

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

OAK GLEN HOUSING PARTNERS, LTD.,

Petitioner,

v.

**FHFC CASE NO. 2002-0060
Application No. 2002-082S**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

RECOMMENDED ORDER

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

APPEARANCES

For Petitioner, Oak Glen
Housing Partners, Ltd.:

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For Respondent, Florida Housing
Finance Corporation:

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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. There are two issues. The first is whether the Petitioner, having checked two blocks under Part III.D of the Universal Application in direct contravention of the Universal Application instructions that an applicant may select only one, can cure that error. The second issue is whether the Petitioner can change its response in Part V.A.3 of its initial Application, wherein it set forth the amount of government-issued tax-exempt bond proceeds when there was neither a NOPSE nor preliminary scoring issue by the Respondent addressing the amount of government-issued tax-exempt proceeds listed in the initial Application.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated into evidence Exhibits 1 through 6 and 8 through 9. Exhibit 7 was marked for identification, but not admitted. At the outset of the informal hearing, a REQUEST FOR APPROVAL AS QUALIFIED REPRESENTATIVE on behalf of Paula C. Reeves, as a Qualified Representative on behalf of Respondent, was considered and without objection the undersigned orally granted that request at the informal hearing. Subsequent to the hearing, the parties timely submitted 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 is a Florida Limited Partnership in the business of developing affordable residential housing in Florida.

2. On or before April 15, 2002, Petitioner submitted an Application to the Respondent for its 2002 Universal Cycle, seeking funding under the SAIL program for the development of an 88-unit garden apartment affordable housing development to be located in Orlando, Florida.

3. The Respondent is a public corporation organized under Chapter 420, Florida Statutes, to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in Florida in order to provide decent, safe and sanitary housing to persons and families of low, moderate and middle income.

4. The Respondent completed the preliminary scoring process with regard to Petitioner's Application on May 13, 2002.

5. As a result of the preliminary scoring, Respondent determined that Petitioner did not meet the Demographic or Area Commitment requirement in Part III.D because Petitioner had selected both "Urban In-Fill Development" and "Large Family Development" boxes on the application form. With regard to the selection of those boxes in Part III.D of the Universal Application, the Universal Application Instructions specifically state that "Applicants may select only one of the following:". Thus the instructions clearly require that applicants select only one of the boxes in

Part III.D. In direct contravention of that argument, Petitioner checked two of the boxes.

6. In answer to Part V.A.3, of the Universal Application, Petitioner checked “yes” to the question “Will local government-issued tax-exempt bond proceeds be used to finance this construction.” Then, in answer to the following question in Part V.A.3, the Petitioner provided the amount of local government-issued tax-exempt bond proceeds to be used and that amount in the initial Application was \$4,400,000.

7. The Respondent in its evaluation and preliminary scoring of Petitioner’s initial Application did not raise any issues with regard to the statement by Petitioner in its initial Application in Part V.A.3 that the amount of government-issued tax-exempt bond proceeds to be used was \$4,400,000.

8. The Respondent did not transmit to applicant any Notice of Possible Scoring Error submitted by other Applicants with regard to Part V.A.3 of Petitioner’s initial Application wherein it listed the amount of local government-issued tax-exempt bond proceeds as \$4,400,000.

9. Petitioner asserts and Respondent did not dispute that Petitioner inadvertently checked both the “Urban In-Fill Development” and the “Large Family Development” boxes under Part III.D of its Initial Application..

10. Petitioner included in its Initial Application a document tabbed “Exhibit 31” and entitled LOCAL GOVERNMENT VERIFICATION OF QUALIFICATION AS URBAN IN-FILL-DEVELOPMENT.” This document contained, in pertinent

part, a statement that “The proposed Development is located on a site or in an area that is targeted for in-fill housing or neighborhood revitalization....” That document contains a certification as to truth and correctness apparently signed by the Mayor of Orlando.

11. Because, according to the Universal Application Instructions, a Petitioner was only allowed to check one box under Part III.D, to the extent that Petitioner’s Exhibit 31 in its initial Application purports to corroborate Petitioner’s selection of “Urban In-Fill Development” as its Demographic or Area Commitment, then Petitioner’s Application is inconsistent on its face since Petitioner also chose “Large Family Development” as its Demographic or Area Commitment.

12. Petitioner attached to its initial Application a document marked “Exhibit 49.” Exhibit 49 of the initial Application contained a copy of what purported to be a PROMISSORY NOTE.

13. In the fourth unnumbered paragraph on the first page of the PROMISSORY NOTE and Exhibit 49, is the statement that “...the Authority has agreed to loan to the Borrower..., [an amount] being the proceeds from the Authority’s \$3,300,000 Multi Family Housing Revenue Bonds,...and its \$1,100,000 Taxable Multi Family Housing Revenue Bonds.” Petitioner argues that the above language in Exhibit 49 to the initial Application makes it clear that the amount of local government-issued tax-exempt bond proceeds to be used by Petitioner for this project is \$3,300,000. In fact, that language in Exhibit 49 to the initial Application

does not bring clarity to the Application. Rather, it is plainly inconsistent with the statement in the Application in Part V.A.3 wherein it is explicitly stated by the applicant that the amount of local government-issued tax-exempt bond proceeds to be used is \$4,400,000.

14. It is undisputed by the parties that if the amount of local government-issued tax-exempt bond proceeds to be used by Petitioner is \$3,300,000 instead of \$4,400,000, it will have the effect in the ranking process of moving Petitioner's Application into Group A, thus rendering Petitioner's Application eligible for funding.

15. The Universal Application Instructions and the Universal Application have been adopted as rules by Respondent. Sections 67-21.002 and 67-48.002, Florida Administrative Code.

16. The Universal Application Instructions under the section "RANKING AND SELECTION CRITERIA" states in pertinent part: "If an Applicant, with local government tax-exempt bonds as a funding source, revises the amount of bonds stated in the Funding section of the Application, Florida Housing will use the higher of the original amount or the revised amount for purposes of Group A and Group B classifications."

17. Petitioner submitted a "2002 CURE FORM" that contained a Revised Page 15 of 21 on which only the box entitled "Urban-Fill Development" had been checked and which further showed that the box entitled "Large Family Development"

was not checked. By this means, Applicant attempted to cure its error when it checked both of the foregoing blocks on Page 15 of 21 of its Initial Application in answer to the question in Part III.D.

18. The Petitioner submitted a second “2002 CURE FORM” attached to which was a Revised Page 20 of 21 of the Universal Application wherein the Petitioner revised its answer to Question V.A.3 with regard to the amount of local government-issued tax-exempt bond proceeds. The revised answer to the question submitted with the CURE FORM showed an amount of \$3,300,000 instead of the amount of \$4,400,000 as set forth in the initial Application.

19. Part III of the Universal Application pertains to “Development.” Section D of Part III requires an Applicant to set forth its “Demographic or Area Commitment,” and the Universal Application Instructions specifically state that “Applicants may select only one of the following” nine designations of commitment. The Application form itself does not repeat this instruction to select only one designation. Petitioner, in its initial Application, checked two of the designations: “Urban In-Fill Development” and “Large Family Development.” As a consequence, Petitioner did not receive the five points available for either designation.

20. Rule 67-48.004, Florida Administrative Code, describes the application and selection process applicable to this case. It states that there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application deadline. These items include the “Demographic or Area

Commitment.” See Rule 67-48.004(14)(i), Florida Administrative Code. Thus, under Respondent’s rules, there is no opportunity for a Petitioner to “cure” this portion of its Application after the Application deadline of April 15, 2002.

21. There are no issues of material fact apparent on the record of this proceeding.

CONCLUSIONS OF LAW

22. Pursuant to Sections 120.569 and 120.57(2) Florida Statutes, and Chapters 67-48 and 67-21, 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. Therefore, Petitioner has standing to bring this action.

23. The Universal Application Instructions as well as the Universal Application have been adopted as rules. Therefore, both Applicants and Respondent are bound by the terms of those rules. Section 67-48.004(2), Florida Administrative Code mandates that “Failure to submit an Application completed in accordance with the Application Instructions and these rules will result in rejection of the Application or a score less than the maximum available in accordance with the instructions in the Application and this rule chapter.”

24. The Universal Application Instructions are unequivocal with respect to Part III.D, pertaining to “Demographic or Area Commitment.” Those instructions

explicitly state that “Applicants may select only one of the following.” The fact that the Application form does not repeat this instruction does not relieve applicants such as Petitioner from complying with the Application Instructions. Indeed, the first page of the instructions encourage applicants to review the instructions and the applicable rules before completing and submitting an application.

25. Petitioner’s argument that they should be allowed to change their Application is inconsistent with Respondent’s rules. The materiality of Petitioner’s erroneous completion of Part III.D with respect to the very competitive application process which the Respondent’s rules require is exemplified by Rule 67-48.004(14)(i), Florida Administrative Code. That rule mandates that certain items, including “Demographic or Area Commitment,” be included in the initial Application and cannot be revised, corrected or supplemented after the Application deadline. Respondent has thus determined, by rule, that the initial submission of the Demographic or Area Commitment designation by an Applicant is essential to a fair and competitive process. This rule further requires that failure to submit these items shall result in rejection of the Application without opportunity to submit additional information. The Petitioner having failed to indicate a single Demographic or Area Commitment designation, the Respondent would have been justified, under its rules, to reject Petitioner’s Application on this ground alone.

26. Rule 67-48.004(6), Florida Administrative Code only allows applicants to cure, i.e., to submit additional documentation, revised pages and other such

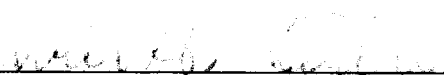
information as the Applicant seems appropriate when there have been issues raised concerning the Application pursuant to Paragraphs (3) and (5) of Rule 67-48.004. That is either in the evaluation and preliminary scoring by Respondent or as a result of a Notice of Possible Scoring Error. With regard to the issue regarding the amount of local government-issued tax-exempt bond proceeds listed in answer to the question in Part V.A.3, of the initial Application, was no issue raised either in the preliminary scoring or as a result of a Notice of Possible Scoring Error. Therefore, as a matter of law, Petitioner is not allowed to “CURE” the amount listed in Part V.A.3 on Page 20 of its Initial Application.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that:

1. The scoring by Respondent of Petitioner’s Application with regard to Part III.D is correct and that;
2. The Petitioner cannot change the amount of \$4,400,000 for local government-issued tax-exempt bond proceeds it set out in Part V.A.3 of Petitioner’s Initial Application.

Respectfully submitted and entered this 3rd day of October, 2002.



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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.