

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

REGENCY GARDENS APARTMENTS, LTD.,)	
and SHEPLAND DEVELOPMENT CORPORATION,)	
)	
Petitioners,)	
)	
vs.)	Case No. 99-3179RX
)	
FLORIDA HOUSING FINANCE CORPORATION,)	
)	
Respondent,)	
)	
and)	
)	
MIAMI RIVER PARK, LTD., and WYNWOOD)	
TOWER APARTMENTS, LTD.,)	
)	
Intervenors.)	
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FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on September 3, 1999, at Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUES

Whether Rule 67-48.005, Florida Administrative Code, and Section VII on Page 16 of Form 1 of the 1999 Housing Credit Application Package adopted by Rule 67-48.002(10) Florida Administrative Code, are invalid exercises of delegated legislative authority. If so, whether Petitioners are entitled to an award of attorney's fees and costs.

PRELIMINARY STATEMENT

On July 26, 1999, Petitioners, Regency Gardens Apartments, Ltd. (Regency), and Shepland Development Corporation (Shepland), filed a Petition to Determine the Invalidity of Rule 67-48.0005, Florida Administrative Code, against Respondent, Florida Housing Finance Corporation (FHFC). This Petition was assigned DOAH Case No. 99-3179RX. On August 11, 1999, Regency and Shepland moved to amend their Petition, to include a challenge to one sentence on page 16 of Form One of the Housing Credit Application adopted by reference in FHFC's Rule 67-48.002(10), Florida Administrative Code. There was no objection, and the motion was granted.

On August 23, 1999, Intervenor, Miami River Park, Ltd., and Wynwood Tower Apartments, Ltd., filed a Petition to Intervene in

DOAH Case No. 99-3179RX. On September 1, 1999, the Petition to Intervene was granted.

Prior to the final hearing, the parties filed a Joint Prehearing Stipulation. The stipulated facts contained in the Joint Prehearing Stipulation have been accepted in this Final Order to the extent they are relevant to this proceeding.

The parties stipulated at the final hearing that Shepland does not have standing in this matter. As used in this Final Order, the term Petitioner, in the singular, shall refer to Regency.

Petitioner did not present any witnesses at the final hearing. Petitioner's Exhibits 1-3, 6-8, and 11-15 were accepted into evidence. Petitioner's Exhibits 4, 5, 9, 10, 16-18, and 20 are rejected as exhibits because they are not relevant to any issue raised in this proceeding. 1/ Petitioner did not submit an Exhibit 19. Respondent presented the testimony of Sue Early. Ms. Early was accepted as an expert in the Florida Housing Combined Cycle Programs and Allocation Process. Florida Housing's Exhibits 1-6 were accepted into evidence. The Intervenors did not present any witnesses or introduce any exhibits.

Petitioner, Respondent, and Intervenors filed proposed final orders, which have been duly considered by the undersigned in the preparation of this Final Order.

FINDINGS OF FACT

1. Part V of Chapter 420, Florida Statutes, consisting of Sections 420.501 - 420.517, Florida Statutes, is the Florida Housing Finance Corporation Act. Respondent, Florida Housing Corporation (FHFC), is a public corporation created by the provisions of Section 420.504, Florida Statutes.

2. Pursuant to Section 420.5099, Florida Statutes, FHFC is the designated housing agency for the State of Florida. FHFC administers the Low Income Housing Tax Credit Program and other housing programs in Florida pursuant to other provisions of the Florida Housing Finance Corporation Act.

3. Pursuant to Section 420.504(2), Florida Statutes, FHFC is an agency of the State of Florida for the purposes of Chapter 120, Florida Statutes. FHFC is governed by an independent member Board of Directors appointed by the Governor. The Board members come from specifically designated industries and backgrounds as set forth in Section 420.504(3), Florida Statutes. Pursuant to Section 420.507, Florida Statutes, FHFC has all the powers necessary or convenient to carry out and effectuate the purposes and provisions of the Florida Housing Finance Corporation Act, including the power to enact rules. 2/

4. Petitioner submitted an application to the FHFC for 1999 Low Income Housing Tax Credits. The parties stipulated that Petitioner has standing to challenge the validity of the rules at issue in this proceeding. The parties further stipulated that

Shepland does not have standing to challenge the validity of the rules at issue in this proceeding.

5. Intervenors, Miami River Park, Ltd., and Wynwood Tower Apartments, Ltd., submitted applications to FHFC for 1999 Low Income Housing Tax Credits. The parties stipulated that these two entities have standing to intervene in this proceeding.

6. The Low Income Housing Tax Credit Program is a federal program whose purpose is to encourage the development of housing for low-income families in the various states. 3/ Section 42 of the Internal Revenue Code (Title 26 of the United States Code) creates federal income tax credits that are allocated to each state and are awarded through state-administered programs to developers of low-income housing projects. The tax credits equate to a dollar-for-dollar reduction of the holder's tax liability which can be taken each year that the project satisfies the Internal Revenue Code requirements, for up to ten years. The developer typically sells or syndicates the tax credit to generate funding for the proposed project.

7. Section 42 of the Internal Revenue Code requires that each state adopt a Qualified Allocation Plan (QAP) establishing procedures to be followed in awarding low-income credits allocated to the states.

8. Section 420.5099, Florida Statutes, provides as follows:

(1) The Florida Housing Finance Corporation is designated the housing credit agency for the state within the meaning of s. 42(h)(7)(A) of the Internal Revenue Code

of 1986 and shall have the responsibility and authority to establish procedures necessary for proper allocation and distribution of low-income housing tax credits and shall exercise all powers necessary to administer the allocation of such credits.

(2) The corporation shall adopt allocation procedures that will ensure the maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.

(3) The corporation may request such information from applicants as will enable it to make the allocations according to the guidelines set forth in subsection (2), including, but not limited to, the information required to be provided the corporation by chapter 9I-21, Florida Administrative Code.

(4) The executive director of the corporation shall administer the allocation procedures and determine allocations on behalf of the corporation. Any applicant disputing the amount of an allocation or the denial of a request for an allocation may request an appeal to the board of directors of the corporation.

(5) For purposes of implementing this program in Florida and in assessing the property for ad valorem taxation under s. 193.011, neither the tax credits, nor financing generated by tax credits, shall be considered as income to the property, and the rental income from rent restricted units in a low-income tax credit development shall be recognized by the property appraiser.

(6) The corporation is authorized to expend fees received in conjunction with the allocation of low-income housing tax credits only for the purpose of administration of the program, including private legal services

which relate to interpretation of s. 42 of the Internal Revenue Code of 1986, as amended.

9. Pursuant to the provisions of Section 420.5099, Florida Statutes, FHFC has established rules for processing applications for housing tax credits. These rules, found in Chapter 67-48, Florida Administrative Code, constitute Florida's QAP. A prime consideration in developing the application process is that the process be completed in a timely manner, since the failure of a state to use all of its allocated credits in a timely manner will result in a loss of housing tax credits. Such a loss is contrary to the statutory mandate that FHFC ensure the maximum use of available tax credits.

10. Petitioner has challenged FHFC's Rule 67-48.005, Florida Administrative Code, which is entitled Applicant Administrative Appeal Procedures, and provides, in pertinent part, as follows:

(1) Following the Review Committee's determination of preliminary scores and ranking, notice of intended funding or denial of funding will be provided to each Applicant with a statement that:

(a) Applicants who wish to contest the decision relative to their own Application must petition for review of the decision in writing within 10 calendar days of the date of the notice. The request must specify in detail the forms and the scores sought to be appealed. Unless the appeal involves disputed issues of material fact, the appeal will be conducted on an informal basis. The Review Committee will review the appeal and will provide to the Applicant a written position paper which recommends either no change in score or an increase or decrease in

a score which it deems to be in error. If the Applicant disagrees with the Review Committee's recommendation, the Applicant will be given an opportunity to participate in the informal administrative appeal hearings scheduled by the Review Committee. If the appeal raises issues of material fact, a formal administrative hearing will be conducted pursuant to Section 120.57(1), Florida Statutes. Failure to timely file a petition shall constitute a waiver of the right of the Applicant to such an appeal.

(b) Applicants who wish to notify the Corporation of possible scoring errors relative to another Applicant's Application must file with the Corporation, within 10 calendar days of the date of the notice, a written request for a review of the other Applicant's score. Each request must specify in detail the assigned Application number, the forms and the scores in question. Each request is limited to the review of only one Application's score. Requests which seek the review of more than one Application's score will be considered improperly filed and ineligible for review. There is no limit to the number of requests which may be submitted. The Review Committee will review each written request timely received and will prepare a written position paper, which will be provided to each Applicant who timely filed a notification and to the Applicant whose score has been questioned, which recommends either no change in score or an increase or decrease in a score which it deems to be in error. Failure to timely and properly file a request shall constitute a waiver of the right of the Applicant to such a review.

(2) Notice will be provided to all Applicants whose score is reduced or whose Application is deemed ineligible pursuant to 67-48.005(1)(b) that they may contest the decision relative to their own Application by petitioning for review of the decision in writing within 10 calendar days of the date of the notice. The request must specify in detail the forms and the scores sought to be appealed. Unless the appeal involves disputed issues of material fact, the appeal

will be conducted on an informal basis. The Review Committee will review the appeal and will provide to the Applicant a written position paper which recommends either no change in score or an increase or decrease in a score which it deems to be in error. If the Applicant disagrees with the Review Committee's recommendation, the Applicant will be given an opportunity to participate in the informal administrative appeal hearings scheduled by the Review Committee. No Applicant or other person or entity will be allowed to intervene in the appeal of another Applicant. If the appeal raises issues of material fact, a formal administrative hearing will be conducted pursuant to Section 120.57(1), Florida Statutes. Failure to timely file a petition shall constitute a waiver of the right of the Applicant to such an appeal.

11. Petitioner has also challenged the following portion of the application form which has been adopted by reference by FHFC's Rule 67-48.002(10), Florida Administrative Code:

. . . In consideration for the Corporation processing and scoring this Application, the Applicant and all Financial Beneficiaries hereby understand and agree that the Corporation will hear appeals only on the Applicant's own score. . . .

12. In 1996, FHFC combined the application processes for the subject low-income tax credit program, the State Apartment Incentive Loan (SAIL) Program (Section 420.587, Florida Statutes) and the Home Investment Partnership (HOME) Program (Section 420.5089, Florida Statutes) to make the application process easier and more efficient.

13. Each year FHFC initiates rulemaking to refine the application process from the previous year and to implement any

changes in the application process. The administrative rules, with any amendments, are adopted annually. All prospective applicants under any of the three combined programs are invited to attend rulemaking workshops.

14. After the allocation of tax credits for Florida is known, a Notice of Funding Availability setting forth that allocation, is published in the Florida Law Weekly. For the 1999 allocation period, the notice was published on October 23, 1998.

15. Due to the limited number of housing credits available in each annual application cycle and the number of applications for those credits, there are not enough credits available for distribution in Florida for all applicants to receive housing credits in the year in which they apply. Consequently, applicants are competing for a fixed pool of resources.

16. For the 1999 period, the application cycle was opened and the application form was available to interested persons on October 30, 1998. From November 9 through 11, 1998, application workshops were held in Tallahassee, Miami, and Orlando, to address any questions regarding the application process.

17. Applicants are given what is referred to as the Application Package, which contains all pertinent forms and sets forth the instructions and criteria by which the applications will be evaluated by FHFC staff. Applicants were required to complete the applications and submit them to FHFC by January 7, 1999. Ninety applications for the three combined programs were

filed. Each application was evaluated by FHFC staff pursuant to the instructions and criteria contained in the Application Package. Partly because FHFC staff is required to verify information reflected in each application, the evaluation process takes six to eight weeks to complete. The evaluation process results in a score for each application. The scores are reviewed and approved by a Review Committee, consisting of FHFC staff. On March 12, 1999, after scores were approved by the Review Committee, a pre-review score was mailed to each applicant.

18. After the applicants were notified of their pre-review score, they had the week beginning March 15, 1999, to review the scoring of all applications. FHFC rules provide an opportunity for an applicant to question its pre-review score and to challenge the pre-review scores received by other applicants.

19. The challenge to an applicant's own score is referred to as a Direct Appeal. The challenge by an applicant to another applicant's score is referred to as a Competitive Appeal. All Direct and Competitive Appeals were due on or before March 22, 1999.

20. Upon receipt of the Direct Appeals and Competitive Appeals, FHFC staff first review the Competitive Appeals and draft a Competitive Appeal Position Paper for each unique issue raised. The Competitive Appeal Position Papers are approved by the Review Committee before being released, which, for 1999, was on April 5, 1999. The same process is followed for the Direct

Appeals. The Direct Appeal Position Papers were approved by the Review Committee and released on April 7, 1999.

21. An applicant whose application was adversely affected by a Competitive Appeal Position Paper (as the result of a Competitive Appeal filed by a competing applicant) has the opportunity to file what is referred to as a Direct Appeal of a Competitive Appeal (DACA).

22. Thereafter, FHFC staff evaluates all issues raised by the Direct Appeals and by the DACAs, and prepares a position paper for each issue. On April 27, 1999, the Review Committee approved the Direct Appeal and DACA position papers. On May 4, 1999, these position papers were mailed to the interested parties.

23. An applicant who was not satisfied with the Direct Appeal or DACA position paper for its application was given a limited period to request a proceeding pursuant to Chapter 120, Florida Statutes. If there were no disputed issues of material fact, the matter proceeded as an informal hearing. If there were disputed issues of material fact, the matter proceeded as a formal hearing.

24. On June 11 and July 30, 1999, the Board of Directors of FHFC considered the Recommended Order that resulted from each administrative hearing and entered a Final Order, which determined the final scores for each application. Thereafter,

the final ranking of the competing applications were completed and approved.

25. Preliminary approval of a tax credit allocation to an applicant is based on the final ranking. An applicant selected for a tax credit allocation is thereafter "invited" by FHFC to a "credit underwriting" whereby the credit-worthiness of the applicant and the proposed project is further scrutinized by a credit underwriter and a draft credit underwriting report is prepared. The credit underwriting process takes fifty to sixty days to complete. For the 1999 cycle, the draft credit underwriting reports were due September 28, 1999.

26. Once the credit underwriting reports are finished, the successful applicant is given a preliminary tax credit allocation. For the 1999 cycle, the applicant then must complete its project or certify that it has expended at least ten percent of its reasonably expected tax credit basis. If the project cannot be completed by the end of the calendar year, the applicant must enter into a Carryover Agreement. The applicant must have expended ten percent of its reasonably expected tax credit basis before it can enter into a Carryover Agreement. The applicant typically has to be prepared to spend large sums of money in a relatively short period of time to meet these requirements.

27. An applicant does not have the opportunity for an administrative hearing pursuant to Chapter 120, Florida Statutes,

on the scoring of a competing application after the Competitive Appeal Position Paper has been issued by FHFC staff. 4/ Pursuant to the challenged rules, an applicant who was not satisfied with the Direct Appeal or DACA position paper for another applicant's application is not permitted a Chapter 120 proceeding and is not permitted to intervene if the other applicant has requested a Chapter 120 proceeding. Such appeals, referred to as Cross Appeals, were once permitted by the rules of FHFC.

28. FHFC determined that Cross Appeals disrupted the application process and placed too great a burden on the FHFC staff. Cross Appeals resulted in a process that was difficult to bring to closure and resulted in litigation expenses that were assessed against the total project cost for the development.

29. Using rule development workshops that were appropriately advertised, FHFC adopted rules permitting Competitive Appeals, but prohibiting Cross Appeals. FHFC did not act arbitrarily or capriciously in adopting these rules.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Sections 120.52(8), 120.56(1), and 120.57(1), Florida Statutes.

31. Regency has the burden of proving the invalidity of the challenged rules by a preponderance of the evidence. Agrico

Chemical Company v. State, Department of Environmental Regulations, 365 So. 2d 759 (Fla. 1st DCA 1979); St Johns River Water Management District v. Consolidated-Tomoka Land Company, 717 So. 2d 72 (Fla. 1st DCA 1998), review denied, 727 So. 2d 904 (Fla. 1999).

32. Section 120.52(8), Florida Statutes, provides as follows:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious;

(f) The rule is not supported by competent substantial evidence; or

(g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret,

or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

33. Petitioner asserts that it has a right to challenge in a formal administrative hearing FHFC's evaluation of a competing application pursuant to the provisions of Chapter 120, Florida Statutes, under the doctrine set forth in Ashbacker Radio Corporation v. Federal Communications Commission, 326 U.S. 327 (1945) and followed Biomedical Applications of Clearwater, Inc. v. Department of Health and Rehabilitative Services, 370 So. 2d 19 (Fla. 2d DCA 1979) and Biomedical Applications of Ocala v. Office of Community Medical Facilities, 374 So. 2d 88 (Fla. 1st DCA 1979). Ashbacker, supra, required the Federal Communication Commissions to afford a radio station a hearing on its evaluation of a competitor's application where the applications were for the same frequency and the granting of one application necessarily entailed the denial of the other. In the Biomedical cases, the Second District Court and the First District Court of Florida ruled that the Ashbacker doctrine required hearings pursuant to Chapter 120, Florida Statutes, for

competing, mutually exclusive, applications for certificates of need.

34. Unlike the Federal Communications Commission or the Florida certificate of need program, FHFC does not determine which development projects may go forward and which will not be permitted to go forward because the applicants submitted to FHCH are not for mutually exclusive licenses or permits. These applications are for tax credits pursuant to a federal incentive program. No applicant has a right to a tax credit, and no applicant who is denied a tax credit will be denied the right to build its proposed development by FHFC.

35. Petitioner has not cited a Florida case in which a court has determined that the rationale that underpins the Ashbacker and Biomedical cases would apply to competitive applications for tax credits. Although this tax credit program is available to all states, Petitioner has not cited a case from another jurisdiction that requires a formal administrative hearing where tax credits are at issue.

36. An Administrative Law Judge should apply existing law. An Administrative Law Judge should not apply the Ashbacker doctrine as urged by Petitioner until a court of competent jurisdiction has ruled that the doctrine should be expanded to apply to the application process at issue in this proceeding, or the legislature has acted to confer rights consistent with the Ashbacker doctrine. 5/

37. The undersigned has considered Petitioner's arguments that are based on its assertion that it is entitled to a formal administrative hearing to compare its application with that of a competing application. Because existing law does not afford Petitioner that right, those arguments as to the invalidity of the challenged rules are rejected.

38. Petitioner's argument that FHFC failed to materially follow the rulemaking process by not utilizing the Uniform Rules of Procedure as required by Section 120.54(5)(a), Florida Statutes, is rejected because the challenged rules are not procedural rules that govern a proceeding in which the substantial interests of a party are determined. Instead, the challenged rules are part of the procedures adopted by FHFC in response to its mandate to properly allocate and distribute low-income housing tax credits in a fair and timely manner. The challenged rules prohibiting cross appeals are properly considered to be rules determining what parties have standing to demand a formal administrative hearing. Respondent correctly asserts that issues of standing are questions of substantive law, not procedural law. See Florida Wildlife Federation v. State, Department of Environmental Regulation, 390 So. 2d 64 (Fla. 1980), and Caloosa Property Owners Association, Inc. v. Palm Beach Board of County Commissioners, 429 So. 2d 1260 (Fla. 1st DCA 1983). Consequently, the Uniform Rules do not apply.

39. Petitioner's argument that the challenged rules exceed FHFC's grant of rulemaking authority is rejected. Because of the time constraints involved in this tax credit program, it is concluded that FHFC could not discharge its statutory duties without rules such as the ones at issue in this proceeding. The legislature has granted FHFC a broad range of authority, which includes the authority to adopt rules necessary to carry out its statutory duties. FHFC has the authority to adopt the challenged rules.

40. Petitioner's argument that the challenged rules vest unbridled discretion in FHFC and its staff because Cross Appeals are not permitted is not persuasive.

41. Petitioner's argument that the challenged rules are arbitrary and capricious is without merit.

CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is ORDERED that the subject Amended Petition for Determination of the Invalidity of Rules 67-48.005 and 67-48.002(10), Florida Administrative Code, is hereby dismissed with prejudice.

DONE AND ORDERED this 18th day of October, 1999, in
Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 1999.

ENDNOTES

1/ The parties requested that ruling on these objections be deferred until after the transcript of the proceedings was filed.

2/ Section 420.507, Florida Statutes, provides FHFC with the authority to discharge its duties, including, the following:

The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:

* * *

(12) To make rules necessary to carry out the purposes of this part and to exercise any power granted in this part pursuant to the provisions of chapter 120.

3/ There is a shortage of affordable housing in Florida. The legislative findings contained in Section 420.502, Florida Statutes, underscore the essential role of FHFC in providing low-income housing to the people of Florida.

4/ Petitioner's dissatisfaction with the challenged rules is that they prohibit its challenge in a formal administrative hearing the scoring of a competitor's application.

5/ The arguments that the Ashbacker doctrine would not apply to the application process at issue in this proceeding are more persuasive than the arguments that the doctrine would apply.

COPIES FURNISHED:

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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 Division of Administrative Hearings and a second copy, accompanied by filing

fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.