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House of Representatives

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July 2, 2019

The Honorable Ken Paxton
Attorney General of the State of Texas
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

RQ-0293-KP

FILE# ML-48575-19
I.D.# 48575

Via email: opinion.committee@oag.texas.gov

Re: Whether the requirements of TEX. GOV'T Code §2306.6715 APPEAL, regarding the appeal process was properly followed when accepting and granting appeals by the Texas Department of Housing and Community Affairs

Dear General Paxton:

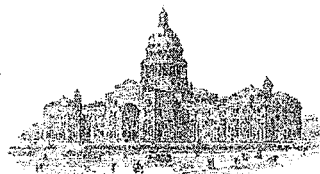
I am writing to you to request an Attorney General opinion on whether the requirement outlined in TEX GOV'T Code §2306.6715(c) (the "Statute") was properly applied when accepting appeals from applicants during the 2019 Competitive (9%) Housing Tax Credit Application Cycle, which is administered by the Texas Department of Housing and Community Affairs ("TDHCA"). I also respectfully request that this opinion be expedited as TDHCA will make awards at the end of July 2019.

Please see the attached documentation that provides a more detailed breakdown of the request.

If you have any questions or need additional information, please do not hesitate to contact me or my staff directly at (512) 463-0486.

Respectfully,

Angie Chen-Button
Chair, House Committee on Urban Affairs



BACKGROUND

On April 26, 2019, Texas Department of Housing and Community Affairs (TDHCA) published an Application Log that showed two applications in Region 11 Urban had violated TDHCA's 1,000-foot rule. The two applicants appealed that ruling. TDHCA accepted the appeals and, based on those appeals, overturned their previous decision.

TDHCA may have violated the Statute when they accepted the appeals. The Statute requires appeals of TDHCA's rulings to be submitted within seven days of publication of the results of the application evaluation process. TDHCA published the Application Log on April 26, 2019. Based upon the Statute, these two appeals were due to TDHCA not later than May 3, 2019. The applicants, however, filed their appeals on May 6, 2019 and May 8, 2019, respectively, more than seven days after TDHCA's publication of the Application Log.

TDHCA claims the applicants met the statutory appeal deadline because TDHCA sent out an email to TDHCA's listserv subscribers on May 1, 2019, announcing that a new Application Log was posted on TDHCA's website.

Notice to applicants based on a listserv email is inconsistent with the Statute, and nowhere is such notice authorized in the 2019 Qualified Action Plan ("QAP") as the basis for commencing an applicant's 7-day appeal period.

STATUTORY COMPLIANCE:

The Statute states:

"The applicant must file a written appeal authorized by this section with the department not later than the seventh day after the date the department publishes the results of the application evaluation process provided by §2306.6710. In the appeal, the applicant must specifically identify the applicant's grounds for the appeal, based on the original application and additional documentation filed with the original application."

Furthermore, please see Section 11.1(b) of the QAP that directly references the Statute and confirms that "publishes" means "publication on the Department's website of a scoring log reflecting that Applicant's score or the seventh day from the date of transmittal of a scoring notice."

The full text of Section 11.1(b) is as follows:

“As provided by TEX. GOV'T Code §2306.6715(c) for Competitive Housing Tax Credit Applications, an Applicant is given until the later of the seventh day of the publication on the Department's website of a scoring log reflecting that Applicant's score or the seventh day from the date of transmittal of a scoring notice.”

The requirements are further outlined in the QAP in Section 11.902(c) which states:

“An Applicant or Development Owner must file its appeal in writing with the Department not later than seven (7) calendar days after the date the Department publishes the results of any stage of the Application evaluation or otherwise notifies the Applicant or Development Owner of a decision subject to appeal. The appeal must be signed by the person designated to act on behalf of the Applicant or an attorney that represents the Applicant. For Application related appeals, the Applicant must specifically identify the Applicant's grounds for appeal, based on the original Application and additional documentation filed with the original Application as supplemented in accordance with the limitations and requirements of this chapter.”

CONCLUSIONS:

The Application Log, published on April 26, 2019, is the result of the application evaluation process. A listserv email does not constitute publication of the results of the application evaluation process. Please note that TDHCA's listserv is a voluntary subscriber based electronic mailing list and is therefore a communication device for only those persons who voluntarily elect to subscribe to it. Moreover, the listserv email relied upon by TDHCA in this instance merely advised its subscribers of the most recent publication of the Application Log on the website and it did not advise the subscribers of any decisions by TDHCA about the subscribers' applications.

The QAP specifically outlines four items that constitute results of the application evaluation process to commence the Statute's 7-day appeal period:

1. Publication of the results of any stage of the Application evaluation [11.902(c)];
2. Notification to the Applicant or Development Owner of a decision subject to appeal [11.902(c)];
3. Publication on the Department's website of a scoring log [11.1(b)];
4. Transmittal of a scoring notice [11.1(b)].

The Application Log posted on April 26, 2019 unequivocally complied with the Statute. Whereas a listserv email does not comply with the Statute because it is not:

- The results of any stage of the Application evaluation;
- Notice of a decision subject to appeal;

- A scoring log; or
- A scoring notice.

The listserv email, sent on May 1, 2019, stated, “The Texas Department of Housing and Community Affairs (TDHCA) has posted a revised 2019 9% Housing Tax Credit (HTC) Application Log to its website at: <http://www.tdhca.state.tx.us/multifamily/housing-tax-credits-9pct/index.htm>.”

TDHCA’s position is that the listserv email sent out on May 1, 2019 commenced the 7-day appeal period. The listserv email clearly states TDHCA posted a log on its website. The link goes to the page on TDHCA’s website where the logs are posted. To reiterate, the listserv email (a) is not a publication of the Application Log; (b) it does not link to the actual Application Log; (c) it is only a courtesy announcement of the publication of the Application Log; (d) it is only sent to subscribers of the listserv; and (e) it does not give notice of a decision, only the announcement of publication.

Our question is whether the 7-day appeal period commenced on April 26, 2019, when the Application Log was published on TDHCA’s website. If so, then the appeals that were filed after May 3, 2019 (the seventh day) were therefore time barred pursuant to the Statute.

The concern is that the Statute was violated. A remedy is for TDHCA to overturn its prior decision on these appeals in question, which would render the respective applications ineligible, and for TDHCA to revert to the Application Log published on April 26, 2019 for Region 11 Urban.