STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON HIGHLANDS, LLC and
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

v.

Case No. 2016-006BP
Application No. 2016-109C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SP GARDENS, LLC

Intervenor,

_____/

ORDER DISMISSING PETITION

On February 12, 2016, Florida Housing Finance Corporation received a Petition, pursuant to Sections 120.569 and 120.57(3), from Madison Highlands, LLC and American Residential Development, LLC (Petitioners). On February 19 Florida Housing received an Amended Petition from Petitioners. This Petition challenged Florida Housing's preliminary decision to award funding pursuant to Request for Applications (RFA) 2015-107 to four other applicants, and not to award funding to Petitioners. If Petitioners are successful in their challenges, and all four other

applicants are found ineligible, Petitioners would then be recommended for funding. If Petitioners fail in one or more of their challenges, they would not be recommended for funding.

On February 26, 2016, Florida Housing entered an Order Dismissing Petition with Leave to Amend. On March 4, 2016, Petitioners filed a Second Amended Petition along with numerous attachments. This Petition was sent as three separate emails, which were received by Florida Housing between 5:36 p.m. and 5:40 p.m. On March 8 Florida Housing entered an Order to Show Cause why the Second Amended Petition should not be dismissed as being untimely filed. On March 15, Petitioners timely filed its Response to the Order to Show Cause.

Section 120.569(2)(c), Fla. Stat., sets forth the procedures that an agency must follow upon receipt of a petition. It provides:

> (c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

I. The Second Amended Petition was Untimely Filed

As noted in both Petitioners' Amended Petition and Second Amended Petition, this matter involves a dispute arising under Section 120.57(3), Fla. Stat.

This statute specifically provides: "Agencies 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." Section 120.54(5), Fla. Stat., sets forth the requirements for the Uniform Rules as follows:

> 120.54(5) UNIFORM RULES.—
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> (a)1. By July 1, 1997, the Administration Commission shall adopt one or more sets of uniform rules of procedure which shall be reviewed by the committee and filed with the Department of State. Agencies must comply with the uniform rules by July 1, 1998. The uniform rules shall establish procedures that comply with the requirements of this chapter. *On filing with the department, the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection.*
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> 2. An agency may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission. The Administration Commission shall approve exceptions to the extent necessary to implement other statutes, to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or to permit persons in this state to receive tax benefits under federal law, or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the exceptions shall be published in the Florida Administrative Register.
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> 3. Agency rules that provide exceptions to the uniform rules shall not be filed with the department unless the Administration Commission has approved the exceptions. *Each agency that adopts rules that provide exceptions to the uniform rules shall publish a separate chapter in the Florida Administrative Code that delineates clearly the provisions of the agency's rules that provide exceptions to the uniform rules and specifies each alternative chosen from among those authorized by the uniform rules.* Each chapter shall be organized in the same manner as the uniform rules.
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> [Italics added.]

The Uniform Rules are adopted in Chapters 28-101 through 28-112, Fla. Admin. Code. Pursuant to Rule 28-106.104(3), Fla. Admin. Code, "[a]ny document received by the office of the agency clerk before 5:00 p.m. shall be filed as of that day but any document received after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day."

The only way that Florida Housing could establish a procedure whereby documents could be filed later than 5:00 p.m. or earlier than 8:00 a.m. would be if it promulgated rules that constituted exceptions to the Uniform Rules and had such rules approved by the Administration Commission. Such rules would have to clearly state that they provided exceptions to the Uniform Rules, specify how they differed from the Uniform Rules, and be organized like the Uniform Rules. Petitioners contend that Rule 67-52.002(3), Fla. Admin. Code, which specifies that pleadings sent by electronic mail "shall be accepted on the date transmitted," somehow has the effect of altering the requirements of the Uniform Rules. That could only be true if that rule had been approved as an exception by the Administration Commission, which it has not. The Uniform Rules are, therefore, the procedural rules of Florida Housing. Rule 67-52.002(3), Fla. Admin. Code, must be read in a manner that does not conflict with the Uniform Rules.

The obvious intent of Rule 67-52.002(3), Fla. Admin. Code, is to specify that Florida Housing does not require paper copies of petitions and other pleadings to be

filed on or before the date due, but instead will accept electronic copies on that date, to be followed within five business days by paper copies. Read in conjunction with Rule 28-106.104(3), Fla. Admin. Code, as it must be, Florida Housing's rules mean that documents will be accepted on the date electronically filed as long as they are filed between 8:00 a.m. and 5:00 p.m.

Petitioners also suggest that notwithstanding the plain language of Rule 28-106.104, Fla. Admin. Code, the deadline for filing set forth in that rule should be considered "directional only and not mandatory." The case law cited to in Petitioners' Response does not support this distinction, but instead finds that some deadlines are not jurisdictional issues, but instead are subject to equitable considerations. In accordance with Section 120.569(2)(c), Fla. Stat., and the case law discussed below, the deadline for filing a petition is mandatory unless a petitioner can demonstrate that the deadline should be tolled for equitable reasons.

Petitioners cite to several DOAH cases to show that late filings have sometimes been accepted by Administrative Law Judges. In each case, though, the issue was the late filing of a Proposed Recommended Order, not a petition; the filing was thus not subject to Section 120.569(2)(c), Fla. Stat., which requires that untimely filed petitions be dismissed. Instead, setting and enforcing the deadline for filing the PRO was entirely discretionary with the ALJ. In each case the ALJ found that the 5:00 p.m. filing deadline did apply, and the PROs were considered to have

been filed the next day, but that since no party was injured by the late filing it would be allowed. The situation in the present case is entirely different; four other applicants would be directly affected if the late filing is allowed, which is why the filing deadline must be strictly enforced absent a showing of extraordinary cause for applying the concept of equitable tolling.

II. Petitioners have not Demonstrated that the Doctrine of Equitable Tolling is Applicable

Section 120.569(2)(c), Fla. Stat., requires that an untimely filed petition be dismissed, but goes on to note that this requirement "does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition." Courts have consistently held that this language has eliminated "excusable neglect" as a valid excuse for a late filing. Aleong v. State, Dept. of Business and Professional Regulation, 963 So.2d 799 (Fla. 4th DCA 2007); Cann v. Dep't of Children & Family Servs., 813 So. 2d 237, 239 (Fla. 2d DCA 2002); Seavor v. Dept. of Fin. Servs., 32 So.3d 722 (Fla. 5th DCA 2010).

"Dismissal of an untimely request for hearing is mandatory, unless facts exist to support the application of the doctrine of equitable tolling." SRQUS v. Sarasota County et al., 2013 WL 6151414 at *10, DOAH Case No. 13-1219, (October 18, 2013); *see also* Machules v. Dep"t of Admin., 523 So. 2d 1132 (Fla. 1988); Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin., 58 So. 3d 907 (Fla.

1st DCA 2011); Cann v. Dep"t. of Child. & Fam. Servs., 813 So. 2d 237 (Fla. 2d DCA 2000. "Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."). Machules at 1134. The doctrine of equitable tolling is not available if the Petitioners failed to exercise due diligence in preserving their legal rights. *See* Jancyn Mfg. Corp. v. Dept. of Health, 742 So. 2d 473, 476 (Fla. 1st DCA 1999)

"Petitioner has the burden of proving by a preponderance of evidence that the doctrine of equitable tolling applies to allow it to file a petition more than 14 days from the publication of the notice of proposed agency action. SRQUS at *10. *See also* Conservation Alliance of St. Lucie Co., Inc. v. Ft. Pierce Util. Auth., WL 2371793, DOAH Case No. 09-1588 (May 24, 2013).

Petitioners argue that the late-filed petition should be accepted under the doctrine of equitable tolling, on the grounds that since the Corporation never explicitly informed Petitioners that the Uniform Rules were applicable, it was "misled or lulled" into inaction. In support of this argument, Petitioners note that the Corporation's website does not contain the deadline provisions found in the Uniform Rules; that when counsel for Florida Housing spoke with a representative of Petitioners about email filing he did not instruct them as to the applicable rules; and that the Order Dismissing Petition did not contain instructions on the

applicability of the Uniform Rules. Petitioners do not allege that they in any way requested this information from Florida Housing or in fact had any communications at all concerning the applicability of the Uniform Rules. "The doctrine of equitable tolling places no affirmative obligation on the part of an agency employee to discern the intent behind a request for information, or to provide documents in the absence of a request." SRQUS at *10.

This argument suggests that the Petitioners must have been unaware that the Uniform Rules would apply to petitions filed with Florida Housing, and assumed that the only applicable procedural rules were to be found in Chapter 67-52, Fla. Admin. Code (which is actually entitled "Corporation Clerk" and makes no mention of any procedures other than that the Clerk will accept certain documents for filing). However, it should be noted that Petitioners referenced the Uniform Rules at least 14 times in their Second Amended Petition, and referenced Chapter 67-52 not once. In fact, the Petition specifically notes in Part VI that "Statutes and rules governing this proceeding are Sections 120.569 and 120.57(3), and Chapter 420, Florida Statutes, and Chapters 28-106, 67-48, and 67-40, Florida Administrative Code."[1]

[1] Rule 67-60.009, Fla. Admin. Code, entitled Applicant Administrative Appeal Procedures, is actually Florida Housing's primary procedural rule for filing petitions under Chapter 120, Fla. Stat. This rule was also never referenced by Petitioners, does not state that it creates an exception to the Uniform Rules, references the Uniform Rules several times, and does not include any time deadlines that would conflict with or supersede the Uniform Rules.

Petitioners have not demonstrated that Florida Housing took any affirmative action to mislead or lull them into believing that the Uniform Rules did not apply. They have not demonstrated that they have in some extraordinary way been prevented from asserting their rights. They may have been mistaken about which rules applied, but such a mistake, even it were somehow to rise to the level of excusable neglect, does not provide Petitioners with an escape from the consequences of a late-filed petition. *see* Aleong v. State, Dep't of Bus. & Prof'l Regulation, 963 So. 2d 799, 801 (Fla. 4th DCA 2007). As the Court said in Environmental Resource Associates v. Department of General Services, 624 So. 2d 330, 331 (Fla. 1st DCA 1993), "the problem in this case is the too ordinary occurrence of a [party] failing to meet a filing deadline." Whether or not this late filing in some way prejudiced any of the opposing parties, and whether or not Florida Housing or these parties knew that Petitioners were going to file an amended petition, are questions that need not be addressed since Petitioners have not met their burden of that equitable tolling should apply.

III. Even if it was Timely, Petition Would Still be Dismissed for Failure to Demonstrate Standing

The Order Dismissing Petition with Leave to Amend was premised on the legal conclusion that Petitioners, as the fifth-ranked applicants, were required to allege that all four of the higher ranked applications were deficient in some way; to

include specific facts that warrant reversal of the agency's proposed action for each applicant; and to cite to rules or statutes that require reversal of the agency's proposed action regarding each applicant. The Second Amended Petition, while considerably longer than the Amended Petition, did not include any new facts, or cite to any new rules or statutes that would, if true, warrant reversal of Florida Housing's proposed action to fund the City Edge application. For this reason, the Second Amended Petition would be dismissed even if it had been timely filed.

Petitioners argue, however, that they need not even allege that all four of the higher-ranked applications must be rejected in order to have standing to proceed. According to their legal theory, because it is possible that the highest ranked application may, through Florida Housing's credit underwriting process, never actually receive funding, and in fact that none of the higher-ranked applications might ultimately receive funding, their substantial interests are affected not by the fact that they have not been recommended for funding, but by the fact that they are not ranked somewhere higher than they are now. Taken to its logical ending, this legal theory would allow even the lowest-ranked applicant to have standing to challenge some or all of the higher ranked applications, because it was hypothetically possible that some or all of these applications might not make it through the credit underwriting process, and that the challenger could eventually be invited to credit underwriting through the long process of attrition.

The Second Amended Petition references a "bifurcated" process for awarding funds, and argues that "an applicant seeking to increase its ranking over other unfunded applicants has standing to challenge any other unfunded applicant that ranked higher than it." The only case cited by Petitioners in support of this legal theory was Pinnacle Rio LLC v. Florida Housing Finance Corporation, DOAH Case No. 14-1398BID (F.O. June 13, 2014; R.O. June 4, 2014). In that case, however, three petitioners were challenging two applicants that were selected for funding, and each petitioner could have been selected for funding if it showed that the higher ranking applicants should be rejected. While it is true that the Administrative Law Judge referenced a "bifurcated and extended selection process" in his Conclusions of Law, this Conclusion was rejected by Florida Housing in its Final Order. And neither the ALJ nor Florida Housing concluded that any unfunded applicant has standing to challenge any other unfunded applicant.

The primary case cited to explain how standing under Chapter 120, Fla. Stat. is determined is Agrico Chemical Co., v. Department of Environmental Regulation, 406 So.2d 479, 482 (Fla. 2nd DCA 1981). In that case the Court created a two-prong test to determine standing. The first prong of that test is that the petitioner must demonstrate that the proposed action will result in injury-in-fact of sufficient immediacy to justify an administrative proceeding. Case law is clear that this injury cannot simply be based on a hypothetical scenario, but instead must be something

that is likely to actually happen. *See* South Broward Hospital District, v. State Of Florida, Agency For Health Care Administration, 141 So.3d 678, 681 (Fla. 1st DCA 2014) ("Under the first prong of Agrico, the injury-in-fact standard is met by a showing that the petitioner has sustained actual or immediate threatened injury at the time the petition was filed, and "[t]he injury or threat of injury must be both real and immediate, not conjectural or hypothetical."); Village Park Mobile Home Ass'n v. State, Dep't of Bus. Regulation, 506 So.2d 426, 433 (Fla. 1st DCA 1987) (concluding that appellants' "speculative concerns" did not demonstrate any immediate injury-in-fact.)

Florida Housing has faced this same question before. In Kathleen Pointe Partners, LLLP v. Florida Housing Finance Corporation, DOAH Case No. 06-4758 (FHFC March 19, 2007), the Petitioner was the third ranked application, and challenged only the first-ranked application. It claimed standing because if the first-ranked application was found ineligible, and if any other higher ranked applicant did not receive funding, then the Petitioner would be selected for funding. The Administrative Law Judge, however, concluded that this "injury" was purely conjecture and that the Petitioner had not demonstrated standing, a conclusion upheld by Florida Housing.

The credit underwriting process typically takes at least several months to complete, and it is only very rarely that an applicant invited to credit underwriting

fails to ultimately secure funding. Petitioners argue that even if they are only successful in their challenges to two of the four higher ranked applicants, this would still increase their chances of being funded. It is sheer speculation, however, that not only might the highest ranked applicant not receive funding, but that the second highest ranked applicant might also fail to complete the underwriting process. This unlikely and speculative possibility does not constitute the sort of injury in fact that is contemplated in Agrico.

Because it was untimely filed, and because it did not demonstrate standing, the Second Amended Petition is DISMISSED with prejudice.

Done this 30 day of March, 2016.

Stephen P. Auger
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 30th day of March, 2016 by electronic mail to the following:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTIONS 120.542(8), 120.569, AND 120.57, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.