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IN THE DISTRICT COURT OF
APPEAL OF FLORIDA,
FIRST DISTRICT

CASE No. 05-0163RP

nmp

FLORIDA HOUSING FINANCE CORPORATION,

Petitioner,

v.

FLORIDA COALITION FOR THE
HOMELESS, INC., ALICE LAGUERRE,
JOSEPHINE GONZALES, and
THE CENTER FOR AFFORDABLE
HOUSING, INC.,

Respondents.

**PETITION FOR REVIEW OF NON-FINAL ADMINISTRATIVE ORDER
AND PETITION FOR WRIT OF PROHIBITION**

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Petitioner, FLORIDA HOUSING FINANCE CORPORATION (“Florida Housing”), the Respondent below, hereby requests, pursuant to Fla. R. App. P., 9-100(c)(3), that the First District Court of Appeals immediately review the “Order Denying Motion to Dismiss,” (the “Order”) rendered by the Division of Administrative Hearings (“DOAH”) in DOAH Case No. 05-163RP on February 2, 2005, and prohibit the DOAH from exercising jurisdiction over this matter, pursuant to Fla. R. App. P., 9-100(e), and says:

1. This Court has jurisdiction. Fla. R. App. P. 9.030(b)(1)(C) ; sec. 120.68(1), Fla. Stat. (2004); and Fla. R. App. P. 9.030(b)(3).
2. Florida Housing is an entrepreneurial public corporation, an instrumentality of the State of Florida, performs an essential public function, and is, for purposes of sec. 120.52, Fla. Stat., an agency. Sec. 420.504, Fla. Stat. Thus, the filing of this Petition invokes an automatic stay of the action below pending review. Fla. R. App. P. 9.310(b)(2).
3. The Order below denied Florida Housing’s Motion to Dismiss, which sought to dismiss as untimely filed the “Petition to Determine the Invalidity of Florida Housing Finance Corporation Proposed Rule Chapters 67-21 and 67-48,” (the “Petition”), filed by the Respondents, the FLORIDA COALITION FOR THE HOMELESS, INC., ALICE LAGUERRE, JOSEPHINE GONZALES, and the CENTER FOR AFFORDABLE HOUSING, INC. (the “Challengers”), based on R.

28-106.104(3) and (9), Fla. Admin. Code, and Dept. of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1053 (1st DCA 1979).

4. Immediate review of this nonfinal order is necessary, as the Order, by delaying the annual funding cycle for multifamily housing developments, will delay the production of housing units at a time when the need for such units is especially dire due to the effects of four hurricanes striking Florida in 2004. The Challengers threatened, beginning in November, 2004, to challenge the 2005 Universal Application Cycle rule amendments unless all changes to the rules which they demanded were made. Florida Housing consistently responded to such demands by pointing out the proposed 2005 rule amendments which were beneficial to the Challengers' interests, and stated that Florida Housing would make no further changes to the 2005 Universal Cycle Rules. The Challengers waited until the last day provided by statute to file their Petition, apparently intending to cause maximum disruption to the 2005 funding cycle.

5. Review of the final agency decision will not provide an adequate remedy for the delay in funding the immediate and desperate need for multifamily housing projects in Florida, given the added need created by the hurricanes which struck the state during 2004. Development interests have invested millions of dollars and tremendous amounts of time in reliance and with the expectation that the Universal Application Cycle will make funding available in a timely manner.

STATEMENT OF FACTS

6. The Challengers filed the Petition below asserting a challenge to the proposed amendments to Ch. 67-21 and 67-48, Fla. Admin. Code.

7. Chapters 67-21 and 67-48 (the “Rules”) establish, *inter alia*, the process for the Universal Application Cycle, by which Florida Housing provides financing for construction of affordable housing projects in Florida, through the State Apartment Incentive Loan and federal HOME apartment loan programs, the federal Low Income Housing Tax Credit program, and the Multifamily Mortgage Revenue Bond (“MMRB”) program. The rules are amended annually to accommodate changing financial and market conditions affecting affordable housing for each annual application cycle.

8. Florida Housing is responsible for allocating and/or lending several hundred million dollars of funding and tax credits annually, to construct affordable housing rental projects. Each year, Florida Housing amends its Universal Application Cycle rules, contained within Ch. 67-21 and 67-48, Fla. Admin. Code (the “Rules”), beginning in late spring or early summer. The rule amendments are typically finalized around the end of each calendar year. The annual changes in the rules are incremental, to adjust to changing market conditions and to make the best use of available funding. Florida Housing attempts to begin the annual funding

cycle earlier in each year, to assist developers in getting the projects funded in concert with the deadlines imposed by the Internal Revenue Code.

RELIEF SOUGHT

9. Florida Housing respectfully requests that this Court reverse the Administrative Law Judge's decision and remand the case to the Division of Administrative Hearings with instructions to dismiss the "Petition to Determine the Invalidity of Florida Housing Finance Corporation Proposed Rule Chapters 67-21 and 67-48," as not timely filed.

10. Alternatively, Florida Housing respectfully requests that this Court issue a writ prohibiting the Division of Administrative Hearings from taking any further action in this matter, as it lacks jurisdiction to proceed based on an untimely filed petition.

ARGUMENT IN SUPPORT OF THE PETITION

11. Challengers filed a wholesale challenge to two entire chapters of Florida Housing's rules, Ch. 67-21 and 67-48, Fla. Admin. Code (App. No. 1, 2, 3, and 4), asserting that all provisions of both rule chapters, whether existing rule provision or proposed rule amendment, are invalid (App. No 5). The Challengers do not say in the Petition how any proposed rule amendment affects them differently in any way from the existing rules. To the contrary, the Challengers allege repeatedly in the Petition that "the Proposed Rules are substantially

equivalent to their three immediate predecessors [the 2002, 2003, and 2004 Universal Application Cycle rules],” (App. No. 5, pp. 4, 5, 16, 18, 19, and 22), or similar statements expressing the notion that the proposed rules differ little from the existing adopted rules (App. No. 5, pp. 3, 11, 14, 15, 17, 22, 27, and 31). The Petition is rife with generalities and, contrary to sec. 120.54(5)(b)4, Fla. Stat., and R. 28-106.201, Fla. Admin. Code, does not state a challenge to specific rule provisions, nor differentiate between existing rules and proposed amendments. The Petition’s primary focus is on challenging existing rule provisions, rather than the proposed 2005 amendments. It seems clear that the intent of the Petition is to cause delay in the cycle, rather than to seek specific changes in the rules.

12. According to the plain language of the statute and Uniform Rules, the Challengers did not timely file their petition challenging Florida Housing’s rules, as explained below. It is imperative that the Challengers not be allowed to disrupt and delay the timely delivery of funding for the multifamily housing projects governed by the challenged rules.

13. Sec. 120.56(2)(a), Fla. Stat., provides in pertinent part:

Any substantially affected person may seek an administrative determination of the invalidity of any ***proposed rule*** by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a), ***within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c)***, within 20

days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). (*Emphasis added*)

14. The final public hearing on the proposed amendments to Rule Chapters 67-21 and 67-48, Fla. Admin. Code, was held pursuant to sec. 120.54(3)(c), Fla. Stat., on January 7, 2005. Ten days after such hearing was January 17, 2005, a state holiday (Martin Luther King Day). Thus, the final day for filing a petition challenging a proposed rule according to sec. 120.56(2)(a), Fla. Stat., was January 18, 2005. R. 28-016.103, Fla. Admin. Code.

15. The filing of pleadings, including the petition filed by the Challengers, with the Division of Administrative Hearings is governed by R. 28-106.104, Fla. Admin. Code, which provides in relevant part:

(3) Any document received by the office of the agency clerk after 5:00pm shall be filed as of 8:00am on the next regular business day.

(8) Any party who elects to file any document by electronic transmission shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result.

(9) The filing date for an electronically transmitted document shall be the date the agency clerk receives the complete document.

16. The Petition was filed electronically. The “complete document” was not received until after 5:00pm on January 18, 2005, according to time codes on

the Petition (App. No. 5), thus pursuant to R. 28-106.104(3) and (9), Fla. Admin. Code¹, the Petition was not filed with the Clerk of the Division of Administrative Hearings until 8:00am on January 19, 2005. (App. No. 9) The Petition was not timely filed so as to challenge the proposed rule, as the ten days allowed by statute for filing (with one day added due to the holiday) ran on January 18, 2005. *See, Whiting v. Florida Department of Law Enforcement*, 849 So.2d 1149 (Fla. 5th DCA 2003) (Petitioner attempted to fax notice of appeal to PERC on last day of filing period; completed filing in the morning of the following day—one day late: petition dismissed as untimely).

17. It is clear from the Division's records, and from the transmission times on the Petition as filed that the complete document filed by the Challengers was not received by 5:00pm on January 18, 2005, and was docketed by the DOAH agency clerk as filed on January 19, 2005. (App. No. 9) The rule contains no exception for exhibits, attachments or appendices to pleadings, therefore, the "complete document" can only mean the entire document as filed. Indeed, the rule seems intended to prohibit electronic "backdoor" filings by beginning a transmission before 5:00pm, then continuing on beyond the time for filing by non-electronic means.

¹ Adopted by the administration Commission as part of the Uniform Rules of Procedure ("Uniform Rules")

18. Failure to file a valid petition or request challenging the proposed rule within the time period provided in statute² is grounds for dismissal as the filing period is jurisdictional. Dept. of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1053 (1st DCA 1979). An agency may not assume jurisdiction of a matter which is not timely filed. Fiat Motors of North America v. Calvin, 356 So.2d 908 (Fla. 1st DCA 1978). The Division was without jurisdiction to entertain the untimely filed challenge to the proposed rule. DOAH's taking jurisdiction of this case constitutes a departure from the essential elements of law.

19. The Order would treat the Petition as a timely filed challenge to the amendments as proposed rules, notwithstanding that the Petition was not filed until January 19, 2005 pursuant to R. 28-106.104(3) and (9), Fla. Admin. Code, which govern filing of papers and pleadings with DOAH. (App. No. 9). An agency must follow its own rules. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (Fla. 1st DCA 1996). This failure to adhere to the DOAH electronic filing rules constitutes a departure from the essential elements of law, as it is inconsistent with an agency rule. Sec. 120.68(7)(e)2., Fla. Stat.

20. The Division of Administrative Hearings and its Administrative Law Judges, like all agencies, are creatures of statute and have no powers beyond those expressly granted in statute. Ocampo v. Department of Health, 806 So.2d 633

² The time periods for filing a challenge to a proposed rule formerly found in sec. 120.54(4), Fla. Stat., are now contained in sec. 120.56(2), Fla. Stat.

(Fla. 1st DCA 2002); City of Jacksonville v. Jacksonville Supervisor's Association, Inc., 791 So.2d 508 (Fla. 1st DCA 2001); Mathis v. Florida Department of Corrections, 726 So.2d 389 (Fla. 1st DCA 1999). Nothing in Chapter 120 grants the ALJ authority to unilaterally waive, alter, or ignore the requirements of the Uniform Rules of Procedure.

21. In treating the Petition as a timely filed challenge to a proposed rule, the Order has the effect of prohibiting Florida Housing from relying on its rules to go forward with its process to allocate hundreds of millions of dollars in loans, private activity bonds and federal Low Income Housing Tax Credits until the rule challenge proceeding is resolved. The MMRB Program is funded out of the state private activity bond (PAB) allocation, pursuant to Part VI of Chapter 159, Fla. Stat. Each calendar year, the Division of Bond Finance (DBF) distributes PAB allocation to certain issuers, including Florida Housing. In order to reserve this allocation for a multifamily purpose, Florida Housing must conduct TEFRA Hearings per sec. 147(f) Internal Revenue Code, on proposed developments received as applications in the 2005 Universal Application Cycle, and then submit the hearing reports to the Governor for approval. The Governor's signed TEFRA approval letter must then be submitted, along with a Notice of Intent to Issue (NOII) form, to the DBF by June 30th of that year in order to reserve any of this

allocation for multifamily developments. Delay in accomplishing the above could put Florida Housing at risk of losing this allocation.

22. 26 C.F.R. sec. 42 and Sec. 1.42-14, Internal Revenue Code, establish and provide rules for the allocation of Low Income Housing Tax Credits (“Tax Credits”). Tax Credits are a dollar-for dollar credit against federal income tax liability, paid over a ten year period, which are sold to generate equity for affordable housing projects. A state must allocate 99% of the state’s credit ceiling (the state’s allocation authority amount) the past year to qualify for the National Pool, those housing credits not used by the states for the preceding year and returned to the Treasury for redistribution. Florida Housing has qualified for the National Pool every year since 1990. Florida typically receives tax credits worth about \$4.5 million from the National Pool annually. The delay in allocation resulting from this litigation could cause Florida Housing to lose access to the National Pool.

23. The Order Denying Florida Housing’s Motion to Dismiss was issued without a hearing, and contains neither findings of fact nor conclusions of law to support or explain why the Petition “. . . should be treated as timely filed,” when doing so flies in the face of the valid applicable DOAH rules. (App. No. 8) Ruling on this Motion to Dismiss without hearing or argument constitutes a departure

from the essential elements of law. *See, Eight Hundred, Inc. v. Florida Department of Revenue*, 837 So.2d 574, 576 (Fla. 1st DCA 2003).

24. The Order does not affect only Florida Housing, but has profound effects on the developers, contractors, and managers of affordable housing projects because of the delayed distribution of funding. That delay will ultimately affect the very persons the Petition claims to represent: those who are in need of waiting for available affordable housing. Review is appropriate, as the agency's action in taking unwarranted jurisdiction has immediate and adverse consequences, not only for Florida Housing, but more importantly for those whose need for timely completion of the projects to be funded under these rules is so pressing. Review after final agency action will not remedy the suffering caused by the delay of this funding cycle.

25. The Challengers argued below that they "could have filed the exhibits with an amended complaint," and that such filing would have related back to the partial filing. The fact is that they did not. As a valid timely filing was not made, there was no timely filing to which a later amendment could relate back. *See, Department of Health and Rehabilitative Services v. Alice P.*, 367 So.2d 1045, 1053 (1st DCA 1979).

26. The Challengers wrongly relied upon the theory of equitable tolling to excuse the failure to timely file, citing as authority Ebersol v. Unemployment

Appeals Commission, 845 So.2d 945 (Fla. 5th DCA 2003) (Record raised evidentiary issue of whether notice was given to claimant, and indicated that faxed petition was timely filed). Here, unlike Ebersol, there is no factual issue regarding either notice or when the petition was filed.

27. Florida courts have applied the doctrine of equitable tolling to excuse an otherwise untimely initiation of an administrative proceeding when four requirements are satisfied. First, the filing requirement is not jurisdictional. Machules v. Department of Administration, 523 So. 1132 (Fla. 1988). In the Machules and in Department of Corrections v. Chesnut, 30 Fla. L. Weekly D160 (Fla. 1st DCA Jan. 7, 2005), the time for filing was not jurisdictional. Here, the time for filing a challenge to a proposed rule is jurisdictional. Dept. of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045, 1053 (1st DCA 1979). The first test for equitable tolling is not met.

28. Second, the delay must be a minor infraction of the filing requirement. Stewart v. Department of Corrections, 561 So. 2d 15 (Fla. 4th DCA 1990)); Environmental Resource Associates v. Department of General Services, 624 So. 330, 332-333 (Equitable tolling denied; Judge Zehmer's dissenting opinion found that the delay was a minor infraction).

29. Third, the delay does not result in prejudice to the other party. Stewart, 561 So. 2d at 16. The third requirement of the doctrine of equitable

tolling is not satisfied in this case. The delay sought by Petitioner would prejudice Florida Housing's interests by requiring Florida Housing to incur the expense and delay caused by disregard of the mandatory dismissal language in Section 120.569(2)(c), Fla. Stat., and the filing requirements found in Rule 28-106.104(3) and (9), Fla. Admin. Code, both in continuing this litigation and by the delay such litigation will cause in making funding available for sorely needed affordable housing projects in Florida.

30. Fourth, the delay is caused by the affected party being misled or lulled into inaction, being prevented in some extraordinary way from asserting his or her rights, or having timely asserted his or her rights mistakenly in the wrong forum. Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988). In Machules, the Court found that the agency caused the plaintiff to delay its filing by giving false or misleading information. Here, unlike Machules, the Challengers were not misled by either Florida Housing or DOAH. Equitable tolling is not applicable where the plaintiff was not misled or given false information by the agency. Department of Corrections v. Chesnut, 30 Fla. L. Weekly D160 (Fla. 1st DCA Jan. 7, 2005). Those who would file electronically at DOAH are put on notice by R. 28-106.104(8), Fla. Admin. Code, that they proceed with such filing entirely at their own risk:

Any party who elects to file any document by electronic transmission shall be responsible for any delay, disruption, or

interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the Clerk as a result.

The Challengers cannot have been deceived regarding the electronic filing process, given the plain language of the rule. *See, Whiting v. Florida Department of Law Enforcement*, 849 So.2d 1149 (Fla. 5th DCA 2003) (Petitioner attempted to fax notice of appeal to PERC on last day of filing period; completed filing in the morning of the following day—one day late: petition dismissed as untimely).

31. Eight years after the decision in *Machules*, the legislature enacted the mandatory dismissal language in Section 120.569(2)(c). Ch. 96-159, sec. 18, Laws of Fla. The 1996 mandatory dismissal language was not present in the statutes construed by earlier courts that applied the doctrine of equitable tolling to suspend the filing requirements. Section 120.569(2)(c), requires dismissal of the untimely filed challenge to proposed rules. Dept. of Health and Rehabilitative Services v. Alice P., 367 So.2d 1045 (Fla. 1st DCA 1979), makes clear that the dismissal is without leave to amend. The Challengers are free to file a challenge to the adopted rules. *Id.* at 1053.

32. As noted above, the petition appears to be challenging existing adopted rules rather than the proposed 2005 rule amendments. The Challengers have not pointed to a single provision in the proposed rules which has results in an adverse effect on any of the Challengers. To the extent that equitable

considerations are at issue in this matter, the equities should be resolved in favor of those who are waiting for much-needed housing, rather than in favor of the Challengers, who have not articulated a challenge to the proposed rules.

PROHIBITION

33. This Court has jurisdiction to issue a writ of Prohibition in this cause. Art. V, sec. 4(b)(3), Fla. Const.; Fla. R. App. P. 9.100(e)

34. There are no facts in dispute regarding the filing of the petition below.

35. The Challengers failed to file within a jurisdictional time limit. Dept. of Health and Rehabilitative Services v. Alice P., 367 So.2d at 1052-1053.

Prohibition is appropriate where a document is not filed within a time frame that is jurisdictional. Miami-Dade County v. Peart, 843 So. 2d. 363 (Fla. 3rd DCA 2003).

Failure to file constitutes an irremediable jurisdictional defect. First National Bank in Fort Myers v. Florida Unemployment Appeals Commission, 461 So.2d 208 (Fla. 1st DCA 1984). “Late filing is a defect that no one can correct, not even the court.”

Hawks v. Walker, 409 So.2d 524 (Fla. 5th DCA 1982)

36. Petitioner prays that this Court will issue a writ prohibiting the Division of Administrative Hearings from proceeding further with this action, as it lacks jurisdiction to proceed based on an untimely filing.

ORAL ARGUMENT

37. Petitioner requests oral argument.

CONCLUSION

The Order Denying Motion to Dismiss should be reversed and the Division of Administrative Hearings directed to dismiss the case; alternatively this Court should issue a Writ of Prohibition which prohibits the Division of Administrative Hearings from proceeding with the challenge to proposed rules below, as the “Petition to Determine the Invalidity of Florida Housing Finance Corporation Proposed Rule Chapters 67-21 and 67-48,” was not timely filed, thus the Division lacks jurisdiction to proceed.

CERTIFICATE OF SERVICE

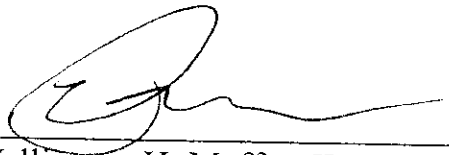
I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Administrative Law Judge Michael M. Parrish, Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, Florida 32399, and by Federal Express to Janet Riley, Esq., Legal Aid Service of Broward County, Inc., 491 State Road 7, Plantation, FL 33317, this _____ day of March, 2005.

CERTIFICATE OF FONT

I HEREBY CERTIFY that, the Petition for Review of Non-Final Administrative Order and Petition for Writ of Prohibition of Petitioner, Florida Housing Finance Corporation, has been generated in Times New Roman, 14-point font, and complies with the font requirements of Fla. R. App. P. 9.210(a)(2), this _____ day of March, 2005.

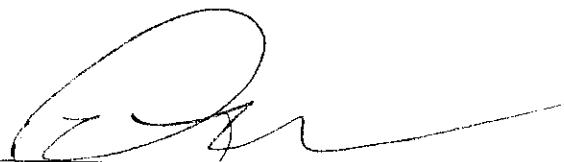
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Administrative Law Judge Michael M. Parrish, Division of Administrative Hearings, 1230 Apalachee Parkway, Tallahassee, Florida 32399, and by Federal Express to Janet Riley, Esq., Legal Aid Service of Broward County, Inc., 491 State Road 7, Plantation, FL 33317, this 31st day of March, 2005


Wellington H. Meffert II
Attorney for Petitioner

CERTIFICATE OF FONT

I HEREBY CERTIFY that, the Petition for Review of Non-Final Administrative Order and Petition for Writ of Prohibition of Petitioner, Florida Housing Finance Corporation, has been generated in Times New Roman, 14-point font, and complies with the font requirements of Fla. R. App. P. 9.210(a)(2), this 31st day of March, 2005


Wellington H. Meffert II
Attorney for Petitioner

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