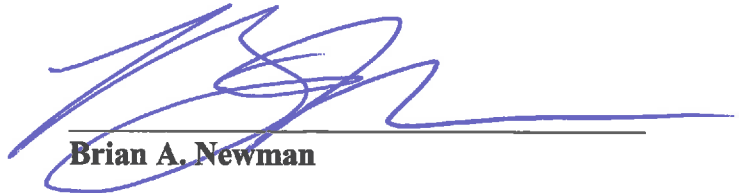
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the true and correct copy of the forgoing has been furnished to
the following via electronic mail:

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Brian A. Newman