STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CAMELLIA POINTE, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2002-0051

FLORIDA HOUSING FINANCE CORPORATION,

APPLICATION NO.: 2002-118C

Respondent.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on October 10, 2002. On or before April 15, 2002, Petitioner submitted its Application to Florida Housing Finance Corporation ("Florida Housing") to compete for an allocation of housing tax credits. Petitioner timely filed a Petition for Review, pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(c), Florida Statutes, and determined that there were no disputed issues of material fact. An informal hearing was held in this case on September 19, 2002, in Tallahassee, Florida, before Florida Housing appointed Hearing Officer, Diane D. Tremor. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order allowing Petitioner's application to receive

7.5 tie-breaker proximity points and not be rejected for failure to meet threshold requirements regarding its ability to proceed with its proposed development.

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

In accordance with the foregoing, it is hereby **ORDERED:**

1. The findings of fact of the Recommended Order are adopted in full as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Final Order.

2. The conclusions of law of the Recommended Order are adopted in full as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Final Order.

3. The Hearing Officer's recommendation that a Final Order be entered allowing Petitioner's application to receive 7.5 tie-breaker proximity points and not be rejected for failure to meet threshold requirements regarding its ability to proceed with its proposed development is approved and accepted as the appropriate disposition of this case. Accordingly, Petitioner's Application receives 7.5 tie-breaker proximity points and is not rejected for failure to meet threshold requirements regarding its ability to proceed with its proposed development

DONE and ORDERED this 10th day of October, 2002.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chairperson

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

Copies to:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CAMELLIA POINTE, LTD.,

Petitioner,

v.

FHFC CASE NO. 2002-0051
Application No. 2002-118C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on September 19, 2002.

APPEARANCES

For Petitioner, Camellia Pointe, Ltd.:	Michael P. Donaldson, Esq. Carlton Fields P. O. Drawer 190 Tallahassee, FL 32302-0190
For Respondent, Florida Housing Finance Corporation:	Wellington H. Meffert II General Counsel Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, FL 32301-1329

EXHIBIT
A

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issues are whether Petitioner is entitled to receive proximity tie-breaker points and whether Petitioner met the threshold requirements regarding its ability to proceed, as evidence by site plan approval (Exhibit 22) and evidence of appropriate zoning (Exhibit 28).

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 7, 13 through 16 and 18. Objections to proffered Exhibits 8 through 12, comprised of excerpts from applications submitted by other competing applicants, were sustained. The undersigned reserved ruling on Exhibit 17. Having considered that document and the parties' arguments with respect thereto, Exhibit 17 is received for the reasons stated below.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. Petitioner timely submitted an application to the Respondent for an

allocation of Federal Low Income Housing Tax Credits in the 2002 Universal Cycle program. The award of housing tax credits is made through a competitive process in which applicants apply using a Universal Application Package, which includes instructions and application forms. The Universal Application Package is adopted as a rule and is incorporated by reference in the Respondent's existing Rule 67-48.002(116), Florida Administrative Code.

2. The Universal Application allows applicants to earn up to 7.5 tie-breaker points based upon the proximity of the proposed development to specified services, including grocery stores, public schools, medical facilities, bus or metro rail stops and other affordable housing developments. The application instructions, which are rules, provide that the applicant "must first identify a Tie-Breaker Measurement Point on the proposed Development site," provide a Surveyor Certification Form and a land survey map which "must clearly show the boundaries of the proposed Development site." The term "development site" is not defined in the application instructions or forms, nor is it defined in Chapter 67-48 of the Respondent's rules. The only other qualification regarding the location of an applicant's chosen tie-breaker measurement point appears in Rule 67-48.002(113), Florida Administrative Code, and on the Surveyor Certification Form, both of which define the tie-breaker measurement point as "a single point selected by the Applicant on the proposed Development site that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development." The instructions further proceed to state how

proximities between the tie-breaker measurement point and other services are to be determined.

3. Petitioner's chosen tie-breaker measurement point is located within its property boundaries at the southeastern corner of its property on a narrow strip of land which constitutes a road providing access to and from the site. In its preliminary scoring, Respondent awarded Petitioner maximum tie-breaker points for its proximity to services.

4. Thereafter, after its review of Notices of Potential Scoring Errors ("NOPSE"), although a NOPSE was not filed with respect to those portions of Petitioner's application involving the tie-breaker points, Respondent reduced Petitioner's tie-breaker scores to zero (0) points. The reason provided by Respondent was, as follows:

> Tie-Breaker Measurement Point cannot be located within 100 feet of a residential building and therefore it is not a valid Tie-Breaker Measurement Point. The Tie-Breaker Measurement Point is not located on the true Development site; it is located at the end of a long, narrow stretch of land designed for the apparent purpose of gaining points that the Applicant would not otherwise be entitled to.

5. In response to Respondent's revisions to preliminary scoring regarding tie-breaker points, Petitioner submitted "cure" documentation stating that the tie-breaker measurement point is located within 100 feet of a planned unit. No Notice of Alleged Deficiency ("NOAD") was filed regarding this "cure." In its final scoring, Respondent stated:

After reviewing the cure, FHFC determined that it correctly decided that the Tie-Breaker Measurement Point is not located on the true Development site and that the Applicant is not entitled to any Proximity Tie-Breaker Points.

6. As a threshold item, Applicants are required to demonstrate that they have the ability to proceed with their proposed project by providing, among other documentation, the applicable local government verification form as to site plan approval (Exhibit 22) and evidence that the proposed development site is appropriately zoned and consistent with local land use regulations (Exhibit 28). With regard to Exhibit 22 (evidence of site plan approval), the application instructions provide that "site plan approval or plat approval may be verified by Florida Housing Staff during the scoring process." No such language appears with regard to Exhibit 28.

7. In its initial application, Petitioner submitted Exhibit 22 (Local Government Verification of Status of Site Plan Approval for Multifamily Developments)and Exhibit 28 (Local Government Verification that Development is Consistent with Zoning and Land Use Regulations). These documents were signed by John Smogor, Orange County's Assistant Planning Manager, who certified that he had the authority to verify the status of site plan approval and to verify consistency with local land use regulations and zoning, and further certified that the information stated in the Verifications were true and correct.

8. In its preliminary scoring of Petitioner's application, Respondent concluded that Petitioner's application met all threshold requirements. No NOPSEs were filed with respect to Petitioner's ability to proceed with its proposed project or with respect to Petitioner's Exhibits 22 or 28. In its "final" scoring released on July 22, 2002, Respondent again concluded that Petitioner met all threshold requirements.

9. At some point in time, Respondent's staff came into possession of a FAX cover sheet with two attached documents. The FAX cover sheet is dated July 11, 2002, on the letterhead of Housing and Community Development Division in Orlando. The two attached documents are both dated prior to the time set by Respondent for notification of NOPSE's and any additional items identified by Respondent to be addressed by the applicant during the "cure" period. The FAX cover sheet indicates that it is from Lisa Chiblow and to four persons, including two members of Respondent's staff. A "post-it Fax Note" is attached to the cover sheet which bears the date of July 24, 2002. The Faxed documents include an Interoffice Memorandum dated May 17, 2002, to Lisa Chiblow, Sr. Housing Assistant, Housing and Community Development Division, from John Smogar, Assistant Manager, Planning Division, referencing the Camellia Pointe Apartments. This Interoffice Memorandum officially retracted the earlier signatures on Petitioners' Exhibit 22 and 28 for the following reason:

> This Future Land Use Designation on the subject property is Low-Density Residential. Although the zoning district is R-3 (Multi-Family

> Residential), the underlying future land use designation takes precedence, rendering the project inconsistent.

The other document attached was correspondence dated June 7, 2002, to Lou Frey, LCA Development II, Inc., from Lisa Chiblow. This letter advised Mr. Frey that the Camellia Pointe Apartments property is not currently entitled to be developed as a multi-family development, and quoted Mr. Smogor's reason cited above. The letter further advised that "the Planning Division is retracting the signatures on the tax credit forms that were signed." Other than the information recited above from the FAX cover sheet, no evidence was adduced and no factual stipulations were reached regarding the date upon which Respondent actually received this information. Likewise, there was no evidence or stipulation as to whether Petitioner ever received the letter dated June 7, 2002.

10. Respondent rendered its "final" scores with respect to all Universal Cycle applicants on July 22, 2002. This was consistent with its tentative dates setting forth time lines posted on its website.

11. On July 26, 2002, Respondent issued "revised final scores" with respect to Petitioner, and perhaps one other applicant. Respondent's July 26, 2002, revised scoring summary reflects that Petitioner did not meet threshold with regard to site plan (Exhibit 22) and zoning (Exhibit 28) because:

> FHFC received notice from the Orange County Planning Division stating that it had retracted its signature on the Local Government Verification of Status of Site Plan Approval form and the Local

Government Verification that Development is Consistent with Zoning and Land Use Regulations form.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

There are two issues in this proceeding. The first issue is whether Petitioner was properly denied proximity tie-breaker points on the ground that its selected tie-breaker measurement point is not located on "the true Development site." The second issue is whether Petitioner's application should be rejected for failure to meet threshold requirements regarding site plan approval and consistency with zoning and land use regulations.

With regard to proximity points, the rules which govern the application process and this proceeding contain only three requirements with regard to the selection of a tie-breaker measurement point: (1) the measurement point is to be selected by the applicant, (2) the measurement point is to be located "on the development site," and (3) the measurement point must be located within 100 feet of a residential building existing or to be constructed as part of the proposed development. The tie-breaker

measurement point selected by the Petitioner herein meets each of these requirements, and, accordingly, Petitioner should be awarded the maximum tie-breaker points (7.5).

There is no requirement in Respondent's Rule 67-48.002(113) or in the application instructions and/or forms, which are rules, that the tie-breaker measurement point be located upon the "true" or the "prime" development site. Indeed, the term "development site" is not defined in Respondent's rules. The rules and instructions require only that the measurement point be "on" the development site, and that a land survey map be provided showing the boundaries of the proposed development site, as well the location of the latitude/longitude coordinates for the tie-breaker measurement point on the proposed development site. These are rules adopted by the Respondent, and applicants are entitled to rely upon those rules. Had Respondent intended that the tie-breaker measurement point be located in the "true," the "prime" or within a certain distance from the majority of the residential units within the development, it could easily have so provided.

Petitioner urges that Respondent was prohibited from reducing the tie-breaker points it received in Respondent's preliminary scoring of its application because no NOPSEs and no NOADs were filed with regard to Petitioner's application in that regard. The undersigned does not agree with this argument in this instance because Rule 67-48.004(5) permits the Respondent to notice applicants, not only of its decisions regarding a NOPSE, but also of "any other items identified by the Corporation to be addressed by the Applicant," thus allowing the applicant to "cure"

any issues raised in preliminary scoring, NOPSEs or any other items identified by the Respondent. Petitioner was timely notified and, in fact, cured that portion of Respondent's concern regarding the location of the tie-breaker measurement point within 100 feet of a residential building. In any event, a resolution of this issue is not necessary in light of the above conclusion that Petitioner's selection of its tie-breaker measurement point was in compliance with Respondent's rules, and Petitioner was entitled to receive tie-breaker points for its proximity to the designated services.

The issues raised with respect to Petitioner's threshold Exhibits 22 and 28 are somewhat more complicated. Generally speaking, Respondent's scoring of an application is to based upon the four corners of the application submitted and cured by the applicant. Indeed, Respondent's staff is not permitted to assist any applicant by adding documents to an application, and applicants and/or their representatives are not permitted to verbally contact Respondent's staff concerning their own application or any other applicant's development. See Rules 67-48.004(1) and (18), Fla. Admin. Code. Rule 67-48.004 seems to suggest that the only information which Respondent is to consider when scoring an application is the information received in the initial application, NOPSEs, additional matters raised by the Respondent during the cure period, information submitted by the applicant in its cure documentation and NOADs. However, complicating this seemingly clear direction, the application instructions permit the Respondent to verify certain items, including site plan

approval "during the scoring process." Such authority to verify is not repeated in the instructions regarding Exhibit 28 relating to evidence of appropriate zoning.

Here, there is insufficient evidence to conclude that Respondent was in the process of verifying Petitioner's site plan approval documentation (Exhibit 22) when it learned (on July 11 or July 24, 2002) that the person who signed Exhibit 22 was retracting his signature on the basis of an alleged future land use designation (low-density residential), even though the property was zoned for multi-family residential. Even assuming that Respondent's staff were verifying Exhibit 22, the issue is whether this was being done "during the scoring process." A resolution of that issue must be considered with respect to the scoring process mandated by Rule 67-48.004,with which both Respondent and all applicants must comply. Except with respect to the mandatory requirements set forth in Rule 67-48.004(14), the rules clearly contemplate that applicants be given the opportunity to cure any deficiencies or inconsistencies contained within their initial application. In addition to Rule 67-48.004(6), the Application instructions provide, at page 2, that

> notwithstanding anything in this Application and all instructions in this Application Package to the contrary, . . . Applicants shall be provided with an opportunity to submit additional documentation and revised pages, as well as other information in accordance with the applicable rules.

In addition, subsection (9) of Rule 67-48.004 clearly provides that while deficiencies in the mandatory elements set forth in subsection (14) may be identified at any time prior to sending the final scores to applicants and will result in rejection of the

application, Respondent may not reject an application or reduce points as a result of any issues not identified in the notices of preliminary scoring, NOPSEs, additional items identified by Respondent prior to the cure opportunity or inconsistencies created by the applicant in its cure documentation. Here, as noted above, problems with Exhibits 22 and/or 28 were not indicated in preliminary scoring, NOPSEs, or additional issues raised by Respondent after the receipt of NOPSEs . Petitioner submitted no revised documentation related to Exhibits 22 and 28 as a part of its cure. Construing the provisions of Rule 67-48.004(9) *in pari materia* with the instructions which allow Respondent to verify site plan approval documentation (which is not one of the mandatory items incapable of cure documentation) leads to the conclusion that such verification efforts must be concluded prior to the date upon which an applicant is permitted to submit its cure documentation. In this cycle, cure documentation was required to be submitted on or before June 26, 2002. Petitioner was not notified that its application had been rejected due to failure to meet threshold because of the "retraction" of signatures on Exhibits 22 and 28 until the Respondent's "revised" final scoring on July 26, 2002.

Petitioner urges that the "revised" final scoring by Respondent is not permissible. In support of this argument, Petitioner points to Rule 67-48.004(9) which provides that even the mandatory elements of an application must be identified "prior to sending the final scores to Applicants." While the Petitioner's argument on the issue of whether Respondent is permitted to revise its scoring subsequent to the

time that it issues its "final" scores, absent the result of the hearing processes permitted in Rule 67-48.005, is persuasive, that issue need not be resolved in this proceeding. The undersigned concludes that Respondent may not, in this case, reject Petitioner's application for failure to meet threshold concerning its "ability to proceed" since it had not previously identified that issue prior to Petitioner's ability to "cure" any apparent defect in Exhibits 22 and 28.

Two additional points raised by Petitioner merit discussion. If, indeed, Petitioner lacks the ability to proceed with its proposed development due to lack of site plan approval, lack of zoning or lack of compliance with local government land use restrictions or plan compliance, this will be discovered during the housing credit underwriting procedures. Rule 67-48.026, Florida Administrative Code, permits the Credit Underwriter to "verify all information in the Application," and issue a detailed report of the development's "credit worthiness, feasibility, **ability to proceed** and viability to the Corporation." The Credit Underwriter's report and recommendation, if accepted by the Executive Director, may result in no housing credits being allocated to the development for the current cycle, regardless of an applicant's ranking as a result of the application scoring process. See Rule 67-48.026 (6), (7), (9 and (10), Florida Administrative Code.

Finally, at the informal hearing, Petitioner offered Exhibit 17 into evidence. Respondent objected on both substantive grounds and the procedural ground that said document was not a part of the application scored by the Respondent. The

undersigned reserved ruling on the admissibility of that Exhibit. Having considered the parties' arguments, the undersigned overrules Respondent's objections to Exhibit 17.

Exhibit 17 is a letter dated September 18, 2002 (one day prior to the informal hearing in this case) from the Planning Manager of Orange County certifying that Petitioner's property is entitled to a Vested Rights Certificate, and is vested for multi-family uses. The letter states that the Certificate entitles the owner to undertake or continue to development of the property, despite the inconsistency of the development with the Comprehensive Plan and that the Certificate supercedes all previous certifications or verifications relating to the use of this property that may have been issued by the Planning Division.

As noted above, documents which are not part of the application typically will not be admitted into evidence in an informal hearing contesting the scoring or rejection of an application. However, where the Respondent itself relies upon documentation or information which is not a part of the application, as it did here, it would be grossly unfair not to allow the applicant to produce counter-evidence directly related to the evidence relied upon by the Respondent. This is particularly true where the applicant, as here, had no opportunity during **any** portion of the scoring process, to cure any perceived deficiencies.

As to the substance of Exhibit 17, Respondent argues that it does address the issue of site plan approval raised by the retraction by Mr. Smogor's of his signature

and verification on Exhibit 22 concerning site plan approval. A careful review of the retraction documentation (Exhibit 16) and Exhibit 17 leads to a rejection of this argument. Exhibit 22 certifies and verifies that the zoning designation of the Petitioner's property is "R-3." The September 18, 2002, correspondence reaffirms that the property is zoned R-3. The retraction documents clearly state that the reason for the retraction of Mr. Smogar's signature on Exhibit 22 is because, although the property was zoned R-3 (multi-family residential), said zoning is inconsistent with the future land use designation, which takes precedence. Thus, the only concern expressed in Mr. Smogar's retraction memorandum was comprehensive plan consistency. Exhibit 17, the September 18th correspondence, clearly cures Mr. Smogar's stated concern and is thus directly related to Exhibit 22, as well as to Exhibit 28.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's application receive 7.5 tie-breaker proximity points and not be rejected for failure to meet threshold requirements regarding its ability to proceed with its proposed development.

Respectfully submitted and entered this 26th day of September, 2002.

Diane D. Tremor

DIANE D. TREMOR
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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

All parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages. Written arguments must be filed with Florida Housing's Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Monday, October 7, 2002. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.