

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Appellate Division

SUBJECT: Florence Villa Community Development Corporation  
DATE: September 15, 2008  
Docket No. A-08-79  
Decision No. 2198

DECISION

The Florence Villa Community Development Corporation (FVDC) appealed a determination by the Administration for Children and Families (ACF) to disallow \$200,000 of funds awarded to FVDC for a Community Economic Development (CED) grant. ACF determined that FVDC had recaptured \$200,000 of the principal from a loan, made with grant funds, to Cypress Gardens Adventure Park, LLC (Cypress Gardens) and that FVDC had transferred the \$200,000 to a different project, without ACF approval, contrary to the terms of the CED grant.

FVDC argues that it reapplied the funds recovered from Cypress Gardens to its "Plants at the Villa Nursery Project" (Nursery project) only after its Executive Director had discussed the plan with the ACF Project Officer for the CED grant. According to FVDC, the Nursery project, like the Cypress Gardens project, was designed to provide employment for low-income residents of the Florence Villa area.

For the reasons stated below, we uphold the disallowance since we conclude that FVDC did not obtain the required, written approval from an authorized official before using the funds for the Nursery project.

**Background**

ACF is an operating division of the federal Department of Health and Human Services and administers the Community Services Block Grant (CSBG) Discretionary Grant program through the Office of Community Services (OCS). Section 680(a)(2) of the CSBG Act, as amended, authorizes the award of competitive grants to private, nonprofit organizations that are community development corporations "to provide technical and financial assistance for

economic development activities designed to address the economic needs of low-income individuals and families by creating employment and business development opportunities." 42 U.S.C. § 9921(a)(2). ACF publishes an annual Program Announcement soliciting applications for these CED grant funds.

FVCDC applied for the CED grant at issue under a Program Announcement published on May 11, 2004. The Program Announcement stated that grants were to be awarded "to encourage rural and community development corporations to create projects intended to provide employment and business development opportunities for low-income people through business or commercial development." 69 Fed. Reg. 26,134 (May 11, 2004); ACF Ex. A. Applicants that proposed to make an equity investment or to provide a loan to a third party were required to submit for OCS approval a third party agreement covering the transaction. 69 Fed. Reg. at 26,139. At a minimum, such an agreement was required to contain information about the purposes for which any loan was to be made, interest rates and other fees, terms of the loan, repayment schedules, collateral security, default and collection procedures, and signatures of the authorized officials of the lender and borrower. *Id.* The term "loan" was defined as "[m]oney lent to a borrower under a binding pledge for a given purpose to be repaid, usually at a stated rate of interest and within a specified period of time." 69 Fed. Reg. at 26,135. Applications in response to the Program Announcement could include only one proposed project. 69 Fed. Reg. at 26,141. Grant funds were to be administered pursuant to Department regulations at 45 C.F.R. Part 74.

On July 12, 2004, FVCDC submitted an application requesting \$700,000 in CED funds, \$500,000 of which were to be used "to provide a loan to facilitate the expansion of Cypress Gardens Adventure Park, which provides entertainment and leisure activities at 6000 Cypress Gardens Blvd in Winter Haven, Florida." FVCDC Ex. 1 (Application at page 5). The abstract for the application said that the project would "create approximately **75 permanent full-time jobs (60% for low-income people)** who reside in the Winter Haven community." *Id.* at 5 (emphasis in original). According to the application, the population of the community served by the project lived in an economically distressed area, which included a high proportion of public assistance recipients, single mothers, at-risk youth, and unemployed or underemployed residents. *Id.* at 6, 29-32.

The Director of OCS, in a letter dated September 14, 2004 addressed to FVCDC's Executive Director, informed FVCDC that a grant in the amount of \$700,000 had been awarded to FVCDC. ACF

Ex. B. The letter informed the Executive Director of the names and contact information for the Program Specialist (whom FVCDC calls its Project Officer) and for the Grants Management Specialist assigned to the project. The letter specifically noted that "[a]ll correspondence and reports related to your grant should be transmitted to the Grants Management Specialist with a copy to your Program Specialist." Id. at 2. The attached notice of Financial Assistance Award indicated both a project and budget period of "09/30/2004 THRU 02/28/2006." Id. at 3. The notice and the Standard Terms and Conditions that were attached to the notice specified that the grant was subject to the requirements of 45 C.F.R. Part 74. Id. at 3-6. The notice provided that, subject to the release of funds, within 30 days of the start of the award period, FVCDC and OCS "must finalize the terms and conditions of the grant" and that FVCDC and the Office of Grants Management "must finalize the budget." Id. at 3-4. The Standard Terms and Conditions provided that the "recipient organization must carry out the project according to the application as approved by the Administration for Children and Families (ACF), including the proposed work program and any amendments, all of which are incorporated by reference in these terms and conditions." Id. at 5-6.

On November 14, 2004, FVCDC submitted a revised budget narrative that, among other things, indicated that \$500,000 of grant funds would be used for a "[l]oan to business for start-up, site development expenses and other business expenses." ACF Ex. C, at 2. On January 21, 2005, OCS issued in response a revised notice of Financial Assistance Award that removed a restriction on draw down of federal funds and moved \$500,000 of grant funds from the "Other" budget category to the "Equipment" category, but stated: "All previous terms and conditions remain in effect." ACF Ex. D.

On January 25, 2006, FVCDC submitted to OCS a document called a "Disposition of Asset Plan of Loan." ACF Ex. E. This document stated:

In accordance with 45 C.F.R. Part 74.36(e), Title to Intangible Property, Florence Villa Community Development Corporation hereby agrees to provide the Administration for Children and Families (ACF), Office of Grants Management (OGM) a copy of the loan documents, at the point at which the loan is executed. These documents should include the identification of the loan recipient as well as the (a) interest rates, (b) length and terms of loans(s) and (c) payment schedule. The documents should also include an identification of any

characteristics establishing defaults and a list of recovery actions to be taken in the event of such default. The Grantee must notify OGM of how program income recovered from the loan will be used.

Id. On January 26, 2006, OCS issued a second revised notice of Financial Assistance Award. Like the other revised notice, the January 26, 2006 notice provided that "[a]ll previous terms and conditions remain in effect" but after "Other" referred to the "following remarks." ACF Ex. F. The remarks explained that the amendment was being issued to correct the January 21, 2005 notice because the \$500,000 for the "business loan was incorrectly placed in the equipment line item" in the budget. The remarks further stated that the "grantee has submitted the 'Disposition of Asset Plan of Loan' signed by the authorized official," that the "loan arrangement is between the grantee and Cypress Gardens Adventure Park, LLC," and that the "loan is for 3 years @ 2.5% interest rate." Id.

In its Semi-Annual Program Progress Report for the period October 1, 2005 through May 30, 2006, FVCDC reported that its major activities and accomplishments for the period included maintaining "550 employees of which 100 came from the target population," developing "marketing material for education and community out reach," tutoring "31 after school youth," and opening "new children's Rides at Cypress Gardens Adventure Park." ACF Ex. G. In the Semi-Annual Program Progress Report for the period July 1, 2006 through December 30, 2006, FVCDC listed similar accomplishments, but reported under "Problems" that "Cypress Gardens file[d] Chapter 11 Bankruptcy" and that FVCDC "[a]ttended a creditors hearing in Valdosta, GA." ACF Ex. H. In a Grantee Status Report for the period January 1, 2007 through June 30, 2007, FVCDC explained that Cypress Gardens had successfully redeveloped and reopened the park, but that the "occurrence of three major weather systems in this community in a one year period has caused tremendous distress to residents and businesses impacted, including Cypress Gardens" and that "[i]nsurance delays and denials have made it necessary for the company to file bankruptcy." ACF Ex. I, at 2. This report further explained that the "park remains open with these 600 employees of which 100 are low-income, while the company undergoes reorganization." Id. None of these reports mentioned any loan repayment by Cypress Gardens to FVCDC.

In August 2007, the Director of OCS received a letter from a Florida Congressman regarding an email his office had received from a constituent (a former FVCDC Executive Director) expressing concern about expenditures of federal funds by FVCDC,

particularly with respect to its purchases to launch a plant nursery and its project to create jobs at Cypress Gardens, which had declared bankruptcy. ACF Ex. J. This inquiry resulted in OCS commencing an investigation. FVDC Ex. 5. As part of its preliminary investigation, OCS asked FVDC to address whether "there are any funds, or principle (sic), to the original loan from [Cypress Gardens] that had been paid prior to bankruptcy proceedings beginning" and if some principal had been recouped, to provide the amount repaid. Id. at 2.

On December 7, 2007, FVDC's Executive Director responded, stating that FVDC is a creditor for debt collection, but did not anticipate recovering any funds "given its position on the debt ladder," but that FVDC had recovered "\$200,000 in loan repayments" from Cypress Gardens before it declared bankruptcy. ACF Ex. K. FVDC said that it had "utilized the repaid funds as working capital for its [Plant] Nursery Enterprise Grant 90EE0631 to support its continued growth." Id. FVDC alleged that its staff had contacted the grant Project Officer regarding reprogramming of the loan repayments and that she had "informed FVDC that as long as the loan repayment funds were utilized to further the 'economic development activities' of the organization, that no regulatory requirements precluded the FVDC from utilizing the repaid funds in said manner." Id.

Meanwhile, on December 4, 2007, the Grants Management Specialist for the grant had advised FVDC's Executive Director to submit a final Financial Status Report and a final Program Progress Report (both of which had been due 90 days after the end of the project period). ACF Ex. L.

On March 19, 2008, OCS informed FVDC that it was disallowing \$200,000 in funds claimed under the grant because FVDC had not obtained prior written approval of the ACF Office of Grants Management to transfer the \$200,000 of recovered loan funds to the Nursery project. FVDC Ex. 6. OCS quoted from the provision at 45 C.F.R. § 74.36, which requires prior approval before a grantee encumbers intangible property or debt instruments obtained with federal funds and which incorporates by reference sections 74.34(g) and (h). Id. at 1. OCS informed FVDC that, even if it had timely requested approval for the transfer, "ACF would have denied the request on the ground that the funds could not be used for a purpose other than originally approved." Id. FVDC timely appealed this determination to the Board, arguing that the cited provisions did not require prior approval and that the award notice allowed it to treat the loan repayment as it did. ACF's response relies not only on section 74.36, but also on the prior approval requirements of section 74.25.

## Analysis

*Whether the \$200,000 loan repayment is subject to Part 74 requirements on intangible property and debt instruments*

As indicated above, the CED grant made to FVCDC was subject to the administrative requirements for grants in 45 C.F.R. Part 74. Section 74.36(e) provides:

Title to intangible property and debt instruments purchased or otherwise acquired under an award or subaward vests upon acquisition in the recipient. The recipient shall use that property for the originally authorized purpose, and the recipient shall not encumber the property without approval of the HHS awarding agency. When no longer needed for the originally authorized purpose, disposition of the intangible property shall occur in accordance with the provisions of 74.34(g) and (h).

Sections 74.34(g) and (h) address disposition of equipment purchased with grant funds and the right of the HHS awarding agency to require transfer of title to it or to a third party. For purposes of Part 74, the terms "intangible property and debt instruments" mean, but are not limited to, "trademarks, copyrights, patents and patent applications and such property as loans, notes and other debt instruments, lease agreements, stock and other instruments of property ownership, whether considered tangible or intangible." 45 C.F.R. § 74.2.

On appeal, FVCDC argues that nothing in section 74.36(e) required FVCDC to seek approval before transferring the \$200,000 from one DHHS ACF program to another. According to FVCDC, subsections (g) and (h) of section 74.34 (to which section 74.36(e) refers the reader), do not apply to the \$200,000 loan repayment because those sections address "equipment" and that term is defined in section 74.2 as "tangible nonexpendable personal property." FVCDC Br. at 6-7. FVCDC argues:

A \$200,000 loan repayment simply is not "equipment" to be disposed of pursuant to 45 CFR Part 74.34, because Part 74.34 instructs on how to dispose of *tangible* property. For this reason it is respectfully suggested that 45 CFR 74.34(g) and (h) have no bearing on how Florence Villa treated this intangible property, because those provisions address how a recipient should treat equipment.

Id. at 7 (emphasis in original).

This argument has no merit. By providing that "disposition of the intangible property shall occur in accordance with the provisions of 74.34(g) and (h)," section 74.36(e) is not suggesting that those sections apply directly, but is merely incorporating the parts of those provisions that provide for disposition of property, whatever its nature. While the incorporated sections address "equipment" (which is tangible property), this does not preclude reading section 74.36(e) to mean that the disposition of intangible property and debt instruments should occur in the same manner as disposition of equipment. Simply stated, pursuant to those sections read together, a grantee may not dispose of intangible property or debt instruments acquired with DHHS funds without first seeking instructions from the DHHS awarding agency, which has the authority to require the grantee to transfer title to it, and, if the grantee does use the property for other purposes, it must compensate the federal government for its share in the cost of the original project or program.

Contrary to what FVCDC argues, moreover, its need for the funds for its Nursery project does not mean that the disposition requirements in section 74.34(g) would not apply. While that section starts with the clause "[w]hen the recipient no longer needs the equipment," that clause, in context, is clearly referring to the grantee's need with respect to the project from which the funds to purchase the equipment were derived, since it then goes on to specify when a grantee may use the equipment for "other activities," meaning activities other than those for which it was purchased. Moreover, section 74.36(e) specifies that the disposition requirements in sections 74.34(g) and (h) apply when the intangible property is "no longer needed for the originally authorized purpose." Thus, FVCDC could not reasonably read these provisions as authorizing it to use the loan repayments to meet any need it has, whether or not related to the activities for which the funds were awarded.

FVCDC also relies on section 74.34(c), which specifies purposes for which equipment acquired with DHHS funds may be used when no longer needed for the original project or program. This reliance is misplaced since that section is not incorporated by reference into section 74.36(e) regarding the treatment of debt instruments, and on its face addresses only equipment.

FVCDC's arguments do raise the issue of whether section 74.36(e) applies here since ACF did not give a reason why it considered the loan repayment to be within the term "intangible property and

debt instruments." Since ACF cited grounds other than section 74.36(e) and those grounds suffice as a basis for the disallowance, however, we do not need to reach this issue. We note, however, that even if the proceeds from repayment of the loan are not the same in nature as the debt instrument requiring repayment, these regulations did put FVDCD on notice that, even though it had title to the debt instrument, the federal government retained an interest in that property (and had a right to be compensated for its interest).

*Whether FVDCD's use of the \$200,000 loan repayment violated provisions requiring prior written approval for any change in the scope or objective of the project*

FVDCD argues on appeal that it reapplied the funds recovered from Cypress Gardens to its Nursery project only after its Executive Director had discussed the plan with the ACF Project Officer for the CED grant. FVDCD submitted an affidavit by its Executive Director in which he attests that, prior to applying the \$200,000 to the Nursery project, he "discussed the plan with the DHHS ACF Grant Project Officer . . . who approved, or at least offered [no] objection [to] the application of the Cypress Gardens funds to the Nursery project." FVDCD Ex. 3, ¶ 9. He further attests that FVDCD had never been "made aware at the time of any requirement to seek direction from the DHHS regarding this \$200,000 loan repayment," and that, since the "\$200,000 was being applied to support another DHHS ACF approved program designed to assist the same low income individuals that the Cypress Gardens program was designed to assist, there was no factual or legal basis for Florence Villa to conclude there was anything legally improper about this use of the loan repayment," and he believed the use was "in keeping with both the spirit and intent of both the Nursery and Cypress Gardens grants." *Id.* ¶¶ 8, 10, 11.

In its brief on appeal, ACF asserts that, by accepting the grant award, FVDCD agreed to comply with the representations made in the grant application and with the terms and conditions associated with the award, including federal law and regulations and Office of Management and Budget (OMB) Circulars governing the administration of grant funds. ACF Br. at 10, citing Brownsville Community Development Corporation, DAB No. 1919, at 12 (2004); Delta Foundation, Inc., DAB No. 1710, at 21 (1999), *aff'd* Delta Foundation, Inc., 303 F.3d 551, 555 (5<sup>th</sup> Cir. 2002); 45 C.F.R. § 74.62(a). In particular, ACF contends, sections 74.25(c)(1) and (j) of Part 74 require recipients to obtain prior written approval for any budget revision that results in a change "in the scope or the objective of the project or program." ACF Br. at 10, also citing 45 C.F.R. §§ 74.2 ("Prior approval means written



approval by an authorized HHS official evidencing prior consent") and 74.25(k) (approvals "shall not be valid unless they are in writing and signed by at least one" of the identified HHS officials, including the head of the HHS Operating or Staff Division that made the award or the "responsible Grants Officer of the HHS Operating or Staff Division"). ACF also notes that, under section 74.25, the awarding agency "may not permit any budget changes in a recipient's award that would cause any Federal appropriation to be used for purposes other than (sic) those consistent with the original purpose of the authorization and appropriation under which the award was made." ACF Br. at 10.

According to ACF, since the grant application states that FVCDC's Executive Director had a history of project management experience, including projects with federal funds, he should have been familiar with federal regulatory requirements. ACF Br. at 10-11, citing FVCDC Ex. 1 (Application at 27). Moreover, asserts ACF, the letter transmitting the award notice identified the Grants Management Specialist for the award and provided that all correspondence should be transmitted to her. ACF Br. at 11, citing ACF Ex. B. at 2. ACF asserts that the Executive Director evidenced his understanding of this by sending the revised budget narrative to the Grants Management Specialist, as well as by submitting a "Disposition of Asset Plan of Loan" that expressly provides that the "Grantee must notify OGM of how program income recovered from the loan will be used." ACF Br. at 11, citing ACF Ex. E.

FVCDC had an opportunity to submit a brief replying to ACF's new regulatory basis for the disallowance but did not do so, even after the Board inquired about whether the brief had been submitted. See Notice of Record Closing dated 9/2/08. That basis, moreover, is essentially the same as under the property disposition requirements discussed above - that FVCDC should have requested written approval of its proposal for how to dispose of the funds through the means it was told to use - correspondence sent to the Grants Management Specialist, with a copy to the Program Specialist.

We agree with ACF that the terms and conditions of the grant award, including the regulations in Part 74, gave FVCDC notice that it could not depend on an oral discussion with the Project Officer as prior approval for its use of the \$200,000 for the Nursery project. Section 74.25(b) states that recipients of DHHS grants are required "to report deviations from budget and program plans, and request prior approvals for budget and program revisions, in accordance with this section." Section 74.25(b)

lists the circumstances in which, for nonconstruction awards, recipients "shall obtain prior approvals from the HHS awarding agency" and includes: "(1) Change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval." Section 74.2 defines the term "prior approval" to mean "written approval by an authorized HHS official evidencing prior consent" and section 75.25(k) provides that approvals granted under that section "shall not be valid unless they are in writing and signed" by at least one of the specified HHS officials. FVCDC does not allege that it thought the Project Officer/Program Specialist was authorized to approve budget changes, and ACF says that she was not. As ACF points out, moreover, FVCDC evidenced an understanding that budget matters should be addressed through the Grants Management Specialist.<sup>1</sup> In any event, the Executive Director's affidavit regarding his conversation with her is equivocal and suggests that she may have simply failed to offer any objection to the proposed use, rather than affirmatively approving it. In sum, FVCDC did not establish that ACF approved transferring the amount of the repaid loan to the Nursery project, much less establish that it met the requirement for prior, written approval from an authorized official.

Such approval was required under 45 C.F.R. § 74.25. The record shows that there is merit to FVCDC's contention that the "objective" of the Nursery project was the same as that of the

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<sup>1</sup> ACF also relies in part on the statement in the "Disposition of Asset Plan of Loan" that the "Grantee must notify OGM [the Office of Grants Management] of how program income recovered from the loan will be used." ACF Ex. E. This statement does not clearly apply to the \$200,000 at issue here. The term "program income," as defined in Part 74, means "gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award," but does not include the receipt of principal on loans "[e]xcept as otherwise provided in the terms and conditions of the award." 45 C.F.R. § 74.2. The Program Announcement for the CED grant at issue here defines "program income" as "[g]ross income earned by the grant recipient that is directly generated by an activity supported with grant funds." 69 Fed. Reg. at 26,135. It does not state that repayment of loan principal is considered program income for purposes of a CED grant, nor do the Standard Terms and Conditions of the award state that the receipt of principal on loans will be treated as program income. Id.; ACF Ex. B, at 5.

Cypress Gardens project - to create jobs for low-income residents of the community. Compare FVCDC Ex. 1, at 5 (Abstract) with FVCDC Ex. 4, at 7 (Project Abstract). Also, the application for the Nursery project award shows that it was under the same statutory authority as the Cypress Gardens application. Compare FVCDC Ex. 1, at 1 (item 10 of Standard Form 424) with FVCDC Ex. 4, at 1 (item 10 of Standard Form 424).

The "scope" of the two projects, however, was very different. While some of the funds for the Cypress Gardens project were to be used by FVCDC for marketing and other activities, most of the funds were for a loan to the adventure park, secured by a third party agreement which was a debt instrument in which the federal government retained an interest, if not title. On the other hand, the Nursery project application indicates that the funds would be used to expand a plant nursery that had been started with enterprise funds "into a full service wholesale and retail plant nursery." FVCDC Ex. 4, at 23. The application states that FVCDC "owns the land on which the retail component will operate and is under contract for a 20 acre site for plant, tree and flower growth." Id. at 23. In addition, FVCDC was to manage the Nursery project directly, and the funds were to be used for equipment, personnel, payroll taxes and benefits, property acquisition, supplies and small equipment, and consulting, technical assistance, and evaluation. Id. at 33, 40 (unnumbered page, "Sources and Uses of Funds Statement").

We conclude that, given these differences in project scope, FVCDC was required to obtain prior written approval from an authorized official before transferring the \$200,000 awarded for a loan to Cypress Gardens to its own Nursery project.

In addition, ACF reasonably determined that, even if FVCDC had requested approval for the transfer in advance from the appropriate, authorized official, such approval would not have been granted. Although the objectives of the projects were similar, ACF could reasonably determine that, since FVCDC had already received federal funds for the Nursery project, no further federal funds should be needed for that project. We also note that ACF has a legitimate concern here that the progress reports that FVCDC submitted not only did not notify ACF that FVCDC had already recovered \$200,000 in loan funds from Cypress Gardens before it declared bankruptcy, but also suggested that only through filing as a creditor might FVCDC be able to recover any of the loan funds.

*Whether the terms and conditions of the Cypress Gardens award expressly allowed FVDC to use the \$200,000 loan repayment for the Nursery project*

FVDC also argues that the answer to the question about how the loan repayment should be treated is found in the Cypress Gardens project award notice at page 2, section 26, where it "explicitly states that 'draw down of federal funds' was expressly allowed." FVDC Br. at 7. According to FVDC, if the grant still retained its character as federal funds once it was awarded to FVDC, then FVDC's "use of the funds for another DHHS program was a proper draw down of the funds pursuant to the very terms of the DHHS Cypress Gardens award." Id.

This argument misconstrues the meaning of the term "draw down" as used with respect to federal grants. Most grants are funded through a letter of credit mechanism which authorizes the grantee to draw down federal funds into its own cash account through an electronic transfer, consistent with rules on minimizing the time elapsing between the transfer of funds from the U.S. Treasury and the payment of funds for program purposes by the recipient. See, e.g., 45 C.F.R. §§ 74.21(b)(5), 74.22. An attachment to the award notice here provided instructions about the DHHS system for electronic transfer of funds, including that new recipients needed to submit a specified form. ACF Ex. B, at 10. Also, the original award notice required certain steps to be taken within 30 days to "finalize" the terms and conditions and budget for the award.<sup>2</sup> Thus, when the revised award notice stated that the amendment was being issued to "remove the restriction on draw down of Federal funds," it was referring to a restriction on the grantee's ability to generate a transfer of funds from the U.S. Treasury to its own account under a letter of credit. It was not, as FVDC contends, giving FVDC an unrestricted ability to use those funds for an unauthorized purpose.

## Conclusion

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<sup>2</sup> We also note that the Program Announcement for the grant provided that the "portion of the grant that will be used to fund project activities will not be released (in any instances) until the agreement has been approved by OCS." 69 Fed. Reg. at 26,138.

For the reasons stated above, we uphold the disallowance of the \$200,000 FVDCDC received as a loan repayment and applied to an activity outside the scope of the grant, without obtaining written prior approval from ACF, as required.

\_\_\_\_\_/s/\_\_\_\_\_  
Stephen M. Godek

\_\_\_\_\_/s/\_\_\_\_\_  
Constance B. Tobias

\_\_\_\_\_/s/\_\_\_\_\_  
Judith A. Ballard  
Presiding Board Member