

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

JANIE POE ASSOCIATES 3, LLC,

Petitioner,

vs.

DOAH CASE NO.: 12-1613
FHFC NO. : 2012-029C
APPLICATION NO. 2011-201C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation for consideration and final agency action on July 20, 2012. The matter for consideration before this Board is a recommended order pursuant to Rule 67-48.005(2), Florida Administrative Code.

Janie Poe Associates 3, LLC, ("Petitioner") timely submitted its 2011 Universal Cycle Program Application (the "Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for funding from the 2011 Universal Cycle Program.

~~Petitioner timely filed its Petition for Review ("Petition"), pursuant to Sections 120.569 and 120.57, Florida Statutes, challenging Florida Housing's scoring of Petitioner's Application. The matter was referred to the Division of~~

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della M. Harris / DATE: 7/24/12

Administrative Hearings, Case No. 12-1613. A final hearing in this matter was held before the Honorable Linzie Bogan, Administrative Law Judge on June 14, 2012, in Tallahassee, Florida. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the arguments, evidence and testimony presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Administrative Law Judge affirmed Florida Housing's final scoring of Petitioner's application which found that Petitioner was not entitled to six Tie-Breaker Measurement Points for a Public Bus Transfer Stop and was not entitled to 1.75 Tie-Breaker Measurement Points for a Public Library for its proposed development. The Administrative Law Judge recommended that Florida Housing enter a Final Order denying the Janie Poe Associates 3, LLC's Petition.

RULING ON THE RECOMMENDED ORDER

The Findings of Fact and Conclusions of Law of the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby ordered:

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


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

Based on the Findings of Fact and Conclusions of Law stated above, **IT IS HEREBY ORDERED** that Florida Housing's scoring of Petitioner's Application is **AFFIRMED** and the relief requested in the Petition is **DISMISSED**.

DONE and ORDERED this 20 day of July, 2012.



FLORIDA HOUSING FINANCE
CORPORATION

By: 
Chair

Copies to:

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General Counsel
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Kevin Tatreau
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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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANIE POE ASSOCIATES 3, LLC,)
)
 Petitioner,)
)
vs.) Case No. 12-1613
)
FLORIDA HOUSING FINANCE)
CORPORATION,)
)
 Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on June 14, 2012, in Tallahassee, Florida, before Administrative Law Judge Linzie F. Bogan, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael P. Donaldson, Esquire
 Carlton Fields, P.A.
 215 South Monroe Street, Suite 500
 Post Office Drawer 190
 Tallahassee, Florida 32302-0190

For Respondent: Matthew A. Sirmans, Esquire
 Florida Housing Finance Corporation
 Suite 5000
 227 North Bronough Street
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STATEMENT OF THE ISSUE

Whether Petitioner is entitled to Proximity Tie-Breaker points for its designated public bus transfer stop and library.

PRELIMINARY STATEMENT

On March 27, 2012, Florida Housing Finance Corporation (Respondent/Florida Housing) issued its final scoring summary which awarded Janie Poe Associates 3 LLC (Petitioner), 79 out of a possible 79 Application points, plus six out of a possible six Ability to Proceed points, and 27 out of a possible 37 Proximity Tie-Breaker points. Florida Housing did not award Petitioner any Proximity Tie-Breaker points for either the public bus transfer stop or library designated by Petitioner in its 2011 Universal Application. Petitioner contends that Florida Housing should have awarded it six Proximity Tie-Breaker points for its designated public bus transfer stop and 1.75 points for its designated library.

Florida Housing transmitted the instant case to the Division of Administrative Hearings on May 5, 2012, for a disputed fact hearing. The case was scheduled for final hearing on June 14, 2012.

During the final hearing on June 14, 2012, Petitioner offered the testimony of Joseph Chambers (accepted as an expert in affordable housing development), Sarah Blanchard (accepted as an expert in transportation planning), and William Russell.

Respondent offered the testimony of one witness, Steve Auger. Mr. Auger currently serves as executive director of Florida Housing and was accepted as an expert in affordable housing development. The deposition testimony of Tracy Wagner was offered by the parties as Joint Exhibit 10. The parties stipulated to the authenticity and admissibility of Joint Exhibits 1 through 11, and official recognition was taken of Respondent's rules, particularly Florida Administrative Code Rule 67-48, as well as the incorporated Universal Application Package or UA1016 (Rev. 2-11) (Universal Application), which includes the Forms and Instructions. These items, collectively, were admitted into evidence.

A Transcript of the proceeding was filed with the Division of Administrative Hearings on June 18, 2012. A Proposed Recommended Order (PRO) was filed by Petitioner and Respondent. Each PRO was considered in the preparation of this Recommended Order.

FINDINGS OF FACT

The parties stipulated to the following facts as reflected in paragraphs 1 through 13, below.

1. Petitioner is a Florida for-profit limited liability company with its address at 3 East Stow Road, Suite 100, Marlton, New Jersey 08053, and is in the business of providing affordable rental housing units in the State of Florida.

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. § 420.504, Fla. Stat. (2011).^{1/}

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

- (a) Housing Credit Program (HC) pursuant to section 42 of the Internal Revenue Code and section 420.5099, Florida Statutes, 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 Florida Administrative Code Rule 67-48; and
- (b) HOME Investments Partnerships Program (HOME) pursuant to section 420.5089, Florida Statutes, and Florida Administrative Code Rule 67-48.

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 Florida Administrative Code Rule 67-48.004(1)(a).

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 Florida Administrative Code Rule 67-48. Specifically, Florida Housing's application process for the 2011 Universal Cycle, as set forth in Florida Administrative Code Rules 67-48.001 through 67-48.005, 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 (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 (NOPSE scoring summary) to applicants of any resulting change in their preliminary scores;
- (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 (final scoring summary) to applicants of any resulting change in their scores.
- (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^{2/};

- (j) Final scores, ranking of applications, and award of funding to successful applicants, including those who successfully appeal the adverse scoring of their application; 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 resulted in a denial of Florida Housing funding to the challenging applicant.

6. Petitioner timely submitted its application for financing in Florida Housing's 2011 Universal Cycle. Petitioner, pursuant to Application No. 2011-201C, applied for \$1,190,000.00 in annual federal tax credits to help finance the development of its project, a 73-unit apartment complex in Sarasota, Florida, known as Janie's Garden Phase 3.^{3/}

7. As part of its application, Petitioner submitted its 2011 Universal Cycle-Surveyor Certification for Competitive HC Applications Form as Exhibit 25 (Surveyor Form).

8. In its review and score of Petitioner's application dated February 22, 2012 ("The NOPSE score"), Florida Housing identified certain deficiencies, including a NOPSE concerning the Public Bus Transfer Stop/Public Bus Rapid Transit Stop which provides as follows:

Evidence provided in a NOPSE indicates that the Public Bus Transfer Stop/Public Bus Rapid Transit Stop listed on the Surveyor Certification for Competitive HC Applications form is neither a location at which passengers may access at least three routes of public transportation via buses nor a location where passengers may access at least one bus that travels at some point during the route in a lane or corridor that is exclusively used by buses and that has scheduled stops every 20 minutes during the hours of 7am to 9am and 4pm to 6pm Monday-Friday.

9. Petitioner timely submitted cures in response to these scoring deficiencies, including a letter from Anthony Beckford, general manager, Sarasota County, dated January 26, 2012; and a new Surveyor Form as a replacement for the Surveyor Form submitted as Exhibit 25 with Petitioner's application.

10. Following the submission of cures and after a review of NOADs, Florida Housing scored Petitioner's application and issued its final scoring summary dated March 27, 2012, in which Florida Housing concluded that Petitioner met all threshold requirements and awarded Petitioner 27 Proximity Tie-Breaker points.^{4/}

11. Specifically, Florida Housing awarded 27 Proximity Tie-Breaker points out of a possible 37 points for the following reasons:

1P The Applicant attempted to cure item 1P by providing information demonstrating that there was an additional bus route added prior to the application deadline; however, the cure is deficient because this route was "ready for implementation on December 5,

2011" and not available for use by the general public as of application deadline as required.

1P Applicant attempted to cure item 1P by providing information demonstrating that there was an additional bus route added prior to the application deadline; however the cure is deficient because the schedule for this route will not have hourly stops between the hours of 4pm and 6pm Monday-Friday as required.

12. The Proximity Tie-Breaker that Petitioner would be entitled to receive for the Transit Services Public Bus Transfer Stop is six points; and for a public library is one and three quarters of a point.

13. Petitioner timely filed its Petition contesting Florida Housing's scoring of its application, whereupon Florida Housing forwarded the matter to the Division of Administrative Hearings.

14. December 6, 2011, the date that Petitioner submitted its application, was the deadline for applicants to submit the 2011 Universal Cycle Application. In its final scoring summary dated March 27, 2012, Florida Housing scored Petitioner's application such that for the proximity of its proposed development to the Verman Kimbrough Memorial Library (Kimbrough Library), Petitioner received zero Proximity Tie-Breaker points. Florida Housing did not award any such points to Petitioner because in its opinion, the Kimbrough Library does not meet Florida Housing's definition for a public library in that the

library's holdings are not "available for the public to borrow at no cost." Petitioner disputes this contention and asserts that the public can borrow materials at no cost from the library as long as the public uses the materials while in the library.

15. Florida Housing's 2011 Universal Application

Instructions provide as follows:

Public Library--For purposes of proximity tie-breaker points, a Public Library means a library that is part of a city, county, or regional public library system or cooperative and has materials available for the public to borrow at no cost.

16. The Ringling College of Art and Design is located in Sarasota, Florida, and has as a part of its campus the Kimbrough Library. The Kimbrough Library is a part of the Tampa Bay consortium of libraries. The primary purpose of the Kimbrough Library is to support the academic programs at the Ringling College of Art and Design. In furtherance of this purpose, the Kimbrough Library has, as a significant portion of its holdings, items such as art history books and large folios comprising artist representations, paintings, and the like. The majority of the periodicals in the library, such as Art News and Architectural Digest, are related in some way to the visual arts. The Kimbrough Library subscribes to various newspapers and has Wi-Fi and computers available for use by its patrons.

17. For purposes of the instant dispute, the Kimbrough Library has three classes of patrons: Paying Members, Non-Members, and Regular Members. Paying Members are individuals that pay an annual fee of \$50.00 to the Ringling College Library Association. A benefit of being a Paying Member is that individuals in this class are issued library cards that allow them to check out materials from the library.

18. Non-Members are able to enter the library, without cost, during its hours of operation and are allowed to peruse the library's holdings and access the library's computers and Wi-Fi. As Non-Members are not issued library cards, these individuals are not allowed to check-out or otherwise remove materials from the library. Library materials are available to Non-Members for in-library use only.

19. Regular Members are current students, alumni and employees of the Ringling College of Art and Design, and certain high school teachers from Sarasota County and Manatee County, respectively. The Kimbrough Library issues library cards to its Regular Members, and these cards allow them to check-out materials from the library.

20. The library has on its website a list of frequently asked questions and responses thereto. The following excerpts are instructive:

Q: Do alumni have borrowing privileges [sic]?

A: Graduates of Ringling College of Art and Design have perpetual borrowing privileges at Kimbrough Library. They may check out up to 15 items at a time, excluding CDs and slides, and use many of the online subscription databases when visiting the Library. Register at the Circulation Desk for a library card. (Emphasis supplied).

Q: Can members of the community use the library?

A: Yes, for research and browsing. If you also wish to check out materials, you may become a member of the Ringling College Library Association. Individual memberships are \$50.00 per year. High school arts and humanities teachers in Sarasota and Manatee counties may register for a library card at no charge.

Q: How long can books be checked out?

A: Three weeks for students and Ringling College Library Association Members. Six weeks for faculty and staff.

21. On or about February 29, 2012, Tracy Wagner, who works for the Ringling College of Art and Design as vice-president of Finance and Administration, submitted to Florida Housing a letter regarding "FHFC Proximity Scoring-Library-Verman Kimbrough Memorial Library." Ms. Wagner, in her capacity as vice-president of Finance and Administration, does not have any oversight responsibilities for the library, but she does work with the library director "on maintenance and construction projects." By

her own admission, Ms. Wagner is only "somewhat" familiar with the operations of the library.

22. According to Ms. Wagner, the Kimbrough Library satisfies Florida Housing's definition of a public library in relevant part, because the library allows "area residents to use the library free of charge which includes the use of [the] library computers[,] as well as the ability to borrow any of [the] books for use within the library." Ms. Wagner's opinion is belied by the library's response to frequently asked questions, which treat as synonymous the acts of "borrowing" and "checking out" materials from the library. The library's response to frequently asked questions make clear that in-library "research and browsing" are different from the privilege of being able to borrow materials from the library. The library's responses to frequently asked questions, as opposed to the assertions by Ms. Wagner, are a competent and credible source for information about the operational aspects of the Kimbrough Library.

23. For the reasons stated in stipulated paragraphs 8 and 11 above, Respondent, in its final scoring of Petitioner's application, did not award Petitioner any Proximity Tie-Breaker points for the public bus transfer stop identified by Petitioner in its application. The bus transfer stop in question is at or near the intersection of Orange Avenue and 23rd Street in Sarasota, Florida.

24. It is undisputed that as of December 6, 2011, passengers using the bus transfer stop at the intersection of Orange Avenue and 23rd Street were able to ride buses servicing routes seven (Newtown-NE) and eight (Newtown-US 301). It is also undisputed that on December 5, 2011, Sarasota County Transportation Authority (SCTA), approved route 71 (Booker HS) for future operation. Once route 71 becomes operational around September 2012, it will have scheduled stops at the intersection of Orange Avenue and 23rd Street and will have, Monday through Friday, passenger pick-up and drop-off during the following times for inbound bus service: 7:58 a.m.; 8:28 a.m.; 5:28 p.m.; and 5:58 p.m. Outbound passenger pick-up and drop-off times at this location will be as follows: 7:47 a.m.; 8:17 a.m.; 5:17 a.m.; and 5:47 p.m.

25. On or about April 19, 2012, Ms. Sarah Blanchard, who works at Sarasota County Area Transit as a senior transit planning manager, submitted on behalf of Petitioner a letter to Florida Housing. Ms. Blanchard's missive to Florida Housing states in part as follows:

In terms of meeting the FHFC requirements during the p.m. period indicated for us as 4 to 6 p.m., the average headway, as defined by SCAT, is one hour, which equates to "hourly." That number is derived by dividing the period (two hours) by the number of directional trips, two, to obtain the average one hour headway.

CONCLUSIONS OF LAW

26. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

27. Petitioner bears the burden of establishing by a preponderance of the evidence the material allegations concerning its claim. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996); Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 834 (Fla. 1993); Espinoza v. Dep't of Bus. & Prof'l Reg., 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999); Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); and § 120.57(1)(j) ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute. . . .").

28. A preponderance of the evidence is defined as "the greater weight of the evidence" or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

29. Respondent formally adopted the Universal Application as a rule. § 120.55(1)(a)4. and Fla. Admin. Code R. 67-48.004(1)(a). ~~The Forms and Instructions are agency~~ statements of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice

requirements of Florida Housing and, therefore, the Forms and Instructions meet the definition of a "rule" as contemplated by section 120.52. Accordingly, the Instructions and Forms are themselves rules.

30. Part III.A.10. of the instructions for the Universal Application provide in part as follows:

Applications Requesting Competitive HC
[Housing Credit]

Proximity tie-breaker points may be awarded to an Application for the proximity of the Development's Tie-Breaker Measurement Point to:

- Eligible Transit, Tier 1 and Tier 2 services; and
- Latitude and longitude coordinates of properties identified on the 2011 FHFC Development Proximity List (the List) serving the same demographic group as the proposed Development. The List, effective 9-27-10, is incorporated by reference and is available on the Corporation's Website under the 2011 Universal Application link labeled Related References and Links.

* * *

a. In order for all Applications to be eligible for proximity tie-breaker points other than those awarded based on Part III.A.10.b.(1) below, the Applicant must submit a properly completed and executed Surveyor Certification for Competitive HC Applications form, provided behind a tab labeled "Exhibit 25," which includes the Tie-Breaker Measurement Point and services information requested below:

* * *

(2) Proximity to services:

(a) Transit Services

Applicants may select one (1) of the following four (4) Transit Services on which to base the Applicant's Transit Score. If the Applicant provides information for more than one Transit Service or more than one of each type of Transit Service, the Applicant will not receive any proximity tie-breaker points for the Transit Service Score. (For example, Applicants are limited to selecting one Public Bus Transfer Stop, even though there may be another Public Bus Transfer Stop nearby. If the Applicant provides information for two Public Transfer Stops, the Applicant will not receive any proximity tie-breaker points for either of the Public Bus Transfer Stops.) The eligible Transit Services are defined below:

* * *

(ii) Public Bus Transfer Stop (Maximum 6 Points)

For purposes of proximity tie-breaker points, a Public Bus Transfer Stop means a fixed location at which passengers may access at least three routes of public transportation via buses. Each route must have a scheduled stop at the Public Bus Transfer Stop at least hourly during the times of 7am to 9am and also during the times 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis. This would include both bus stations (i.e. hubs) and bus stops with multiple routes. Bus routes must be established or approved by a Local Government department that manages public transportation. Buses that travel between states will not be considered.

* * *

To be considered for proximity tie-breaker points in this Application, all Transit Services, Tier 1 Services and Tier 2 Services must be in existence and available for use by the general public as of the Application Deadline with the exception of the SunRail Public Rail Stations.

31. An agency is afforded wide discretion in the interpretation of a statute it administers and such interpretation should not be overturned, unless clearly erroneous. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998); Natelson v. Dep't of Ins., 454 So. 2d 31, 32 (Fla. 1st DCA 1984).

32. The parties agree that even though route 71 was approved prior to the Universal Application deadline, the route was, nevertheless, not available for use by the general public when Petitioner submitted its application on December 6, 2011. As to this issue, the essence of Petitioner's argument is that a conflict exists in the Instructions for the Universal Application because Part III.A.10. generally provides that "to be considered for proximity tie-breaker points all services must be in existence and available for use by the general public as of the application deadline," whereas Part III.A.10.a.(2)(ii) "specifically provide[s] that to be acceptable, 'bus routes' must be established or approved by a Local Government department that

manages public transportation. . . ." Petitioner's argument is not persuasive.

33. The instructions for the Universal Application make clear that bus routes are included within the category of "transit services." While it is accurate to say, pursuant to Part III.A.10.a.(2)(ii), that a "bus route" must be "approved" to be acceptable for consideration for Proximity Tie-Breaker points, it is inaccurate to read the Instructions in such a way as to obviate the requirement that the approved "bus route" must be available for use by the general public as of the application deadline as required by Part III.A.10. of the Universal Application Instructions. The fact that route 71 was not operational as of December 6, 2011, is fatal to Petitioner's claim for entitlement to Proximity Tie-Breaker points for this category because the Instructions unambiguously require that the route be available for use by the public as of the application deadline.^{5/} Petitioner failed to meet its burden of proof with respect to this issue.

34. As for the library issue, Florida Housing interprets the phrase "borrow at no cost," as used in the Universal Application Instructions at Part III.A.10.a.(2)(ii), to mean that an item must be available for removal from the library premises (check out) by a member of the public without cost. In attempting to show the unreasonableness of Florida Housing's

definition of the term "borrow," Petitioner suggests a more expansive definition of the term that includes within its meaning the act of taking temporary possession of an item belonging to the library while both the possessor and the item remain within the confines of the library building. Petitioner's suggested definition is more akin to the definition associated with the act of "browsing" as this term was most commonly used before the advent of the Internet.

35. The question is not whether Petitioner's interpretation of the word "borrow" is reasonable, which it is not, but whether Petitioner has shown that Florida Housing's interpretation is so unreasonable as to constitute an impermissible construction of the term. See State of Fla., Bd. of Optometry v. Fla. Soc. of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988) ("only a permissible construction" will be upheld by the courts).

36. In support of its position, Petitioner relies on the opinion testimony of Mr. Joseph Chambers, who, through experience and training, is an expert in the area of affordable-housing development, and Ms. Tracy Wagner, who works as a vice-president for Finance and Administration for the Ringling College of Art and Design.

37. While Mr. Chambers is recognized, by stipulation, as an expert in the area of affordable housing development, there was no credible evidence elicited from Mr. Chambers establishing his

credentials or expertise in matters related to library sciences and operations. An expert witness may only testify as an expert in the areas of his or her expertise. Mattek v. White, 695 So. 2d 942, 943 (Fla. 4th DCA 1997) (physicist, who was qualified as an expert on accident reconstruction and biomechanics, was not qualified to express an opinion about whether the plaintiff suffered a permanent injury); and Goodyear Tire & Rubber Co., Inc. v. Ross, 660 So. 2d 1109, 1111 (Fla. 4th DCA 1995) (witness must be qualified as an expert on the discrete subject on which he is asked to opine). Because Mr. Chambers is not an expert in the discrete area of library sciences and internal operations related thereto, his opinion as to the ultimate question regarding the alleged unreasonableness of Florida Housing's definition of the word "borrow" is considered only because of the general stipulation of the parties, but is given no weight by the undersigned.

38. Ms. Wagner was not qualified as an expert witness and, therefore, her testimony was offered in the context of that of a lay witness. Ms. Wagner testified that in her opinion, the Kimbrough Library meets Respondent's definition of a public library.

39. Regarding lay witness opinion testimony, section 90.701, Florida Statutes, provides as follows:

If a witness is not testifying as an expert, the witness's testimony about what he or she perceived may be in the form of inference and opinion when:

(1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he or she has perceived to the trier of fact without testifying in terms of inferences or opinions and the witness's use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party; and

(2) The opinions and inferences do not require a special knowledge, skill, experience, or training.

40. Ms. Wagner's lay opinion regarding the definition of the term "borrow" as used by Florida Housing, does not require of Ms. Wagner that she rely upon any of her senses of "perception" within the meaning of section 90.701. Fino v. Nodine, 646 So. 2d 746, 748-749 (Fla. 4th DCA 1994) ("[A]cceptable lay opinion testimony typically involves matters such as distance, time, size, weight, form and identity."). Because the threshold requirements for section 90.701 have not been satisfied, Mr. Wagner's lay opinion as to whether the Kimbrough Library satisfies Florida Housing's definition of a public library is disregarded as incompetent. Even if, however, Ms. Wagner's opinion were considered, it would lack sufficient weight to assist Petitioner in meeting its burden of proof given Ms. Wagner's admitted unfamiliarity with library operations.

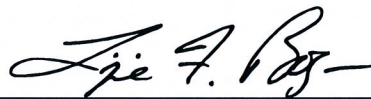
41. Petitioner failed to meet its burden of proof in establishing its entitlement to public library Proximity Tie-Breaker points.

42. Because Petitioner failed to demonstrate that Respondent's interpretation of the Instructions in the Universal Application is unreasonable or clearly erroneous, Florida Housing's interpretation must be accepted.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Florida Housing Finance Corporation, enter a final order denying Petitioner, Janie Poe Associates 3 LLC's, Petition for Review.

DONE AND ENTERED this 6th day of July, 2012, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of July, 2012.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2011, unless otherwise indicated.

^{2/} The instant proceeding is the subject of such a challenge.

^{3/} The United States Congress has created a program, governed by section 42 of the Internal Revenue Code, 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 Internal Revenue Code 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, Florida Housing is the designated "housing credit agency" for the State of Florida and administers Florida's tax credit program under its Housing Credit program (HC). 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.

^{4/} Petitioner was awarded 79 total points and six Ability to Proceed Tie-Breaker points.

^{5/} It is not necessary to reach the issue of whether route 71 will stop at least hourly between the hours of 4:00 p.m., and 6:00 p.m., Monday through Friday, because one of the predicate requirements for this analysis has not been demonstrated; to wit, that the route was available for use by the public as of the application deadline. Nevertheless, even if the necessary predicate was established, Respondent's interpretation of the "hourly" stop requirement would stand. In the instant dispute, Florida Housing interprets the phrase "at least hourly" to mean that route 71 buses must pick up passengers at Orange Avenue and

23rd Street at least once during the 4 o'clock hour and at least once during the 5 o'clock hour. While the "average headway" method used by SCTA for determining whether a bus picks up passengers "at least hourly" is certainly a reasonable interpretation of the phrase, it cannot be said that Florida Housing's interpretation is so strained as to be unreasonable. See Bd. of Podiatric Med. v. Fla. Med. Ass'n., 779 So. 2d 658, 660 (Fla. 1st DCA 2001) (it is fundamental that an agency is accorded wide discretion and deference in the interpretation of statutes which it administers and that an agency's interpretation of a rule it administers should be upheld when it is within the range of permissible interpretations).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.