

May 23, 2012

VIA HAND DELIVERY

Della M. Harrell, Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

Re: Heritage Village Commons, LTD. v. Florida Housing Finance Corporation
FHFC Case No. 2012-013 UC

Dear Ms. Harrell:

Enclosed is my Recommended Order in the referenced proceeding, along with Joint Exhibits 1 through 6, Petitioner's Exhibits 1 through 7, Respondent's Exhibit 1, and the parties' Proposed Recommended Orders. I did not receive a transcript of the informal hearing.

By copies of this letter and the Recommended Order, the parties are advised that the Recommended Order and the record of the hearing are being transmitted to your office on this date.

Very sincerely yours,



Diane D. Tremor

DDT/bsr

Enclosures

cc: Warren M. Husband, Esquire
Robert J. Pierce, Esquire

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HERITAGE VILLAGE COMMONS, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

FHFC Case No. 2012-013UC
Application No. 2011-055C

_____ /

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, Diane D. Tremor, held an informal hearing in the above captioned proceeding in Tallahassee, Florida on May 9, 2012.

APPEARANCES

For Petitioner:

Warren H. Husband
Metz, Husband & Daughton, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909

For Respondent:

Robert J. Pierce
Assistant General Counsel
Florida Housing Finance Corporation
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STATEMENT OF THE ISSUES

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application met threshold requirements involving the project's Developer.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 6. Petitioner's Exhibits 1 through 7 and Respondent's Exhibit 1 were also received into evidence. Joint Exhibit 1 is a Joint Stipulation of Facts and Exhibits. That document basically describes the application process and the circumstances regarding the scoring of Petitioner's application with regard to the issues in dispute. The Joint Stipulation of Facts and Exhibits (Joint Exhibit 1) is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders, which have been fully considered by the undersigned.

FINDINGS OF FACT

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

1. The Petitioner, Heritage Village Commons, LTD., submitted Application Number 2011-055C in Florida Housing's 2011 Universal Cycle

seeking \$1,510,000 in annual federal tax credits to help finance the development of a 120-unit apartment complex in Longwood, Seminole County, Florida, known as Heritage Village Commons. (Joint Exhibit 1)

2. The 2011 Universal Application Instructions, at Part II.A.3 and Part II.B., require certain information regarding the Developer. As relevant to the issues in this proceeding, Part II.A.3 requires that a list of the Principals for each Developer be provided behind a tab labeled “Exhibit 9.” Part II.B.1 of the Instructions contains a threshold requirement that the name of each Developer be provided, and further states that the identity of the Developers listed in the application may not change until the proposed work is complete unless approved by the Board as provided in Rule 67-48.004. These same Instructions, at Part II.A.2.c, provide that an “Applicant” must be a legally formed entity qualified to do business in Florida as of the Application Deadline. (Petitioner’s Exhibit 1)

3. Petitioner’s original application, at page 3, stated the name of its Developer as “Heritage Village Developer, Inc.” Its Exhibit 9 describes the “Developer Entity” as “Heritage Village Developer, Inc.,” and states, in graph form, “50%, Jonathan L. Wolf” and “50%, Anthony J. Nicholson.” (Joint Exhibit 2)

4. In its preliminary scoring of Petitioner’s application, Florida Housing determined that Petitioner failed to meet threshold requirements because it “failed

to identify the officers and directors of the Developer entity Heritage Village Developer, Inc.” (Joint Exhibit 3)

5. In response to this preliminary scoring, Petitioner submitted as a Cure a revised Exhibit 9, listing “Heritage Village Developer, Inc., a Florida corporation,” as the Developer Entity and, in chart form, stating “50%, Jonathan L. Wolf, Director/President/Secretary” and “50%, Anthony J. Nicholson, Director/Vice President/Treasurer.” The revised Exhibit 9 contained a notation regarding the Developer Entity stating that “[t]he structure as of the date of incorporation (2/8/12). The Developer had no principals as of the Application Deadline other than an agreed-upon ownership structure – Jonathan L. Wolf (50%) and Anthony J. Nicholson (50%).” (Joint Exhibit 4)

6. In its final scoring of Petitioner’s application, Florida Housing determined that Petitioner’s cure was deficient because the Developer entity listed in the Application and on revised Exhibit 9 was not incorporated until February 8, 2012, and therefore did not exist as of the Application Deadline. Florida Housing cited Rule 67-48.004(14), Florida Administrative Code, which lists the “identity of the Developer” among the non-curable items that must be included in the Application and that cannot be revised, corrected or supplemented after the Application Deadline. Florida Housing determined that because the Developer entity listed in the initial Application and on revised Exhibit 9 did not exist at the

time, Petitioner failed to correctly identify the Developer as of Application Deadline as required by Rule 67-48.004(14). (Joint Exhibit 6)

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because Florida Housing determined that Petitioner failed to meet threshold requirements with regard to its Developer, Petitioner's substantial interests are affected by Florida Housing's proposed agency action.

The issue for determination in this proceeding is whether Petitioner's application met threshold requirements with regard to its Developer. More specifically, the issue is whether a Developer(s) listed in the initial application must be a legally formed entity as of the Application Deadline.

The Universal Application Package or UA1016 (Rev. 2-11), which includes the application forms and the Application Instructions, is adopted by Rule 67-48.004(1)(a), Florida Administrative Code. Part II of the Application Instructions contains requirements with regard to the Applicant and Development Team. With regard to the Applicant, the Instructions specifically provide that an "Applicant must be a legally formed entity [i.e., limited partnership, corporation, limited liability company, etc.] qualified to do business in the state of Florida as of the

Application Deadline.” (Instructions, page 4, at paragraph 2.c) There is no similar requirement in the Instructions or anywhere else with regard to a Developer. The Instructions require that a list, as of the Application Deadline, of Principals for a Developer be provided behind a tab labeled “Exhibit 9.” The Instructions also advise that “[t]he identify of the Developer(s) listed in this Application may not change until the construction or rehabilitation work proposed in this Application is complete, unless approved by the Board as provided in Rule 67-48.004. F.A.C.” (Instructions, page 7). This same requirement is contained in Rule 67-48.004(14)(b), Florida Administrative Code, which lists the “identity of each Developer” as an item that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline. Among the other items listed in that Rule is the “name of Applicant entity.”

Here, Petitioner listed its Developer in its initial application as “Heritage Village Developer, Inc.”, thus providing the identity of its developer. This identity did not change in the Petitioner’s Cure materials and thus Petitioner did not revise, correct or supplement the identity of its Developer, as proscribed by Rule 67-48.004(14)(b). The only thing that changed was the fact that its Developer was not formally incorporated until February 8, 2012, a date after the Application Deadline of December 6, 2011, and Petitioner’s Cure materials candidly disclosed that fact. Unlike the requirements for an Applicant, the Instructions do not specifically

require that a Developer be a legally formed entity qualified to do business in this state as of the Application Deadline. While Florida Housing may desire to impose such a requirement, as indicated by its scoring and its position in this case, it simply has not done so and applicants cannot be penalized for failure to comply with a nonexistent rule.

Respondent urges that since “Heritage Village Developer, Inc.” was not incorporated as of the Application Deadline, it did not exist and the provision of its name as the Developer in the initial application constituted a nullity and had the same effect as leaving that space blank. That argument might prevail if Florida Housing had a rule requiring that the Developer must be a legally formed entity qualified to do business in Florida as of the Application Deadline. It does not. It is also persuasive that the listing of items which cannot be changed after the Application Deadline include the “name of Applicant entity” and the “identity of each Developer.” Rule 67-48.004(14)(a) and (b), Florida Administrative Code. The word “identity” is nowhere defined in the governing statutes or in Florida Housing’s rules. In any event, the Petitioner’s Developer was identified in the original application, it did not change in the Cure materials, and its Principals remained the same.

Finally, Respondent argues that the case of *Savannah Springs Apartments II, Ltd. v. Florida Housing Finance Corporation*, FHFC Case No. 2007-048UC (Final

Order August 11, 2008) is similar and requires the rejection of Petitioner's application. A review of that case indicates material differences in the facts and, therefore, that case does not dictate the conclusion to be reached in the instant case. The *Savannah Springs* case involved a misidentification of the general partner of the Developer, which was a limited partnership. The holding in that case was that since a limited partnership is not a legal entity and has no identity apart from its members, there was, in fact, no identification of the Developer in the initial application.

Here, Petitioner properly and consistently "identified" its Developer and its Developer's Principals throughout its application. As previously discussed, the fact that the Petitioner's Developer entity was not incorporated until a date after the Application Deadline is not fatal. Case law establishes that pre-incorporation agreements made by a company's principals become those of the newly formed corporation itself when the corporation takes some action that ratifies those agreements or that accepts the benefits thereof. See, for example, *Meyer v. Nator Holding Co.*, 136 So. 636, 638 (Fla. 1931) and *Smith v. Loftis*, 150 So. 645, 646-47 (Fla. 1933). Here, the newly formed Developer clearly ratified its commitment to serve in that capacity by virtue of its execution of the cured Developer Certification form. (See Petitioner's Exhibit 2)

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's application be found to meet threshold requirements regarding its Developer for the proposed project.

Respectfully submitted this 23rd day of May, 2012.



DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation
Sundstrom, Freidman & Fumero, LLP
2548 Blirstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

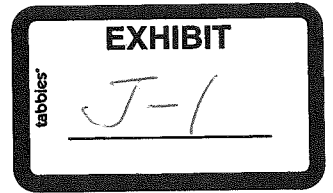
Copies furnished to:

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Robert J. Pierce
Assistant General Counsel
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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(3), Florida Administrative Code, Applicants 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, excluding the caption and certificate of service. Written arguments must be filed with Florida Housing Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, no later than 5:00 p.m. five (5) calendar days from the date of issuance of the Recommended Order. 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.



**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

HERITAGE VILLAGE COMMONS, LTD.,

Petitioner,

vs.

FHFC CASE NO.: 2012-013UC
Application No.: 2011-055C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

JOINT STIPULATION OF FACTS AND EXHIBITS

Petitioner, HERITAGE VILLAGE COMMONS, LTD. (“Petitioner”), and Respondent, FLORIDA HOUSING FINANCE CORPORATION (“Florida Housing”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 9:00 am, May 9, 2012, in Tallahassee, Florida, and agree to the findings of fact and to the admission of the exhibits described below.

THE PARTIES

1. Petitioner is a Florida limited partnership with its address at 1275 Lake Heathrow Lane, Suite 115, Heathrow, Florida 32746, and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and

promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. Section 420.504, F.S.

BACKGROUND

3. Florida Housing administers various affordable housing programs including the following:

(a) Housing Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code and Section 420.5099, F.S., under which Florida Housing is designated as the Housing Credit agency for the state of Florida within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code, and Rule Chapter 67-48, F.A.C.; and

(b) HOME Investments Partnerships (HOME) Program pursuant to Section 420.5089, F.S., and Rule Chapter 67-48, F.A.C.

4. The 2011 Universal Cycle Application, through which affordable housing developers apply for funding under the above-described affordable housing programs administered by Florida Housing, together with Instructions and Forms, comprise the Universal Application Package or UA1016 (Rev. 2-11) adopted and incorporated by Rule 67-48.004(1)(a), F.A.C.

5. Because the demand for HC and HOME funding exceeds that which is available under the HC Program and HOME Program, respectively, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapter 67-48, F.A.C. Specifically, Florida Housing's application process for the 2011 Universal Cycle, as set forth in Rule 67-48.001-.005, F.A.C., involves the following:

- a. the publication and adoption by rule of a “Universal Application Package,” which applicants use to apply for funding under the HC and HOME Programs administered by Florida Housing;
- b. the completion and submission of applications by developers;
- c. Florida Housing’s preliminary scoring of applications, noticed to applicants via a preliminary scoring summary;
- d. an initial round of administrative challenges in which an applicant may take issue with Florida Housing’s scoring of another application by filing a Notice of Possible Scoring Error (“NOPSE”);
- e. Florida Housing’s consideration of the NOPSEs submitted, with notice to applicants of any resulting change in their preliminary scores via a NOPSE scoring summary;
- f. an opportunity for the applicant to submit additional materials to Florida Housing to “cure” any items for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;
- g. a second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant’s cure materials by filing a Notice of Alleged Deficiency (“NOAD”);
- h. Florida Housing’s consideration of the NOADs submitted, with notice to applicants of any resulting change in their scores via a final scoring summary;
- i. an opportunity for applicants to challenge, by informal or formal administrative proceedings, Florida Housing’s evaluation of any item in their own application for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;¹
- j. final scores, ranking of applications, and award of funding to successful applicants, including those who successfully challenge the adverse scoring of their application before the date rankings are adopted; and
- k. an opportunity for applicants to challenge, by informal or formal administrative proceedings, Florida Housing’s final scoring and ranking of competing applications where such scoring and ranking

¹ This proceeding is the subject of such a challenge.

resulted in a denial of Florida Housing funding to the challenging applicant.

PETITIONER'S APPLICATION AND SCORING ISSUES

6. The Petitioner timely submitted its application for financing in Florida Housing's 2011 Universal Cycle. The Petitioner, pursuant to Application No.: 2011-055C, applied for \$1,510,000 in annual federal tax credits² to help finance the development of its project, a 120-unit apartment complex in Longwood, Seminole County, Florida, known as Heritage Village Commons.

7. The 2011 Universal Cycle Application Instructions require certain threshold information regarding the Developer. Relevant in these proceedings are the threshold requirements at Part II.A.3., which requires a list of the Principals of the Developer be provided at Exhibit 9 to the applicant's application, and at Part II. B. 1., which requires the name of the Developer be provided in the application.

8. Petitioner, in its application and on the list of Principals behind Exhibit 9, named Heritage Village Developer, Inc., as the Developer. (*Exhibit J-2*)

² The United States Congress has created a program, governed by Section 42 of the IRC, by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of affordable low-income housing for families. These tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax liability, which can be taken for up to ten years if the project continues to satisfy IRC requirements. The tax credits allocated annually to each state are awarded by state "housing credit agencies" to single-purpose applicant entities created by real estate developers to construct and operate specific multi-family housing projects. The applicant entity then sells this ten-year stream of tax credits, typically to a syndicator, with the sale proceeds generating much of the funding necessary for development and construction of the project. The equity produced by this sale of tax credits in turn reduces the amount of long-term debt required for the project, making it possible to operate the project at below-market-rate rents that are affordable to low-income and very-low-income tenants. Pursuant to section 420.5099, F.S., Florida Housing is the designated "housing credit agency" for the state of Florida and administers Florida's tax credit program under its Housing Credit (HC) Program. Through the HC Program, Florida Housing allocates Florida's annual fixed pool of federal tax credits to developers of affordable housing under its annual Universal Cycle application process.

9. Florida Housing identified the following deficiency relevant to these proceedings in its preliminary scoring of the Petitioner's Application issued on 1/19/2012

(Exhibit J-3):

| | | | | | | | |
|----|-----|----|----|------------|--|-------------|--|
| 2T | II. | A. | 3. | Principals | The Applicant failed to identify the officers and directors of the Developer entity Heritage Village Developer, Inc. | Preliminary | |
|----|-----|----|----|------------|--|-------------|--|

10. The Petitioner timely submitted a cure in response to this scoring deficiency. **(Exhibit J-4)**

11. Following review of Petitioner's cure and the NOADs filed in response to the cure by competing applicants **(Exhibit J-5)**, Florida Housing scored the Petitioner's Application and issued its final scoring summary dated 3/28/2012 in which Florida Housing concluded that the Petitioner's cure was deficient for the following reasons

(Exhibit J-6):

| | | | | | | | |
|----|-----|----|------|-------------------|--|-------|--|
| 4T | II. | A. | 3. | Principals | Based on information provided in the Applicant's cure for item 2T and in NOADs, the Developer entity listed in the Application and on revised Exhibit 9 was not incorporated until February 8, 2012, and therefore did not exist as of Application Deadline. As a result, the Applicant failed to include and correctly identify the Developer as of Application Deadline as required by the applicable instructions and subsection 67-48.004(14), FAC, which lists the identity of the Developer among the non-curable "items that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline." Because the Applicant's failure to include and correctly identify the Developer as of Application Deadline is not curable, revised Exhibit 9 must be rejected as it relates to the Developer entity. | Final | |
| 5T | II. | B. | 1.a. | Name of Developer | Based on information provided in the Applicant's cure for Item 2T and in NOADs, the Developer entity listed in the Application and on revised Exhibit 9 was not incorporated until February 8, 2012, and therefore did not exist as of Application Deadline. Under subsection 67-48.004(14), FAC, the identity of the Developer is among the non-curable "items that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline." Because the Developer entity listed in the initial Application and on revised Exhibit 9 did not exist at the time, the Applicant failed to correctly identify the Developer as of Application Deadline as required by subsection 67-48.004(14), FAC. | Final | |

12. As a result of the noted deficiencies, the Petitioner's application failed threshold.

13. The Petitioner timely filed its Petition contesting Florida Housing's scoring of its application regarding the threshold failures whereupon Florida Housing noticed the matter for an informal hearing.

OFFICIAL RECOGNITION OF RULES

14. The parties request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application Package or UA1016 (Rev. 2-11) which includes the forms and instructions.

15. The parties stipulate, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of the Florida Housing Finance Corporation and to any Rules promulgated by the Florida Housing Finance Corporation, including past and present versions of the Universal Cycle Application, Instructions, and any forms and exhibits attached thereto or incorporated by reference therein.

EXHIBITS

16. The parties offer the following joint exhibits into evidence and stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

Exhibit J-1: This Joint Stipulation of Facts and Exhibits.

Exhibit J-2: Excerpt from Petitioner's original application comprised of page that includes the name of developer at Part II.B.1. and Exhibit 9 to that application.

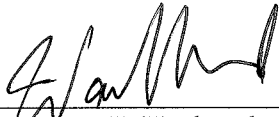
Exhibit J-3: Preliminary scoring summary dated 1/19/2012 of Petitioner's application.

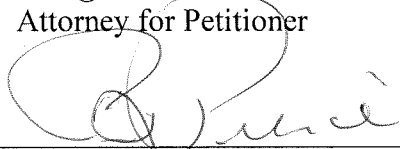
Exhibit J-4: Portion of Petitioner's cure materials comprised of a revised Exhibit 9.

Exhibit J-5: NOADs filed by Application Numbers 2011-232C and 2011-225C directed to Petitioner's cure.

Exhibit J-6: Final scoring summary dated 3/28/2012 of Petitioner's application.

Respectfully submitted this 9th day of May, 2012.

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