

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

**YBOR III, LTD.,
OCHLOCKNEE POINTE,**

Petitioner,

v.

**FHFC CASE NO. 2002-0055
Application No. 2002-177C**

**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 16, 2002.

APPEARANCES

For Petitioner, Ybor III, Ltd.,
Ochlocknee:

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For Respondent, Florida Housing
Finance Corporation:

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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue is whether Petitioner's application should be rejected for the reason that its check for the application fee which accompanied its application was returned unpaid. Stated differently, the issue is whether a returned application fee check can be "cured" by the filing of a cashier's check during the "cure" period.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 8. Petitioner's Exhibit A was also received. At the commencement of the hearing, the parties filed a Prehearing Stipulation containing a Joint Stipulation of Facts and Exhibits. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with regard to the issue in dispute. The Joint Stipulation of Facts and Exhibits is attached to this Recommended Order as Exhibit 1, and the facts recited therein are incorporated in this Recommended Order.

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 timely submitted an application to Respondent for an award of an allocation of low-income housing tax credits. Accompanying its application was a check in the correct amount for the application fee.

2. Petitioner's application and the application process are governed by Chapter 67-48, Florida Administrative Code, and the Universal Application Package, which includes application instructions and application forms, and which is adopted by reference in Respondent's Rule 67-48.002(116).

3. The application instructions require that applications be received by the Respondent by 5:00 p.m. on the application deadline (April 15, 2002), and that the application fee must be paid by check or money order submitted with the completed original hard application. The instructions further provide that:

Failure to submit the correct fee with the "Original Hard Copy" Application by the Application Deadline or 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.

These same instructions, two paragraphs later, provide:

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.

4. After receipt of Petitioner's application and check for the application fee, Respondent commenced its preliminary scoring of all applications. At some point between April 15th -- the application deadline, and May 13, 2002 -- the completion of preliminary scoring, Petitioner's application fee check was returned by the bank and marked "unavailable funds," "insufficient funds," and "please do not deposit again, enter for collection only."

5. In its preliminary scoring, Respondent's staff notified Petitioner that it had received the full 71 points, but had failed to achieve "threshold" on several items, including "failure to pay the Application fee as of the Application Deadline because the check submitted was returned due to non-sufficient funds." Petitioner was further advised that its application was rejected and that "no further action will be taken to score this Application and Florida Housing will disregard the scores reflected in this report." Petitioner received the same advice from the Respondent on or about June 10, 2002, after Respondent's review of Notices of Potential Scoring Errors ("NOPSE").

6. Within the time permitted for "cures," Petitioner submitted additional documentation, revised forms and other information to the Respondent, including a cashier's check in the amount of \$2,000 representing the application fee. Petitioner's Statement of Explanation for Cure is that the certified/cashier's check was being submitted in place of its original check submitted with the application and that "this action was created as a result of preliminary scoring; it is a curable item."

7. On or about July 22, 2002, Respondent issued its “final” scoring, again indicating that, as a result of its preliminary scoring, Petitioner’s application was rejected for failure to pay the application fee as of the application deadline, and that Respondent would disregard the scores reflected in that scoring summary.

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 a check for an application fee which is submitted with a timely filed application, but which is subsequently returned for insufficient or unavailable funds, may be “cured” by a cashier’s check timely submitted to the Respondent during the cure period. The resolution of this issue is dependent upon the rules which govern this proceeding.

The application instructions, which are rules, clearly state that failure to submit the correct fee with the application by the application deadline “will result in automatic rejection of the application and no action will be taken to score the application.” Were this the sole rule on this subject, Respondent’s proposed rejection of Petitioner’s application without an opportunity to “cure” the defect would be

justified. However, other instructions and rules, which must be read *in pari materia* with the application instructions, lead to a contrary result.

Consistent with Rule 67-48.004(6), Florida Administrative Code, which permits applicants to timely submit additional documentation, revised pages and such other information deemed appropriate by the applicant to address issues raised after preliminary scoring and Respondent's review of NOPSEs, the 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 67-48.004, applicants shall be provided with an opportunity to submit additional documentation and revised pages, as well as other information in accordance with applicable rules.
(Emphasis supplied)

This language, on its face, clearly supercedes all other instructions. The "except for" language of the above instruction has reference, in this instance, to subsections (6) and (14) of Rule 67-48.004. These constitute the sole restrictions upon the submittal of "cures." Subsection (6) limits "cures" to issues raised pursuant to Respondent's preliminary scoring, NOPSE's and any other items identified by the Respondent to be addressed by the applicant. Subsection (14) contains a listing of 13 items "that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline," and provides that failure to submit such items "shall result in rejection of the Application without opportunity to submit additional information. Any attempted changes to these items will not be accepted." The

payment of the application fee is not among the items listed in Rule 67-48.004(14). Under the principle of *expressio unius est exclusio alterius*, the mention of one thing implies the exclusion of another. It would have been a simple matter for Respondent to have included the application fee as one of the non-curable items in its rules. Not only did it fail to do so, its own application instructions repeat that notwithstanding any instructions in the application package to the contrary, all issues raised in preliminary scoring are subject to “cure,” unless the issue involves one of the items expressly enumerated in Rule 67-48.004(14). Accordingly, Petitioner had the opportunity to “cure” its returned application fee check by submitting a cashier’s check in the correct amount during the cure period.

Rule 67-48.004(13) provides additional grounds for rejection of an application after consideration of the cure documentation. None of those grounds are applicable with respect to Petitioner’s submission of its application fee by cashier’s check.

Respondent further argues that an application fee check is a negotiable instrument and is not a “document” which can be resubmitted in a “cure” pursuant to Rule 67-48.004(6). The only support offered by Respondent for this interpretation of its rule is Section 90.953, Florida Statutes. That statute is part of the Florida Evidence Code. It pertains to the admissibility into evidence of duplicate copies of negotiable instruments and other writings evidencing a right to the payment of money. The issue in this proceeding is not one of evidence. There is no dispute as to the authenticity of either the returned check or the cashier’s check submitted by the

Petitioner. The issue here is whether a returned application fee check can be cured by the submission of a cashier's check during the cure period. In that context, it is concluded that a check constitutes a "document" within the meaning of Rule 67-48.004(6). Indeed a "document" is defined in Respondent's Rule 67-48.002(38) as

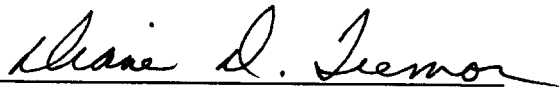
any written or graphic matter of any kind whatsoever however produced or reproduced, including but not limited to records, reports, memoranda, minutes, notes, graphs, maps, charts, contracts, opinions, studies, analysis, photographs, financial statements and correspondence as well as any other tangible thing on which information is recorded.

(Emphasis supplied) By Respondent's own rules, the application fee checks are clearly "documents" within the meaning of Rule 67-48.004(6). At the very least, the cashier's check constitutes "such other information as the applicant deems appropriate to address the issues raised" by the Respondent's preliminary scoring, within the meaning of that "cure" rule.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that the Petitioner's "cure" documentation, including the application fee, be accepted and that Petitioner's application, as "cured," be scored for determination of eligibility for an award of an allocation of low-income housing tax credits in the 2002 Universal Cycle.

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



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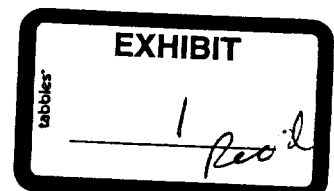
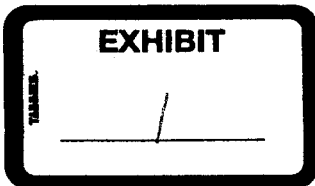
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**PRE-HEARING STIPULATION
OF FACTS AND EXHIBITS**

The parties, YBOR III, LTD., OCHLOCKNEE POINTE (“Ybor III”), and FLORIDA HOUSING FINANCE CORPORATION (“Florida Housing”), hereby stipulate and agree to the following facts:

1. On or before April 15, 2002, Ybor III submitted an Application to Florida Housing for the award of an allocation of low-income housing tax credits (“Tax Credit”) in the 2002 Universal Cycle.

2. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing and refinancing houses and related facilities in Florida in order to provide decent, safe and affordable housing to persons and families of low, moderate and middle income.



3. To encourage the development of low-income housing for families, in 1987 Congress created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar for dollar reduction of the holder's federal tax liability which can be taken for up to ten years, if the project satisfies the Internal Revenue Code's requirements each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for the construction of the development.

4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of Florida's Tax Credits to applicants for the development of rental housing for low income and very low-income families. (See section 420.5099, Fla. Stat.)

5. Each state receives an annual allotment of Tax Credits allocated to the state, primarily on a per capita basis.

6. After the scoring process, Florida Housing allocates the Tax Credits pursuant to Fla. Admin. Code R. 67-48 *et. al.* and a Qualified Allocation Plan ("QAP"). The provisions of the QAP are adopted and incorporated by reference in Fla. Admin. Code R. 67-48.025. The Internal Revenue Code requires Florida Housing to develop the QAP. (See 26 U.S.C.A., § 42 (m).)

7. Pursuant to the QAP, Tax Credits are apportioned among the most populated counties, medium populated counties and least populated counties. There are also various other set-asides and special targeting goals set forth in the QAP. Set-asides and special targeting goals for the 2001 Combined Cycle include non-profit, elderly,

farmworkers, commercial fishing workers, Front Porch/Hope VI, urban in-fill, a high-rise in an urban in-fill and the Rural Development 514, 515 and 516 programs.

8. Pursuant to the state and federal statutory mandates, Florida Housing has established, by rule, a competitive application process for the distribution of available Tax Credits. (See section 420.507 (22)(f), Fla. Stat. and Fla. Admin. Code R. 67.48 *et. al.*) Awards for the SAIL program, the Multifamily Mortgage Revenue Bonds (“MMRB”) program and the Tax Credit (“Housing Credit”) program are included in a single application process (the “Universal Cycle”) governed by Fla. Admin. Code R. 67-48 *et. al.* and Fla. Admin. Code R. 67-21 *et. al.* The Housing Credit program is included in this competitive application process in which applicants for any of the above-referenced Florida Housing multi-family rental programs submit a single Universal Application (“Application”).

9. The Application and instructions for completion were adopted by Fla. Admin. Code R. 67-48.002(116), and Fla. Admin. Code R. 67-21.002(97), some of which are not applicable to every Applicant. The portion of the Application pertaining to Housing Credits is directly pertinent to the Ybor III Application.

10. Some of the parts of the Application include “threshold” items. Failure to properly satisfy threshold requirements results in rejection of the application. Other parts allow applicants to earn points, however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant’s overall score.

11. On or before the Application Deadline, April 15, 2002, Ybor III submitted its completed Application along with its check for the Application Fee. Ybor III's check was subsequently returned by Ybor III's bank and marked "Insufficient funds," "Unavailable funds," and "Please do not deposit again. Enter for collection only."

12. After Ybor III submitted its 2002 Universal Cycle Application, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Fla. Stat., and Fla. Admin. Code R. 67-48 *et. al.* Florida Housing completed the scoring process on May 13, 2002.

13. After performing preliminary scoring, Florida Housing's staff notified Ybor III of the results. The Application had failed to achieve "threshold" on four items including "failure to pay the Application fee as of the Application Deadline because the check submitted was returned due to non-sufficient funds." Florida Housing advised the Applicant "No further action will be taken to score this Application and Florida Housing will disregard the scores reflected in this report."

14. Any applicant could question the scoring of Ybor III's Application if it believed Florida Housing had made a scoring error, within ten calendar days after the date the applicant received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE"). On June 10, 2002, Florida Housing sent Ybor III any NOPSE relating to its Application submitted by other applicants.

15. Ybor III submitted additional documentation, revised forms, and other information that it deemed appropriate to address any curable issue raised in any NOPSE

and preliminary scoring. These documents, revised forms and other information were known as “cures” and were due on or before June 26, 2002 (the “cure period”).

16. After Ybor III submitted its cures, all applicants had an opportunity to review Ybor III’s cures. Any applicant could submit to Florida Housing a Notice of Alleged Deficiencies (“NOAD”) to challenge the Ybor III’s cures.

17. After the NOAD process, on or about July 22, 2002, Florida Housing sent Final Scores and a Notice of Rights to Ybor III, informing Ybor III that it could contest Florida Housing’s actions in accordance with the provisions of sections 120.569 and 120.57, Fla. Stat.

18. Ybor III timely requested an informal hearing by filing its Petition for Informal Proceeding in Accordance with Sections 120.569 and 120.57(2), Fla. Stat., on or about August 13, 2002.

19. The issue in this case is whether Florida Housing erred when it rejected and took no further action to score Ybor III’s Application or cure for a Housing Credit program allocation in the 2002 Universal Cycle program. Specifically, Florida Housing determined that Ybor III failed to submit the Application fee by the Application Deadline when Ybor III issued Florida Housing a check that was returned by Ybor III’s bank and marked “Insufficient funds,” “Unavailable funds,” “Please do not deposit again. Enter for collection only.”

The parties proffer the following joint exhibits:

Exhibit 1: Prehearing Stipulation.

Exhibit 2: Preliminary 2002 Universal Scoring Summary for Ybor III's Application dated 05/14/02.

Exhibit 3: NOPSE 2002 Universal Scoring Summary for Ybor III's Application dated 06/10/02.

Exhibit 4: Final, pre-appeal, 2002 Universal Scoring Summary for Ybor III's Application dated 07/22/02.

Exhibit 5: Page 2 of the Application Instructions.

Exhibit 6: Pages 55-56 of the Application Instructions.

Exhibit 7: Pages 72-76 of the Application Instructions.

Exhibit 8: Copy of Ybor III's Check presented for payment of the Application Fee.

Respectfully submitted this _____ day of September, 2002.

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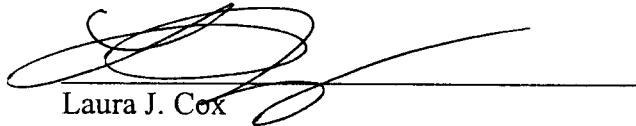
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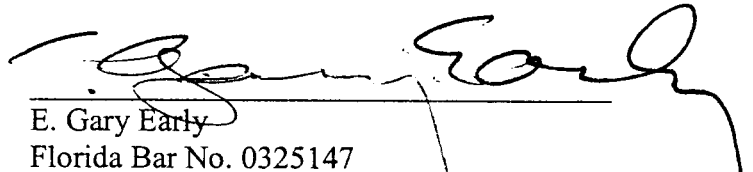
Exhibit 7: Pages 72-76 of the Application Instructions.

Exhibit 8: Copy of Ybor III's Check presented for payment of the Application Fee.

Respectfully submitted this 16th day of September, 2002.



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