

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

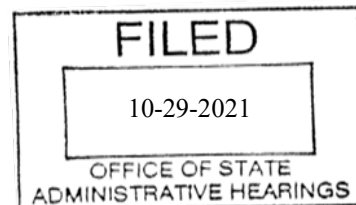
**TAD3 PRODUCTIONS/FNL
PRODUCTIONS, LLC,
Petitioners,**

v.

**GEORGIA DEPT. OF ECONOMIC
DEVELOPMENT,
Respondent.**

**Docket No.: 2123699
2123699-OSAH-GDED-DENX-67-Malihi**

Agency Reference No.: 2123699



FINAL DECISION

I. INTRODUCTION

Petitioners TAD3 Productions, LLC (“TAD3”) and FNL Productions, LLC (“FNL”) appeal the decision by the Georgia Department of Economic Development (the “Department”) to deny the Petitioners tax credit certification under the Georgia Entertainment Industry Investment Act (the “Act”). A hearing was held on August 30, 2021.¹ The Petitioners were represented by Christina Baugh, Esq. Assistant Attorney General Aanal Patel appeared for the Department. For the reasons stated below, the Department’s decision to deny tax credit certification is **AFFIRMED**.

II. FINDINGS OF FACT

1.

The Department is tasked with certifying projects for applicants seeking to claim tax credits under the Act. Each year, the Department reviews approximately 350-400 applications for tax credit certification under the Act. About 97% of these applications are approved. (Testimony of Allison Fibben, Transcript [hereinafter, “T.”] 175; Lily Thomas, T. 156.)

¹ The record closed on October 1, 2021, following post-hearing submissions by the parties.

2.

When reviewing an application, the Department considers whether it is complete, if the budget is commensurate with the production type, the crew involved, any distribution plans, whether the project is an eligible type of project, and whether there is a work-for-hire relationship present. An application must be submitted no later than the end of principal photography, and, once it is submitted, the Department will render a decision no later than 60 days from the date of application submission. Applications can be withdrawn by an applicant. (Testimony of Lily Thomas, T. 157-58, 169-70; Exhibit R-1.)

3.

The application contains three questions related to funding: (1) whether the project is fully funded; (2) what the budget is; and (3) what the estimated Georgia spend is. The Department requires this information so that it may ensure that Georgia vendors and crew are paid, and that the production company is actually ready to move forward with the project at the time it applies. Production companies may not use certification letters as a method to obtain project funding. Production companies may be asked to provide additional documentation after the application is initially reviewed. As it relates to funding, the Department will accept a wide variety of proof, including finance agreements, bank statements, funding agreements, SAG and IATSE bonds, or any combination thereof. However, any of those documents individually may not be sufficient to show funding if it does not demonstrate a complete picture of the project's finances. A production company is expected to show that it had full funding when it began production, regardless of the point at which it applies. That funding must be in an amount commensurate with the project budget listed on the application. (Testimony of Lily Thomas, T. 160-64; Exhibit R-1.)

4.

TAD3 is a production company created by business partners Jason Sciavicco and Michael Ruch. On October 27, 2020, TAD3 applied for tax credit certification for an unscripted television project (the “Project”), originally called “Untitled Valdosta High School Project,” with a working title of “Friday Night Life.” This initial application was incomplete. Allison Fibben of the Department exchanged emails with Mr. Sciavicco and Rita Ruch, on behalf of TAD3, regarding the information required for a complete application. Although Mr. Sciavicco and Ms. Ruch requested to speak with Ms. Fibben by telephone, all communication occurred via email. (Testimony of Allison Fibben, T. 176, 212-14, 217-18, 232; Testimony of Jason Sciavicco, T. 23, 28-29, 80, 83; Exhibit R-3, R-4, R-11.)

5.

On November 11, 2020, TAD3 submitted a second application. This application also was incomplete. On November 12, 2020, Ms. Fibben provided via email a list of items that would be necessary in order to complete the application, including “documentation that the project is fully funded.” Responding to the email, Mr. Sciavicco asked Ms. Fibben what type of documentation would show that the project is fully funded. Ms. Fibben replied, “A bank statement, or other account documents showing \$3.8M² is available today to produce the project.” Mr. Sciavicco provided some additional information in response to the items listed by Ms. Fibben, and he stated that he would resubmit the application with the needed documentation. (Testimony of Allison Fibben, T. 222-23; Testimony of Jason Sciavicco, T. 89-91; Exhibit R-5, R-11.)

² The Petitioners argue that the correct amount is not \$3.8 million, as they initially indicated to the Department, but instead between \$2.2 and \$2.6 million, because by this point in November 2020, they were negotiating an agreement with Netflix that included an anticipated budget of \$2.2 to \$2.6 million. Mr. Sciavicco acknowledged, in his email reply of November 13, 2020, that an agreement with Netflix had not yet been finalized. The agreement with Netflix is dated December 17, 2020. The \$3.8 million amount represents the top end of the budget range provided by the Petitioners in their October 27 and November 11 applications. (Exhibit P-25, R-4, R-5, R-10, R-11 at p. 39.)

6.

On November 13, 2020, Ms. Fibben sent an email to TAD3, stating, in relevant part:

To date, the production company has not provided funding documentation, the estimated spend, a budget, a commercial production office address; therefore, the conclusion is that the project is not fully funded as stated on the application, does not meet the criteria for certification and certification will not be awarded.

Ms. Fibben also provided a letter, attached to the email, dated November 13, 2020, which stated similarly, in relevant part:

After careful review of the information submitted by TAD3 Producitons (sic) LLC, the project submitted does not meet the requirements for certification. The production company has not provided funding documentation, the estimated spend, a budget, a commercial production office address; therefore, the conclusion is that the project is not fully funded and does not meet the criteria for certification to be awarded.

Although Mr. Sciavicco and TAD3 argued that they did not understand that the application for certification had been denied because, as conceded by the Department, the word “deny” was not used in these communications, the Department unmistakably conveyed that the Project did not meet the requirements for certification and would not be receiving certification because of the listed deficiencies in the application. (Testimony of Allison Fibben, T. 223-24; Testimony of Jason Sciavicco, T. 91-92; Exhibit R-6, R-11.)

7.

Subsequently, rights and ownership of the Project, which was eventually called “Titletown High,” were transferred to FNL. FNL is a production company that was created specifically for the production of the Project. On December 11, 2020, FNL submitted a third application to the Department for tax credit certification. Ms. Fibben informed FNL that this application could not be accepted because the Project had already applied for certification, which had been denied in November. (Testimony of Allison Fibben, T. 198-99, 228-30; Testimony of Jason Sciavicco, T.

23-25, 28; Ex. P-31, R-7, R-12.)

8.

TAD3 and FNL then filed an appeal with the Department's General Counsel, Andrew Capezzuto. Mr. Capezzuto reviewed the record as well as a number of additional documents provided by the Petitioners for the first time in connection with the appeal. These included bank statements and credit card statements in the name of Blue Eyes Holding, LLC, payroll records, a heavily redacted license agreement between Blue Eyes Production, Inc. and Netflix, and a copy of a wire transfer receipt, posted on December 1, 2020. Blue Eyes Production (dba Blue Eyes Entertainment) is a production company owned by Jason Sciavicco's wife, Holly. Blue Eyes Holding, LLC is an unrelated entity. As he conducted the review, Mr. Capezzuto sought clarification from the Petitioners' counsel as to the relationship among Blue Eyes Holding, FNL, and TAD3; he also inquired about the fact that the applicants for certification were TAD3 and FNL, but the licensing agreement was between Netflix and Blue Eyes Production. (Testimony of Andrew Capezzuto at T. 236, 238, 245; Testimony of Jason Sciavicco, T. 27, 117, 120; Exhibit P-14 through 24, R-9, R-13, R-14.)

9.

As set forth in the production services agreement provided to Mr. Capezzuto during the Department-level appeal, FNL and Blue Eyes Production agreed that FNL would create the Project as a work for hire for Blue Eyes Production, and that Blue Eyes Production was the sole and exclusive owner of the content. The production services agreement provided that FNL would render all necessary production services, and that FNL had been hired by Blue Eyes Production to do so. Read in connection with the Netflix license agreement, Blue Eyes Production, as the owner of the content, had the right to license the project with Netflix. Pursuant to the Netflix agreement

the Petitioners provided, Blue Eyes Production agreed to pay Netflix 50% of the tax credits it earned, and under the production services agreement, Blue Eyes Production assigned its right to the tax credits to FNL. The Petitioners did not provide to Mr. Capezzuto a revised Netflix agreement, short-form Netflix agreement, or other agreement between TAD3 and FNL transferring the right to claim the credits. (Testimony of Andrew Capezzuto, T. 246-48, 252-53, 255-58, 263-65; Exhibit P-26, R-9, R-10.)

10.

Mr. Capezzuto upheld the Department's initial determination not to award certification. In a letter dated March 5, 2021, Mr. Capezzuto explained that although several of the deficiencies noted by Ms. Fibben had been resolved, the Department still had not received documentation sufficient to show that the Project was fully funded. He also noted that, based on the additional materials provided by the Petitioners in conjunction with the appeal, the Project appeared to be a work for hire and thus ineligible for the tax credits. On March 30, 2021, Mr. Capezzuto emailed Petitioners' counsel regarding additional documents that the Petitioners had provided after the Department-level appeal in an effort to show that payments were being made and costs covered from August 2020 through the end of 2020. Mr. Capezzuto stated that these documents, including PayPal, credit card, and checking statements, only demonstrated costs incurred by the account holder; they did not show that the Project was fully funded at the time the certification was sought. (Testimony of Andrew Capezzuto, T. 238-43, 250; Exhibit R-10, R-13, R-14.)

11.

The term "fully funded" was not defined in the Department's rules at the time relevant to this appeal.³ At the hearing, Mr. Sciavicco maintained that "fully funded," in industry parlance,

³ In 2021, the Department's rules were revised to require that applicants demonstrate assets equal to or more than 75% of the budgeted cost of the project. See Ga. Comp. R. & Regs. 159-1-1-.02(7).

means that they have secured commitments for funding the Project. He stated that the Project was at all times fully funded because he was able to pay cast, crew, and vendors per their agreements. When production began, in August 2020, Mr. Sciavicco had access to \$300,000 of his own funds, plus a commitment from Mr. Ruch for up to \$1 million for the Project. In October 2020, according to Mr. Sciavicco, Netflix committed another \$1.25 million to the Project, reflected in a short-form agreement later finalized in the Licensing Agreement of December 17, 2020. Thus, Mr. Sciavicco believes the combination of these commitments in August and October, along with his access to his own funds, means that the Project should have been considered fully funded. In contrast, according to Mr. Capezzuto and the Department, the term “fully funded,” at the time the applications were submitted in 2020, meant that a production company had money available to it, either directly or through an agreement, in an amount commensurate with the budget listed on the application. It is this definition that Ms. Fibben used when she asked the Petitioners to provide documentation such as a bank statement or other account documents showing the availability of \$3.8M for the Project. (Testimony of Jason Sciavicco, T. 25, 144-46, 269-70; Testimony of Andrew Capezzuto, T. 251-52; Exhibit R-15.)

III. CONCLUSIONS OF LAW

1.

The Petitioners bear the burden of proof in this matter. Ga. Comp. R. & Regs. 616-1-2-.07(2); see this Court’s Order of July 28, 2021. The standard of proof is a preponderance of evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

Pursuant to the Georgia Entertainment Industry Investment Act, O.C.G.A. § 48-7-40.26, production companies may apply for qualifying projects to be certified for two types of tax credits:

(1) the base film tax credit, which amounts to a “tax credit equal to 20 percent of the base investment in this state,” and (2) “an additional tax credit equal to 10 percent of such base investment” (also called the “uplift tax credit”) for promoting Georgia’s film industry in its completed production. O.C.G.A. § 48-7-40.26(c)(1), (2); Ga. Comp. R. & Regs. 159-1-1-.02(6).⁴

3.

The statute authorizes the Department to promulgate rules and regulations in order to determine what projects qualify for these tax credits. O.C.G.A. § 48-7-40.26. Productions are certified on a project-by-project basis. Ga. Comp. R. & Regs. 159-1-1-.03(1)(a). Applicants seeking the tax credits may be asked to provide certain documentation, including budget information, funding sources, distribution agreements, production schedules, personnel information, and any other documentation required by [the Department].” Id. “Only one Production Company may claim the tax credit, per project.” Id. Importantly, “[e]ach project must be applied for and certified individually once the project is fully funded.” Id. Work-for-hire service companies are not eligible for the tax credits. Ga. Comp. R. & Regs. 159-1-1-.05(2); see also O.C.G.A. § 48-7-40.26(b)(13) (“In the instance of a ‘work for hire’ in which one production company . . . hires another production company . . . to produce a project or contribute elements of a project for pay, the hired company shall be considered a service provider for the hiring company, and the hiring company shall be entitled to the film tax credit.”). Finally, [s]ubmission of project documentation that does not adhere to industry standards may result in denial . . . of certification.” Ga. Comp. R. & Regs. 159-1-1-.05(7).

4.

If an application for certification is disapproved, the applicant may appeal to the

⁴ At all times relevant to this appeal, the 2018 version of the Department’s Rules was in effect. See Ex. R-2. Therefore, all references to the Department’s Rules in this decision are references to the 2018 Rules.

Department's General Counsel. Any further appeals are made before the Office of State Administrative Hearings. Ga. Comp. R. & Regs. 159-1-1-.08. An Administrative Law Judge "shall make an independent determination on the basis of the competent evidence presented at the hearing." Ga. Comp. R. & Regs. 616-1-2-.21.

5.

After careful review of the evidence presented by the parties, the undersigned concludes that the Petitioners have not met their burden to prove that they met the requirements for certification. Specifically, the Petitioners have not shown that the project was fully funded at the time they sought certification. As noted, the 2018 Rules do not define this term, and the parties disagree about its meaning. If a statute or regulation's text is unclear, Georgia courts must employ the rules of statutory construction. Johnson v. State, 308 Ga. 141, 144-45 (2020); City of Guyton v. Barrow, 305 Ga. 799, 802-03 (2019) (explaining that only after applying all the canons of statutory construction may a court find a regulation ambiguous and holding deference unwarranted because regulation was not ambiguous). Although "[t]he common and customary usages of the words are important," they are not the sole consideration. 308 Ga. at 144 (citation omitted). Instead, words must be considered within the greater legal context or statutory scheme. City of Guyton, 305 Ga. at 805 (directing that courts should endeavor to "[understand] the legal context in which the rule was created").

6.

With this framework in mind, the Court concludes that the term "fully funded," as it was used in 2020, meant that a production company had money available to it in an amount commensurate with the budget provided on the application, and as shown by supporting documents such as bank statements. Reliance on an applicant's assertion of a commitment for funding would

not comport with the common usage of the term or the intent of the Legislature. “[A]bsent clear evidence to the contrary, words should be assigned their ordinary, logical, and common meaning.” State v. Hammonds, 325 Ga. App. 815, 817 (2014) (citation omitted). The Merriam-Webster online dictionary defines “fully” as “in a full manner or degree: completely.” <http://www.merriam-webster.com/dictionary/fully> (last visited Oct. 22, 2021). It defines “funded” as “a sum of money or other resources whose principal or interest is set apart for a specific objective.” <http://www.merriam-webster.com/dictionary/funded> (last visited Oct. 22, 2021). “[W]here one seeks the benefit of an exemption from taxation, any such exemption must be strictly construed and will not be found unless the terms under which it is claimed clearly and distinctly show that such was the intention of the legislature.” Ga. Dep’t of Revenue v. Ga. Chemistry Council, Inc., 270 Ga. App. 615, 618 (2004).

7.

Even if the meaning of “fully funded” were to include commitments to fund, Petitioners have not provided evidence, beyond Mr. Sciavicco’s testimony, to show that Mr. Ruch had in fact committed \$1 million to the Project. Moreover, the Department provided numerous opportunities for Petitioners to supplement their applications with the necessary supporting documents both during the application process and afterwards. In connection with the Department-level appeal, the Petitioners provided certain bank records, credit card statements, and payroll records that raised new questions even as they purported to answer the original questions.

8.

As for the question of whether there was a “work for hire” relationship between FNL and Blue Eyes Production within the meaning of the Act and the Department’s rules, the Petitioners have not met their burden to show that FNL was entitled to receive the certification for tax credits.

The evidence shows that, pursuant to an agreement between Blue Eyes Production and FNL in November 2020, FNL agreed to render all production services necessary for the production of the Project; FNL’s services were subject to Blue Eyes’ approval, as was the project budget and schedule. The agreement also noted that all services rendered by FNL were created as a “work made for hire” commissioned by Blue Eyes within the meaning of U.S. copyright law, and that Blue Eyes was the sole and exclusive author and owner of the project. The undersigned cannot conclude, based on the evidence presented at the hearing, that FNL was eligible to receive certification.

IV. DECISION

The Petitioners have not met their burden to show that they are eligible for tax credit certification for the Project. Accordingly, the Department’s decision to deny the application for the Project is **AFFIRMED**.

SO ORDERED, this the 29th day of October, 2021.

Michael Malihi

Michael Malihi, Judge