STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

AGUACLARA, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2003-0032
APPLICATION NO. 2002-087C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_______________________________________/

RECOMMENDED ORDER

An informal hearing on this matter was noticed for September 11, 2003. Aguaclara, Ltd. (Aguaclara) and Florida Housing Finance Corporation (Florida Housing) submitted a Joint Proposed Recommended Order on September 9, 2003 to the Florida Housing Finance Corporation's appointed Hearing Office, David E. Ramba.

APPEARANCES

The representatives for the parties are as follows:

For Petitioner:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
201 South Biscayne Boulevard
Suite 420
Miami, Florida 33131

For Respondent:

Wellington H. Meffert II, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

EXHIBITS

There were no joint exhibits submitted with the proposed joint recommended order.

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application and cure materials included a grocery store within 1 mile of the development to receive 1.25 tie-breaker points.

FINDINGS OF FACT

The parties jointly submit the following proposed findings of fact, conclusions of law, and recommendations:

1. Respondent, Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to administer the financing and refinancing of projects which provide housing affordable to persons and families of low, moderate and middle income in Florida.

2. Florida Housing is the state entity designated by the Department of the Treasury to administer the allocation of Low Income Housing Tax Credits, as set forth in Section 42 of the Internal Revenue Code of 1986, as amended. The program awards a dollar-for-dollar reduction from income tax liability. The tax credits are typically sold to raise equity for the construction of affordable housing units.

3. On or before April 8, 2003, Petitioner, Aguaclara submitted an Application to Florida Housing Finance Corporation for the award of competitive 9% tax credits from the Florida Housing's Housing Credit ("HC") program in the 2003 Universal Cycle, to assist in the financing of a 185 unit apartment complex in Miami, Florida.

4. Florida Housing has established by rule a process (the "Universal Cycle") in which applicants for any of the above-referenced Florida Housing multi-family rental programs

submit a single application (the "Universal Cycle Application") by which projects are evaluated, scored, and competitively ranked.

5. The 2002 Universal Cycle Application, adopted as Form UA1016 by R. 67-21.002(97) and 67-48.002(116), Fla.Admin.Code, consists of Parts I through VI and instructions, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application. Other parts allow applicants to earn points, however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

6. To provide a means of determining which applicant should rank higher when all threshold requirements were met and application scores were identical, Florida Housing awarded "tie-breaker" points for proposed developments which were in close proximity to certain services, including grocery stores. A development located within one mile of a grocery store is eligible to receive 1.25 proximity tie-breaker points.

7. After Petitioner submitted its 2002 Universal Cycle Application, Florida Housing's staff undertook preliminary scoring of the Application pursuant to Part V, Chapter 420, Florida Statutes, and Rule Chapter 67-48, Florida Administrative Code.

8. In its application, Aguaclara submitted documentation demonstrating that its development was located within one mile of a grocery store, and Florida Housing in its preliminary scoring awarded Aguaclara the maximum 1.25 tie-breaker points for its proximity to a grocery store.

9. After completing preliminary scoring, Florida Housing's staff and by letter dated on or about May 13, 2003, Florida Housing advised Aguaclara that its preliminary score was 66 points, with 7.5 proximity tie-breaker points.

10. Any applicant could question the scoring of Petitioner's Application if it believed Florida Housing had made a scoring error, by filing a Notice of Possible Scoring Error ("NOPSE") within ten calendar days after the date the applicant received the preliminary scores.

11. A NOPSE was filed which stated that Florida Housing erred in awarding the tie-breaker points to Aguaclara, as the V & P Supermarket, located at 1630 NW 27th Avenue, Miami, Florida, did not meet the definition of a grocery store under the rules, its floor space being less than the required minimum of 4,500 square feet.

12. After reviewing each NOPSE that was timely received, on June 9, 2003, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants, along with Florida Housing's position on any such NOPSE.

13. In response to the NOPSE, Florida Housing deducted the 1.25 tie-breaker points awarded to Aguaclara for its proximity to a grocery store, resulting in a total of 6.25 tie-breaker proximity points.

14. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any issue raised in any NOPSE, Florida Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June , 2002 (the "cure period").

15. As its cure, Aguaclara submitted information which substituted another grocery store, La Fama #2, located at 2288 NW 28th Street, Miami, Florida, for the grocery store indicated in its initial application.

16. All applicants had an opportunity to review cures submitted by Petitioner, and any applicant could submit to Florida Housing a Notice of Alleged Deficiencies ("NOAD") challenging the Petitioner's cures. A NOAD was filed which stated that Florida Housing should not award the tie-breaker points to Aguaclara, as La Fama #2 did not consist of at least 4,500 square feet of air-conditioned space, and there did not meet the definition of "grocery store," under the rules.

17. On or about July 22, 2003, Florida Housing advised Aguaclara that its total application score was unchanged, at 66, and that its total tie-breaker proximity points remained at 6.25, noting that, "Applicant attempted to cure Item 1P [the grocery store proximity issue] by submitting a new Grocery Store, but the cure was deficient because the retail establishment submitted in the cure does not meet the definition of a Grocery Store as it consists of less then [sic] 4,500 square feet of air conditioned space."

18. Florida Housing did not accept the La Fama #2 as a grocery store, and did not award any tie-breaker proximity points to Aguaclara on that basis.

19. Following this process, Florida Housing on July 22, 2002, sent Pre-Appeal Scores and a Notice of Rights to Petitioner. The Notice of Rights notified Petitioner that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

20. Petitioner timely requested an informal hearing by filing its Petition for Informal Administrative Hearing on August 12, 2003.

21. After review of Aguaclara's Petition, Florida Housing verified that La Fama #2 is a grocery store within the meaning and intent of Florida Housing's criteria, consisting of over 4,500 square feet of air conditioned space devoted to retail self service sales of food and household goods.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and R. 67-47, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Florida Housing is authorized to institute a competitive application process, Sec. 420.507 (22)(f), Fla. Stat., and has done so, Rule 67-48.004, Fla. Admin. Code.

3. Florida Housing's application form and instructions, are adopted as a form, UA1016, by Rule 67-48.002(116), Fla. Admin. Code. Part III, Section A, subsection 11, paragraph (1), subparagraph (b), provides that a proposed development located within one mile of a grocery store will receive 1.25 tie-breaker points.

4. The application instructions at page 10 of UA1016 provide "[A] grocery store means a self-service retail market that sells food and household goods and has at least 4,500 square feet of air-conditioned space. Webster's New Collegiate Dictionary defines "grocery" as "[C]ommodities sold by a grocer; a grocer's store;" and defines "grocer," as "[A] dealer in staple foodstuffs, eats produce, and dairy products and usually household supplies."

5. Florida Housing interprets the above referenced definition of "grocery store," to include La Fama #2.

6. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation, Legal Environmental Assistance Foundation, Inc., v. Board of County Commissioners of Brevard County, 642 So.2d 1081 Fla. 1994); Miles v. Florida A and M University, 813 So.2d 242 (Fla. 1st DCA 2002), even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. Golfcrest Nursing Home v. Agency for Health care Administration, 662 So.2d 1330.

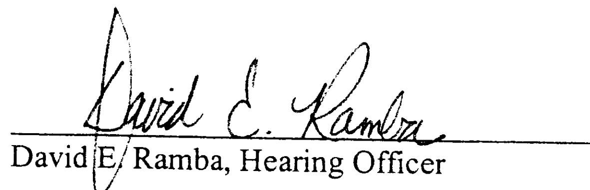
7. Florida Housing's interpretation of the term "grocery store," as applied to the La Fama #2 store, supplied by Petitioner for purposes of proximity tie-breaker points, is neither clearly erroneous nor unreasonable.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is hereby RECOMMENDED:

That a FINAL ORDER be entered by Respondent stating Petitioner, Aguaclara, Ltd.'s, proposed development is located within one mile of La Fama #2, a grocery store, and is thus entitled to the award of 1.25 tie-breaker points for that proximity.

Respectfully submitted this 23rd of September, 2003.



David E. Ramba, Hearing Officer

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ARBOR CREST, LTD.,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_______________________________________/

FHFC CASE NO. 2003-035
Application No. 2003-093CS

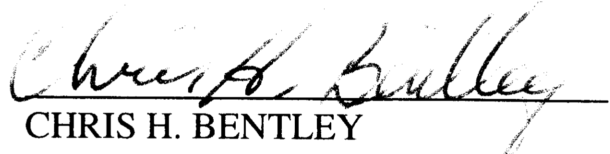
ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, an informal hearing was scheduled before the undersigned Hearing Officer on September 10, 2003. Prior to the hearing, the parties reached an agreement resolving the sole issue in dispute, and submitted to the undersigned Hearing Officer a Joint Proposed Recommended Order, which is attached hereto as Exhibit A. In essence, the parties agreed that Petitioner, ARBOR CREST, LTD., is entitled to an award of 1.25 proximity tie-breaker points because of its location within one mile of a pharmacy.

Based upon this agreement and the Joint Proposed Recommended Order, there is no need for additional Findings of Fact and/or Conclusions of Law, and the issues raised in the Petition are moot. Accordingly, no Findings of Fact or Conclusions of

Law are made herein. The parties jointly executed Joint Proposed Recommended Order is attached as Exhibit A.

Respectfully submitted and entered this 16th day of September, 2003.



CHRIS H. BENTLEY
Hearing Officer for Florida Housing Finance Corporation
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Tallahassee, FL 32301

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ARBOR CREST, LTD.

Petitioner,

vs.

Application No. 2003-093CS
2003 Universal Cycle

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_______________________________/

JOINT PROPOSED RECOMMENDED ORDER

Petitioner Arbor Crest, Ltd. ("Arbor Crest") and Respondent Florida Housing Finance Corporation ("Florida Housing") present the following Joint Proposed Recommended Order:

APPEARANCES

For Petitioner:

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Tallahassee, Florida 32301

For Respondent:

Wellington Meffert
General Counsel
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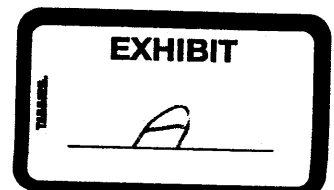

PRELIMINARY STATEMENT

Arbor Crest timely filed an application with Florida Housing for Housing Credits and a SAIL Loan in the 2003 Universal Cycle in connection with the development of an apartment complex in Quincy, Florida. On July 21, 2003, Arbor Crest was provided notice through Florida Housing's Universal Scoring Summary that its cure relating to tie-breaker points concerning proximity to a pharmacy would not be considered because "the new information was submitted on a previously signed Surveyor Certification Form with no indication that the surveyor certified the additional information." Arbor Crest timely filed a petition for informal administrative hearing on August 8, 2003. The petition disputed Florida Housing's determination that Arbor Crest is entitled to only 0.75 tie-breaker points for its proximity to a pharmacy and sought entry of a Recommended Order finding that Arbor Crest is entitled to 1.25 such tie-breaker points. The parties agree that Arbor Crest has demonstrated that the information in its cure is correct and that Arbor Crest, therefore, is entitled to 1.25 tie-breaker points relating to its proximity to a pharmacy.

FINDINGS OF FACT

1. Arbor Crest timely submitted an Application to Florida Housing for Housing Credits and a SAIL Loan in the 2003 Universal Cycle in connection with a proposed 120-unit apartment complex in Quincy, Florida.

2. To encourage the development of low-income housing for families, Congress in 1987 created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar-for-dollar reduction of the holder's federal tax liability, which can be taken for up to ten years if the project satisfies the Internal Revenue Code's requirements each year. The developer

sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for the construction of the development.

3. Florida Housing is a public corporation organized pursuant to section 420.504, Florida Statutes, to provide and promote financing of affordable housing and related facilities in Florida. Florida Housing is an agency as defined in section 120.52, Florida Statutes, and, therefore, is subject to the provisions of Chapter 120, Florida Statutes.

4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of low-income Tax Credits (also known as Housing Credits) in Florida. *See* § 420.5099, Fla. Stat. In this capacity, Florida Housing determines which entities will receive Housing Credits for financing the construction or rehabilitation of low-income housing.

5. Florida Housing administers the State Apartment Incentive Loan Program (SAIL) pursuant to section 420.5087, Florida Statutes.

6. Florida Housing is governed by a Board of Directors appointed by the Governor with the Secretary of the Department of Community Affairs sitting ex-officio.

7. Housing Credits and SAIL Loans are allocated by Florida Housing through a competitive application process. Applications are submitted to Florida Housing through a once-a-year process referred to as the Universal Cycle, which is governed by chapter 67-48, Florida Administrative Code.

8. The Universal Cycle is a single-application process for the Housing Credit program, the SAIL program, and the Home Investment Partnership Program operated by Florida Housing pursuant to section 420.5089, Florida Statutes, and federal Housing and Urban Development regulations.

9. Florida Housing uses a scoring process outlined in rule 67-48.004, Florida Administrative Code, and a Qualified Allocation Plan (QAP). The provisions of the QAP are adopted and incorporated by reference in rule 67-48.025, Florida Administrative Code. Pursuant to the QAP, Housing Credits are apportioned among the most populated counties, medium populated counties, and least populated counties. The QAP also establishes various set-asides and special targeting goals.

10. The 2003 Universal Application Package, adopted by rule 67-48.002(111), Florida Administrative Code, includes forms and instructions for applicants.

11. Some application requirements are "threshold" items, and failure to properly include a threshold item or satisfy a threshold requirement results in a rejection of the application. To provide a means of determining which applicants should rank higher when all threshold requirements are met and scores are identical, Florida Housing awards "tie-breaker" points for proposed developments that are in close proximity to certain services, such as a grocery store, school, pharmacy, or bus stop. *See* Universal Application at Part III.A.11.b. A maximum of 3.75 proximity tie-breaker points may be awarded.

12. Preliminary scores for all applicants were released by Florida Housing on May 12, 2003. Following consideration of comments submitted by other Applicants and further review of applications pursuant to rule 67-48.004(4) and (5), Florida Housing released NOPSE[1] scores on June 9, 2003. Applicants then were permitted to submit "cures" to problems identified in the NOPSE scores. *See* r. 67-48.004(6). Applicants also were allowed to comment on the "cures" submitted by competitors by filing Notices of Alleged Deficiencies (NOADs). *See* r. 67-48.004(7).

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[1] NOPSE stands for Notice of Possible Scoring Error.

13. After review of NOADs, final scores were released by Florida Housing through a Universal Scoring Summary dated July 18, 2003. Each applicant received its own Universal Scoring Summary.

14. In its Application, Arbor Crest stated that it was located within one mile or less of a pharmacy, which would entitle the development to 1.25 tie-breaker points.

15. When preliminary scores were released by Florida Housing on May 12, 2003, Arbor Crest was awarded only 0.75 points for its proximity to a pharmacy. *See* Item # 4P.III.A.11.b.(4) of Florida Housing's Preliminary Scoring Summary for Arbor Crest. In its explanation for the scoring, Florida Housing stated that the "[a]ddress provided for the Pharmacy plots between 2 and 3 miles of the Tie-Breaker Measurement Point." *Id.* at Item # 4P.

16. In response to the Preliminary Scoring Summary, Arbor Crest submitted two cures relating to the pharmacy. Both cures included a signed Surveyor Certification Form stamped "Revised." Listed on the revised form was new information about the location of a Winn-Dixie pharmacy that is within one mile of the proposed development's tie-breaker measurement point.

17. When final scores were released in Arbor Crest's Universal Scoring Summary, Florida Housing again awarded Arbor Crest only 0.75 proximity tie-breaker points for its proximity to the pharmacy. In explanation, Florida Housing stated:

> Applicant attempted to cure Item 4P, but the cure was not accepted because the new information was submitted on a previously signed Surveyor Certification Form with no indication that the surveyor certified the additional information.
>
> *See* Universal Scoring Summary at Item # 1C.III.A.11.

18. Cures are governed by rule 67-48.004(6), which provides in relevant part:

> Within 9 Calendar Days of receipt of the notice set forth in subsection (5) above, each Applicant shall be allowed to cure its Application by submitting additional documentation, revised pages and such other information as the Applicant deems appropriate to address the issues raised . . . . Where specific pages of the Application are revised, changed or added, each new page(s) must be marked as "revised," and submitted. Failure to mark each new page(s) "revised" will result in the Corporation not considering the revisions, changes or additions to that new page. Pages of the Application that are not revised or otherwise changed may not be resubmitted, except that documents executed by third parties must be submitted in their entirety even if only a portion of the original document was revised.

18. Arbor Crest resubmitted the entire Surveyor Certification Form in its cure with new information concerning the location of the pharmacy. The rest of the form was identical to the form originally submitted with the Application. As required by rule 67-48.004(6), the word "REVISED" was typed at the top of the form.

19. Page 12 of the Universal Application Instructions states that, "To be considered for tie-breaker points in this Application, the . . . Pharmacy . . . must be in existence and available for use by the general public as of the Application Deadline." By not re-dating the certification form to a date after the Application Deadline, the surveyor made it clear that not only was the pharmacy at the point indicated on the form, but that it was there before the deadline established by Florida Housing.

20. Florida Housing apparently was concerned that the surveyor did not re-date or re-sign the form when he added the additional information about the pharmacy. However, nothing in rule 67-48.004(6) requires a form included in a cure to be re-dated or re-signed. Rather, the rule contemplates that a cure will include new information, it must be stamped as "REVISED," and that documents executed by third parties must be submitted in their entirety. All of the rule's requirements were satisfied by Arbor Crest.

21. Nonetheless, to alleviate any concerns about the legitimacy of the information in the cure, the surveyor has provided Florida Housing with both a letter and a sworn affidavit certifying the cure's accuracy. Florida Housing has accepted as correct the information provided in those documents.

22. Arbor Crest should have been awarded 1.25 points for proximity to a pharmacy because the Winn-Dixie pharmacy identified in the cure is located within a mile of the proposed development. The letter and sworn affidavit from the surveyor remove any doubt about whether the information in the cure is accurate.

CONCLUSIONS OF LAW

1. Pursuant to sections 120.569 and 120.57(2), Florida Statutes, and rules 28-106.301 and 67-48.005, Florida Administrative Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Florida Housing is authorized to institute a competitive application process pursuant to section 420.507(22)(f), Florida Statutes, and has done so through rule 67-48.004, Florida Administrative Code.

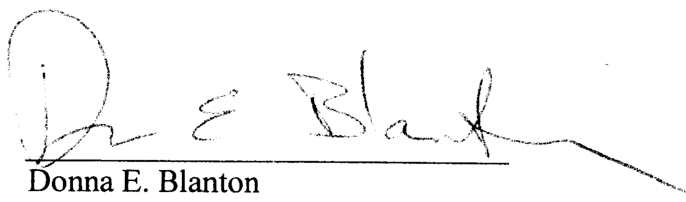
3. The 2003 Universal Application and accompanying instructions are incorporated by reference into rule 67-48.002(111), Florida Administrative Code.

4. Petitioner has provided information in its cure that satisfies the requirements for the award of 1.25 proximity tie-breaker points because of its location within one mile of a pharmacy. Accordingly, Petitioner is entitled to those points.

RECOMMENDATION

Based on the Findings of Fact and Conclusions to Law stated above, the parties recommend that the Hearing Officer enter a Recommended Order determining that Arbor Crest is entitled to 1.25 tie-breaker points because of its proximity to a pharmacy.

Respectfully submitted this 3rd day of September, 2003,



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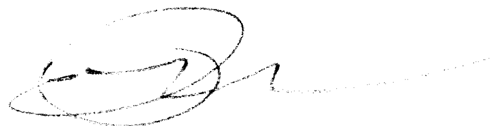
Attorney for Village Centre Apartments, Ltd.



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Attorney for Florida Housing Finance Corporation

Affidavit of Richard W. Phillips

The affiant appeared before the undersigned Notary Public and being duly sworn states:

1. My name is Richard Wayne Phillips. I am the President of Cornerstone Land Surveying, Inc. in Tallahassee, Florida. I am a Florida licensed surveyor. My Surveyor and Mappers license is current and active with the Florida Department of Business and Professional Regulation and is number 5557.

2. I completed and attested to a Surveyor Certification dated March 10, 2003, that was filed with the Florida Housing Finance Corporation in connection with the application of Arbor Crest in Gadsden County.

3. I updated that Surveyor Certification as submitted to Florida Housing on June 19, 2003, to reflect the location of the Winn Dixie Pharmacy. A copy of that revised Surveyor Certification is attached as Exhibit A.

4. The Winn Dixie Pharmacy is located at the coordinates that I listed on that revised Surveyor Certification.

Sworn to and subscribed before me this 25th day of August, 2003, by Richard Wayne Phillips, who is personally known to me or has produced ______________ as identification.

WITNESS my hand and official seal, this 25th day of August, 2003.

Carolyn S. Rayboun
MY COMMISSION # CC959731 EXPIRES
August 9, 2004
BONDED THRU TROY FAIN INSURANCE, INC.

Carolyn S. Rayboun
Notary Public
State of Florida
My commission expires: 8/9/2004

(AFFIX SEAL)

SINCERELY,
Richard W Phillips

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ASWAN VILLAGE ASSOCIATES, LLC.,

Petitioner,

v.

FHFC CASE NO. 2003-042
Application No. 2003-026S

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 administrative hearing in Tallahassee, Florida, in the above-styled case on September 10, 2003.

APPEARANCES

For Petitioner, Aswan Village Associates, LLC.:

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Holland & Knight, LLP
701 Brickell Avenue, Suite 3000
Miami, FL 33131

For Respondent, Florida Housing Finance Corporation:

Paula C. Reeves
Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue for determination in this proceeding is whether the application of Petitioner, ASWAN VILLAGE ASSOCIATES, LLC., meets the threshold requirement that there be a firm financing commitment for the proposed project. More specifically, the issue is whether Petitioner was required to demonstrate that thirty-five percent (35%) of the total equity being provided was paid prior to or simultaneously with the closing of the construction financing.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9. Petitioner's Exhibit 1 was also received into evidence, but the parties later agreed that it was not relevant to the sole issue in dispute. Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

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

1. The Petitioner, ASWAN VILLAGE ASSOCIATES, LLC., a limited partnership, submitted an application to the Respondent, FLORIDA HOUSING

FINANCE CORPORATION, for an award of funds from the State Apartment Incentive Loan (SAIL) program for the development of affordable rental housing in the 2003 Universal Application Cycle. The 2003 Universal Application form and Instructions are adopted and incorporated by reference in the Respondent's Rule 67-48.002(111), Florida Administrative Code.

2. Among the threshold requirements for applicants is that financing documentation reflect that all funding commitments are firm. With respect to equity commitments, the Instructions to the 2003 Universal Application provide as follows:

Syndication/HC Equity

- A firm commitment from a Housing Credit Syndicator is an agreement which is executed and accepted by all parties including the Applicant, is dated, and includes all terms and conditions of the agreement. In order for a syndication/equity commitment to be scored firm, it must expressly state the syndication rate (amount of equity being provided divided by the anticipated amount of credits the syndicator expects to receive), capital contributions pay-in schedule (stating the amounts to be paid prior to or simultaneously with the closing of construction financing and the amounts to be paid prior to completion of construction), the percentage of the anticipated amount of credit allocation being purchased, the total amount of equity being provided, and the anticipated Housing Credit Allocation. **Additionally, in order for the commitment to be scored firm, 35% of the total equity being provided must be paid prior to or simultaneously with the closing of the construction financing.** Proceeds from a bridge loan from the syndicator will count toward meeting this requirement; however, bridge loans from other sources will not count toward meeting this

requirement.

- Applicants may submit a closed limited partnership agreement and it will be counted as firm. If the agreement fails to provide the **items** required for a commitment stated above, the Applicant must provide signed documentation from the purchaser of credits, i.e. limited partner, that provides the **data** requested in the previous paragraph.

- If not syndicating/selling the housing credits, the owner's commitment to provide equity must be included. The commitment must include the following:

  - the total amount of equity; and
  - the pay-in schedule stating the amounts to be paid prior to or simultaneously with the closing of construction financing and the amounts to be paid prior to the completion of construction; and the anticipated Housing Credit Allocation.

- Important! If not syndicating/selling the housing credits, evidence of ability to fund, as defined under Firm Commitment above, must be provided as an exhibit to the Application. **Additionally, in order for the commitment to be scored firm, 35% of the total equity being provided must be paid prior to or simultaneously with the closing of the construction financing.** Proceeds from a bridge loan will NOT count toward meeting this requirement.

- If the amount of housing credits requested on the funding request form is less than the anticipated amount of credit allocation stated in the equity/owner/syndication commitment, the commitment will not be considered a source of financing.

- A bridge loan contained within a syndication commitment will be counted as a firm commitment if the syndication commitment is scored firm. A demonstration of the ability to fund is not required

> for the bridge loan in order for the syndication commitment to be scored firm. The Applicant may include the amount of the bridge loan as equity proceeds on the Construction or Rehabilitation Analysis and on the Permanent Analysis. **The bridge loan amount will be counted as equity proceeds for meeting the 35% requirement stated in the first bullet of this section.** (Emphasis supplied)

3. To demonstrate its equity financing, Petitioner submitted an Exhibit containing a copy of an executed document entitled "First Amended & Restated Operating Agreement of Aswan Village Associates, LLC." The parties agree that this Operating Agreement, which was executed on February 25, 2003, is a closed limited partnership agreement within the meaning of the second paragraph quoted in Paragraph 2 above. There is no dispute that the Petitioner provided the applicable factual information required in the second sentence of the first paragraph quoted in paragraph 2 above; to wit: the syndication rate, the capital contributions pay-in schedule, the percentage of the anticipated amount of credit allocation being purchased, the total amount of equity being provided and the anticipated housing credit allocation. The Petitioner did not demonstrate that thirty-five percent (35%) of the total equity being provided was paid prior to or simultaneously with the closing of the construction financing (the "35% requirement").

4. The Petitioner's position is that the 35% requirement is not applicable or required for a closed limited partnership agreement to be considered a firm

commitment. The Respondent's position is that the 35% requirement is applicable to all applicants, even those who submit closed operating agreements.

CONCLUSIONS OF LAW

5. 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. No issue as to proper notice or jurisdiction has been raised in 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.

6. This case concerns the issue of whether Petitioner's application should be rejected for failure to demonstrate a firm commitment for equity financing solely because Petitioner did not demonstrate that thirty-five percent (35%) of the total equity being provided was paid prior to or simultaneously with the closing of the construction financing. More specifically, the issue is whether the 35% requirement is applicable when a closed limited partnership operating agreement, such as that submitted by Petitioner in its application, is provided to demonstrate firm equity financing.

7. The application Instructions, at pages 60 and 61, address equity financing

and set forth the information and activities required to demonstrate a firm commitment. Those Instructions, quoted in paragraph 2 of the Findings of Fact above, address Housing Credit Syndicator agreements (the first bullet), closed limited partnership agreements (the second bullet), owner commitments in the absence of syndicating or selling housing credits (third bullet) and bridge loans (fifth bullet). The Instructions concerning all but one of those four types of equity financing specifically refer to the requirement that 35% of the total equity being provided be paid prior to or simultaneously with the closing of the construction financing. The one exception is a closed limited partnership agreement.

8. The Instructions provide that a closed limited partnership agreement "will be counted as firm" and that the same "items" required with respect to a Housing Credit Syndicator agreement be documented either in the closed limited partnership agreement itself or in further documentation that provides the same "data." The five "items" or "data" required with respect to syndicator agreements are factual information. They include facts concerning a rate, a schedule, a percentage, an amount and an allocation. The remaining or "additional" requirement with respect to syndication equity financing is the 35% requirement. Unlike the factual information which must be included in the agreement, the 35% requirement is of a different character. It is not a mere fact. It is an act or function which must occur in

order for the commitment to be scored firm. The 35% requirement is set forth in a separate sentence, and is preceded by the word "additionally." The 35% requirement is simply not a part of the factual information (i.e., an "item" or a portion of "data") which must be provided by a limited partnership which has a closed agreement demonstrating equity financing.

9. While the 35% requirement is expressly referenced in the paragraphs pertaining to syndication, owner financing and bridge loans, it is not contained within the Instructions relating to closed limited partnership agreements. Had the Respondent intended to apply the 35% requirement to a limited partnership agreement which is closed, it would have been a simple matter to add such a requirement to the paragraph specifically pertaining to closed limited partnership agreements, as it did with respect to syndicator agreements, an owner's provision of equity and bridge loans. It did not add such a requirement, and none can be implied from the plain wording of the instructions.

10. Counsel for the Respondent argues that the Instructions relating to closed limited partnership agreements, by referencing "the items required for a commitment stated above" and "the data requested in the previous paragraph," mandate the application of the 35% requirement to such closed limited partnership agreements. This interpretation is unreasonable and erroneous because it contradicts the plain

wording of the Instructions.

11. Had the Respondent intended to treat closed limited partnership agreements in the same manner as syndicator agreements, there would be no reason or need for the second bulleted paragraph in the Instructions. The Instructions obviously draw a distinction between a commitment represented in a Housing Credit Syndicator agreement and a commitment represented in a closed limited partnership agreement.

12. Moreover, the Respondent's interpretation of the Instructions ignores the word "additionally," which precedes the statement of the 35% requirement in the paragraph pertaining to syndicator agreements. As written, the 35% requirement is simply not within the same group as the five delineated "items" or "data" which must be expressly "stated" in a syndicator agreement. It is a separate "additional" requirement which is not restated as a requirement for closed limited partnership agreements to be considered firm.

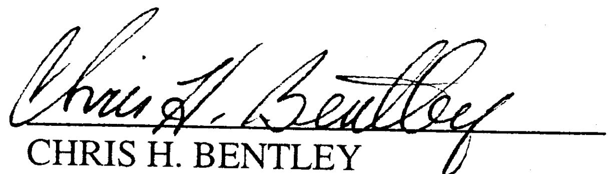
13. In summary, the Instructions provide that if there is a closed limited partnership agreement and documentation of the five items required with respect to syndicator agreements, the equity commitment will be deemed firm. There is no requirement that 35% of the total equity provided be paid prior to or simultaneously with the closing of the construction financing by an applicant who submits a closed

limited partnership agreement. Having provided the required information regarding its equity financing, Petitioner met the threshold requirement of a firm financial commitment.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's commitment for equity financing, as represented in its closed limited partnership operating agreement, be deemed a firm commitment.

Respectfully submitted and entered this 18th day of September, 2003.



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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 Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Friday, September 26, 2003. 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.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BELMONT HEIGHTS ASSOCIATES
PHASE III, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2003-050
APPLICATION NO.: 2003-110C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_______________________________________/

RECOMMENDED ORDER

An informal hearing on this matter was noticed for September 11, 2003. BELMONT HEIGHTS ASSOCIATES PHASE III, LTD., ("Petitioner") and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing") submitted a Joint Proposed Recommended Order on August 28, 2003 to the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

APPEARANCES

The representatives for the parties at the hearing are as follows:

For Petitioner:

Michael Donaldson, Esquire
Carlton Fields, P.A.
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Tallahassee, FL 32302

For Respondent:

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Florida Housing Finance Corporation
227 N. Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

JOINT EXHIBITS

There are no joint exhibits submitted with the Joint Proposed Recommended Order.

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application contained sufficient documentation to receive 1.25 tie-breaker points for proximity to a grocery store and 1.25 tie-breaker points for proximity to a public school.

PRELIMINARY STATEMENT

Petitioner applied for funding during the 2003 Universal Cycle, seeking an allocation of Low Income Housing Tax Credits ("Housing Credits"). Petitioner was notified by Florida Housing of its final scores on or about July 18, 2003. On August 12, 2003, Petitioner, Belmont Heights timely filed a Petition for an Informal Administrative Hearing under Sections 120.569 and 120.57(2), Florida Statutes, disputing the Florida Housing Finance Corporation's ("Corporation") final scoring of its 2003 Universal Cycle Application for the proposed Belmont Heights Estates Phase III apartment complex. The Corporation granted Petitioner an informal hearing in this matter. Petitioner sought a determination that the Petitioner was entitled to 1.25 tie-breaker proximity points for proximity to a grocery store and was entitled to 1.25 tie-breaker proximity points for proximity to a public school. The parties agree the surveyor report provided by Petitioner contain correct latitude and longitude coordinates of the grocery store and public school and therefore entitled to the tie-breaker proximity points.

FINDINGS OF FACT

1. On or before April 8, 2003, Petitioner submitted an Application to Florida Housing Finance Corporation's ("Florida Housing") 2003 Universal Cycle for the award of an allocation of low-income housing tax credits ("Tax Credits") for the development of Belmont Heights Estates Phase III, a proposed 251-unit affordable housing apartments complex to be located in Tampa, Hillsborough County, Florida.

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

3. To encourage the development of low-income housing for families, in 1987 Congress created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar for dollar reduction of the holder's federal tax liability which can be taken for up to ten years, if the project satisfies the Internal Revenue Code's requirements each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for the construction of the development.

4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of Florida's Tax Credits to applicants for the development of rental housing for low income and very low-income families. (See Section 420.5099, Fla. Stat.)

5. After the scoring process, Florida Housing allocates the Tax Credits pursuant to Fla. Admin. Code R. 67-48 *et. al.*, and a Qualified Allocation Plan ("QAP"). The provisions of the QAP are adopted and incorporated by reference in Fla. Admin. Code R. 67-48.025

6. Pursuant to the state and federal statutory mandates, Florida Housing has established a competitive application process that attempts to insure the most effective use of available Tax Credits. (See Section 420.507 (22)(f), Fla. Stat. and Fla. Admin. Code R. 67.48 *et. al.*) Awards for the SAIL program, the Multifamily Mortgage Revenue Bonds program and the Low Income Housing Tax Credit program are included in a single application process (the "Universal Cycle") governed by Fla. Admin. Code R. 67-48 *et. al.* The Housing Credit program is included in this competitive application process in which applicants for any of the above-referenced Florida Housing multi-family rental programs submit a single application (the "Universal Application").

7. The 2003 Universal Application, adopted by Fla. Admin. Code R. 67-48.002(111), parts I through V, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application. Other parts allow applicants to earn points, however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

8. Petitioner submitted its 2003 Universal Application, on or before April 8, 2003. As part of its Application, Petitioner submitted a Surveyor Certification at Part III, Section A, Subsection 11.b(1), at Exhibit 25, which indicated the longitude and latitude coordinates for the location of a grocery store and public school. In its Application, Petitioner indicated that both the grocery store and public school were less than or equal to one mile from the proposed development site and was therefore entitled to a total of 2.50 Proximity tie-breaker points or 1.25 points for each service.

9. After Petitioner submitted its 2003 Universal Application, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Fla. Stat., and Fla. Admin. Code R. 67-48 *et. al.* Florida Housing completed the scoring process on May 12, 2003.

10. After performing preliminary scoring, Florida Housing's staff notified Petitioner of the results. Florida Housing awarded Petitioner one Tie-Breaker Proximity Point for its proximity to a grocery store and no points for its proximity to a public school. Florida Housing determined that Petitioner was only entitled to one Tie-Breaker Proximity Point based upon the Street Atlas USA 2003 software. The Street Atlas USA 2003 software determined that the grocery store was more than one mile away from the proposed development site and that the public school was more than five miles away.

11. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any curable issue raised in any NOPSE, Florida Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June 19, 2003 (the "cure period").

12. In response to Florida Housing's preliminary score, Petitioner submitted a cure to Part III, Section A, Subsection 11.b(1), at Exhibit 25, providing another Surveyor Certification along with a Surveyor's Report which confirmed that both the grocery store and school were less than one mile from the proposed development site's Tie-Breaker Measurement Point. The surveyor concluded that the Street Atlas USA 2003 software failed to correctly locate the location of the grocery store and public school and that both were less than or equal to one mile of the proposed development site.

13. After Petitioner submitted its cures, all applicants had an opportunity to review Petitioner's cures. Any applicant could submit to Florida Housing a Notice of Alleged Deficiencies ("NOAD") to challenge the Petitioner's cures. A NOAD was filed on Petitioner's application questioning Petitioner's cure to Part III, Section A, Subsection 11.b(1) at Exhibit 25, specifically, that Petitioner's cure did not state that the Street Atlas USA 2003 software failed to correctly identify a location that is on the service site upon entering the service's address.

14. Florida Housing then reviewed the NOAD and determined in its final scoring of Petitioner's Application, that the cure to Part III, Section A, Subsection 11.b(1) and Exhibit 25 failed to achieve the selected proximity tie-breakers points. This item is designated as 1P and 2P on the 2003 Universal Scoring Summary.

15. Following this process, Florida Housing on July 18, 2003, sent Pre-Appeal Scores and a Notice of Rights to Petitioner. The Notice of Rights notified Petitioner that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

16. Petitioner timely requested an informal hearing by filing its "Petition for Review," on August 12, 2003.

17. Part III, Section A, Subsection 11.b, of the 2003 Universal Application Instructions states in part that, "If an Applicant concludes upon entering an Address for a service... into the Street Atlas USA 2003 software that the software fails to correctly identify a location that is on a service site, the Applicant may provide evidence of the inaccuracy..." Petitioner's Surveyor Certification and Affidavit of Surveyor demonstrated that the surveyor entered the addresses of the grocery store and public school in the Street Atlas 2003 software and determined that it failed to correctly identify the location of either service.

CONCLUSIONS OF LAW

1. Pursuant to Sec. 120.569 and 120.57(2), Fla. Stat. and Fla. Admin. Code R. 67-48 *et. al.*, the Hearing Officer has jurisdiction over the parties to this proceeding. The Petitioner's substantial interests are affected by the proposed action of the Corporation. Therefore, the Petitioner has standing to bring this proceeding.

2. Florida Housing is authorized to institute a competitive application process pursuant to section 420.507 (22)(f), Fla. Stat., and has done so at Fla. Admin. Code R. 67-48.004.

3. The 2003 Universal Application, Parts I through V, and accompanying instructions are incorporated by reference into Fla. Admin. Code R. 67-48.002(111). Part III, Section A, Subsection 11 says in part:

> To be eligible for tie-breaker points, the Applicant must indicate the proximity of the Proposed Development to services and Development Address...If an Applicant concludes upon entering an Address for a service (Grocery Store, Public School, Medical Facility or Pharmacy) into the Street Atlas USA 2003 software that the software fails to correctly identify a location that is on a service site, the Applicant may provide evidence of the inaccuracy behind a tab labeled "Exhibit 25" of the Universal Application...for consideration by Florida Housing. At a minimum, the evidence must contain an additional certification from a Florida licensed surveyor, not related to any party of the Applicant...which states: (1) the name of the service in question; (2) that the Street Atlas USA 2003 software fails to correctly identify a location that is on the service site upon entering the service's Address; and (3) the correct latitude and longitude coordinates (seconds, truncated after one decimal place) of the main public entrance for the respective service.

4. Petitioner submitted a Sworn Clarification and Affidavit of Mark A. West, a licensed professional surveyor in the State of Florida, which reaffirmed his conclusion that when he entered the address of the grocery store and public school, the Street Atlas USA 2003 software failed to correctly identify a location that is on the service site of the grocery store or the public school. Mr. West confirmed and clarified this determination was the basis for his use

of the longitude and latitude coordinates. Mr. West then provided the correct latitude and longitude coordinates of the main public entrances to both service sites

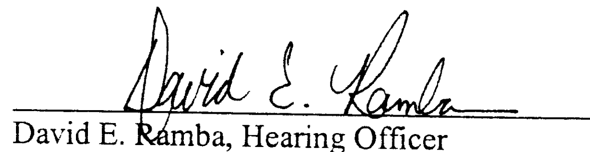
5. Petitioner has provided information in its cure documentation which satisfies the required elements to achieve the selected Proximity Tie-Breaker Points, provided in the instructions to Part III, section A, Subsection 11.b(1), at Exhibit 25 of the Universal Application. Accordingly, Petitioner is entitled to 1.25 Proximity Tie-Breaker Points for proximity to a grocery store; and 1.25 Proximity Tie-Breaker Points for proximity to a public school.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is hereby RECOMMENDED:

That a FINAL ORDER be entered by Respondent giving Applicant 1.25 Proximity Tie-Breaker Points for proximity to a grocery store and 1.25 Proximity Tie-Breaker Points for proximity to a public school.

Dated this 2nd day of September, 2003 in Tallahassee, Florida.



David E. Ramba, Hearing Officer

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CMP CHP SAN MARCOS, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2003-033
Application No.: 2003-082B

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_______________________________________/

RECOMMENDED ORDER

An informal hearing on this matter was noticed for September 11, 2003. CMP CHP SAN MARCOS, LTD. ("Petitioner") and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing") submitted a Joint Recommended Order on September 11, 2003 to the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

APPEARANCES

The representatives for the parties are as follows:

For Petitioner:

Michael P. Donaldson
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For Respondent:

Laura J. Cox, Assistant General Counsel
Florida Housing Finance Corporation
227 N. Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329

JOINT EXHIBITS

There were no joint exhibits submitted with the Joint Proposed Recommended Order.

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application should be scored as satisfying threshold requirements for the "equity commitment."

PRELIMINARY STATEMENT

On or before April 8, 2003, Petitioner submitted an Application to Florida Housing for a loan of $15,600,000 through the Multifamily Mortgage Revenue Bond ("MMRB") Program and $738,412 in accompanying non-competitive housing tax credits in the 2003 Universal Cycle. On July 18, 2003, Florida Housing notified Petitioner of the results of the scoring of Petitioner's Application and provided Petitioner with a Notice of Rights pursuant to Sections 120.569 and 120.57, Fla. Stat. On August 12, 2003, Petitioner timely filed its Petition for Hearing appealing the finding that the "equity commitment" letter failed to satisfy threshold requirements. The parties agree that Petitioner relied on incorrect statements in the Preliminary and NOPSE 2003 MMRB, SAIL & HC Scoring Summaries ("Preliminary and NOPSE Scoring Summaries"). Petitioner's reliance on such statements deprived Petitioner of the opportunity to cure

defects in the equity commitment letter. The parties further agree that the "equity commitment" should be scored as satisfying threshold requirements since the defect had not been previously identified in the Preliminary and NOPSE Scoring Summaries, or through a NOPSE.

FINDINGS OF FACT

1. On of before April 8, 2003, Petitioner submitted to Florida Housing a Multifamily Mortgage Revenue Bond ("MMRB") application for the 2003 funding cycle ("Application"), to obtain below-market interest rate bonds and accompanying non-competitive housing tax credits, to aid in the financing of an apartment complex to be named Lakes at San Marcos, located in Leon County, Florida.

2. Petitioner, CMP CHP San Marcos, Ltd. ("Petitioner") is a Florida for-profit limited liability company, having its address at 241 Peachtree Street, Suite 300, Atlanta, Georgia 30303, and is in the business of providing affordable rental housing units.

3. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing and refinancing houses 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 Multifamily Mortgage Revenue Bond (MMRB) program is administered by Florida Housing, and annually awards affordable housing developers low interest loans and non-competitive tax credits (also known as housing credits) for the

purposes of financing the acquisition and rehabilitation of low and very low income rental housing units.

5. Awards for the MMRB program administered by Florida Housing is included in a single application process (the "Universal Cycle") governed by Fla. Admin. Code Rule Chapter 67-21 *et al.*

6. As Florida Housing's available pool of tax-exempt bond financing is limited, projects seeking such financing must compete for funding. Florida Housing has established a competitive application process (the "Universal Application") to assess the relative merits of proposed projects.

7. The 2003 Universal Application, and instructions for completion, adopted as Form UA1016 by Fla. Admin. Code R. 67-21.002(96) contains parts I through VI, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application.

8. After Petitioner submitted its 2003 MMRB Application, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Fla. Stat., and Fla. Admin. Code R. 67-21.003. Florida Housing completed the preliminary scoring process on May 12, 2003, after which, Florida Housing's staff notified Petitioner of the results that its score was 66 points out of a possible 66 points and 7 out of a possible 7 1/2 tie breaker points. Florida Housing noted in the Preliminary Scoring Summary:

> One of the criteria for a firm equity commitment stated on page 60 of the Universal Application Instructions is that it expressly state the amount of equity to be paid prior to or simultaneous with the closing of construction

and the amount of equity to be paid prior to construction completion. The provided equity commitment **does** (emphasis added) state these requirements. The commitment only states $5,375,808 will be paid at Admission. In addition on page 1 of the commitment it states a total equity commitment of $6,085,800 while on page 2 the equity total is $6,115,800. Therefore, the equity commitment is not firm and is not counted as a source of financing.

9. Any applicant could question the scoring of Petitioner's Application if it believed Florida Housing had made a scoring error, within ten calendar days after the date the applicant received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE").

10. No NOPSEs were filed challenging the Petitioner's application. After considering all NOPSEs, Florida Housing notified applicants by overnight mail on or about June 9, 2003, of any resulting changes in the scoring of their applications. Florida Housing noted in the NOPSE Scoring Summary:

> One of the criteria for a firm equity commitment stated on page 60 of the Universal Application Instructions is that it expressly state the amount of equity to be paid prior to or simultaneous with the closing of construction and the amount of equity to be paid prior to construction completion. The provided equity commitment **does** (emphasis added) state these requirements. The commitment only states $5,375,808 will be paid at Admission. In addition on page 1 of the commitment it states a total equity commitment of $6,085,800 while on page 2 the equity total is

$6,115,800. Therefore, the equity commitment is not firm and is not counted as a source of financing.

11. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any issue raised in any NOPSE, Florida Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June 19, 2003 (the "cure period").

12. After Petitioner submitted its equity commitment cures, which sought solely to correct the inconsistency noted on the scoring summary, all applicants had an opportunity to review the cures. Any applicant could submit to Florida Housing a Notice of Alleged Deficiencies ("NOAD") to challenge the Petitioner's cures and were due on or before June 27, 2003. There were no NOADs filed regarding Petitioner's application.

13. Following this process, Florida Housing on July 21, 2003, sent Pre-Appeal Scores ("Final Scoring Summary) and a Notice of Rights to Petitioner, informing Petitioner that it could contest Florida Housing's actions in accordance with the provisions of sections 120.569 and 120.57, Fla. Stat. Florida Housing noted in the Final Scoring Summary:

> One of the criteria for a firm equity commitment stated on page 60 of the Universal Application Instructions is that it expressly state the amount of equity to be paid "prior to or simultaneous with the closing of construction financing" and the amount of equity to be paid "prior to construction completion." The provided equity commitment **does not** (emphasis added) state these requirements. The commitment only states $5,375,808

will be paid at Admission. In addition on page 1 of the commitment it states a total equity commitment of $6,085,800 while on page 2 the equity total is $6,115,800. Therefore, the equity commitment is not firm and is not counted as a source of financing.

14. Petitioner timely requested an informal hearing by filing its Petition for Review in Accordance with sections 120.569 and 120.57(2), Fla. Stat., on August 12, 2003.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and Fla. Admin. Code R. 67-21 *et al.*, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Florida Housing is authorized to institute a competitive application process, for the MMRB program, Sec. 420.507 (22)(f), Fla. Stat., and has done so at Fla. Admin. Code R. 67-21.003.

3. Florida Housing's application form and instructions are adopted as Form, UA1016 and incorporated by reference into Fla. Admin. Code R. 67-21.002(96).

4. Fla. Admin. Code R. 67-21.003(9) provides that "no Application shall be rejected or receive a point reduction as a result of any issues not previously identified in" the Preliminary Scoring Summary, NOPSEs, or the NOPSE Scoring Summary.

5. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation, Legal Envtl. Assistance Found., Inc., v. Board of County Comm'r of Brevard County, 642 So.2d 1081 (Fla.

1994); Miles v. Florida A and M Univ., 813 So.2d 242 (Fla. 1st DCA 2002), even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So.2d 1330 (Fla. 1st DCA 1995).

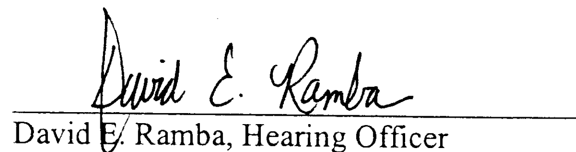
6. Petitioner relied on incorrect statements in the Preliminary and NOPSE Scoring Summaries. Petitioner's reliance on such statements deprived Petitioner of the opportunity to cure the defect in the equity commitment letter. Florida Housing is prohibited from rejecting Petitioner's application for Petitioner's reliance on an incorrect statement in the Preliminary and NOPSE Scoring Summaries.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is hereby RECOMMENDED:

That a FINAL ORDER be entered by Respondent that Petitioner's application should be scored as satisfying threshold requirements for the "equity commitment" since the equity commitment defect had not been previously identified in the Preliminary and NOPSE Scoring Summaries or through a NOPSE.

DATED this *11th* day of September, 2003 in Tallahassee, Florida.



David E. Ramba, Hearing Officer

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CHARLOTTE CROSSING, LTD.,

Petitioner,

v. **FHFC CASE NO. 2003-037**
Application No. 2003-095S

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_______________________________________/

HERON POND APARTMENTS II, LTD.,

Petitioner,

v. **FHFC CASE NO. 2003-036**
Application No. 2003-091CS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_______________________________________/

MERIDIAN WEST, LTD.,

Petitioner,

v. **FHFC CASE NO. 2003-039**
Application No. 2003-097S

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

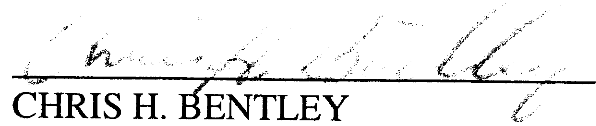
_______________________________________/

ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, informal hearings in the three captioned proceedings were scheduled before the undersigned Hearing Officer on September 10, 2003. Prior to the hearings, the parties submitted a Joint Motion to Consolidate, and that Motion is hereby GRANTED. The parties also reached an agreement resolving the issues in dispute. A Joint Proposed Recommended Order, which is attached hereto as Exhibit A, was submitted. In essence, the parties agreed that each of the Petitioners satisfied threshold requirements for their equity commitment letters; that the Petitioner CHARLOTTE CROSSING, LTD., correctly received three points for incentives through local government support; and that there was no requirement for Petitioner, MERIDIAN WEST, LTD., to demonstrate the ability to fund a bridge loan.

Based upon these agreements and the Joint Proposed Recommended Order, there is no need for additional Findings of Fact and/or Conclusions of Law, and the issues raised in the Petitions are moot. Accordingly, no Findings of Fact or Conclusions of Law are made herein. The parties jointly executed Joint Proposed Recommended Order is attached as Exhibit A.

Respectfully submitted and entered this 6 day of September, 2003.



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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CHARLOTTE CROSSING, LTD.,	**CASE NO.: 2003-037** **App. No.: 2003-095S**
HERON POND APARTMENTS II, LTD.,	**CASE NO.: 2003-036** **App. No.: 2003-091CS**
and	
MERIDIAN WEST, LTD.,	**CASE NO.: 2003-039** **App. No.: 2003-097S**

Petitioners,

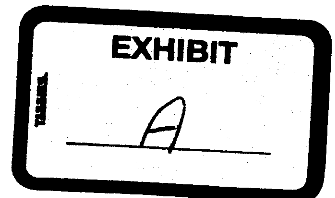
vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_______________________________/

JOINT PROPOSED RECOMMENDED ORDER

Petitioners, Charlotte Crossing, Ltd., Heron Pond Apartments II, Ltd., and Meridian West, Ltd. ("Petitioners") and Respondent, Florida Housing Finance Corporation ("Florida Housing") by and through undersigned counsel, hereby present the following Joint Proposed Recommended Order:



APPEARANCES

The representatives for the parties at the hearing are as follows:

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PRELIMINARY STATEMENT

On or before April 8, 2003, Petitioners submitted their Applications to Florida Housing for an award of funds from the SAIL program, and one Petitioner, Heron Pond Apartments II, Ltd., also applied for an allocation of housing credits for the development of affordable rental housing. On July 18, 2003, Florida Housing notified Petitioners of the results of the scoring of Petitioners' Applications and provided Petitioners with a Notice of Rights pursuant to Sections 120.569 and 120.57, Fla. Stat. On July 30, 2003, August 7, 2003, and August 11, 2003, Petitioners timely filed their Petitions for Review of 2003 Universal Scoring Summary challenging the finding that the "equity commitment" letters failed to satisfy threshold requirements. In addition, Petitioner Meridian West, Ltd. challenged the finding that the funding commitment for the "bridge loan" failed to satisfy threshold requirements; and Petitioner

Charlotte Crossing, Ltd. challenged its score for local government incentives. The parties agree that Charlotte County does not modify fees for affordable housing developments and the form signed by the Charlotte County Administrator was executed in error. As a result, Petitioner Charlotte Crossing did not achieve maximum points for incentives through local government support and the three (3) points awarded to Petitioner Charlotte Crossing for incentives through local government support is correct. The parties also agree that Petitioner Meridian West, Ltd.'s original funding commitment for the "bridge loan" was contained within a syndication commitment, therefore, a demonstration of the ability to fund is not required for the bridge loan in order for the syndication commitment to be scored firm. Upon further research and review, the parties further agree that the proper resolution is that the equity commitment letters provided by Petitioners should be scored as firm.

FINDINGS OF FACT

General Facts as to all three (3) Petitioners

1. Petitioners are Florida limited partnerships with their address at 2950 SW 27th Avenue, Suite 200, Miami, Florida 33133, and are in the business of providing affordable housing units.

2. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing, and refinancing houses, and related facilities in Florida in order to provide decent, safe, and affordable housing to persons and families of low, moderate, and middle income.

3. To encourage the development of low-income housing for families, in 1987 Congress created federal income Tax Credits (also known as housing credits) that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program.

The Tax Credits equate to a dollar for dollar reduction of the holder's federal tax liability, which can be taken for up to ten years, if the project satisfies the Internal Revenue Code's requirements each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for the construction of the development.

4. Each state receives an annual allotment of Tax Credits allocated to the state, primarily on a per capita basis. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of Florida's Tax Credits to applicants for the development of rental housing for low income and very low-income families.

5. Florida Housing uses a scoring process for the allocation of housing credits pursuant to Fla. Admin. Code R. 67-48 *et al.*, and a Qualified Allocation Plan ("QAP"). The provisions of the QAP are adopted and incorporated by reference in Fla. Admin. Code R. 67-48.025. The Internal Revenue Code requires Florida Housing to develop the QAP.

6. Pursuant to the QAP, Tax Credits are apportioned among the most populated counties, medium populated counties and least populated counties. The QAP also establishes set-asides and special targeting goals.

7. In addition to allocating its share of Tax Credits among applicants, the State of Florida provides State Apartment Incentive Loan ("SAIL") financing to encourage the development of certain low-income housing projects in the State. The SAIL program is administered by Florida Housing under Section 420.5087 Fla. Stat. Florida Housing publishes a Notice of Funding Availability announcing the amount of SAIL funding, which in the 2003 Universal Cycle was anticipated at approximately $66,000,000.00.

8. Florida Housing receives its funds for the SAIL program from an allocation of documentary stamp tax revenue and apportions among the counties, grouped as most, medium, and the least populated counties, and according to set-asides and special targeting goals set forth in the statute for the elderly, commercial fishing workers and farm workers and families.

9. Florida Housing has established by rule a process (the "Universal Cycle") in which applicants for any of the above-referenced Florida Housing multi-family rental programs

submit a single application (the "Universal Cycle Application") by which projects are evaluated, scored, and competitively ranked.

10. The 2003 Universal Application Package (UA1016), adopted by Fla. Admin. Code R. 67-48.002(111), includes forms and instructions for applicants. Some application requirements are "threshold" items, and failure to properly include a threshold item or satisfy a threshold requirement results in a rejection of the application. Other parts allow applicants to earn points, however, the failure to provide complete, consistent, and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

11. On or before April 8, 2003, Petitioners submitted their timely applications to Florida Housing for an award of funds from the SAIL program for the development of affordable rental housing in the 2003 Universal Cycle (the "Application").

12. Florida Housing evaluated all applications and notified applicants of their preliminary scores on or before May 12, 2003. Applicants were then given an opportunity to file NOPSEs on or before May 20, 2003.

13. After considering all NOPSEs, Florida Housing notified applicants by overnight mail on or about June 9, 2003, of any resulting changes in the scoring of their applications (the "NOPSE scores"). Applicants were then required to submit, on or before June 19, 2003, "cure" materials to correct any alleged deficiencies in their applications previously identified by Florida Housing.

14. Following the issuance of NOPSE scores, Florida Housing provides an opportunity for applicants to submit additional materials to "cure" any items for which the applicant received less than the maximum score, or for which the application may have been rejected for failure to achieve "threshold."

15. Following the "cure" period, applicants may again contest the scoring of a competing application by filing a Notice of Alleged Deficiencies ("NOAD"), identifying deficiencies arising from the submitted "cure" materials. Applicants were required to file NOADs on competing applications on or before June 27, 2003. After considering the submitted

NOADs, Florida Housing sent "Final" Scores and a Notice of Rights to Petitioner, on or about July 21, 2003, informing Petitioners that their applications had been rejected due to failure to achieve threshold requirements and that they could contest Florida Housing's actions in accordance with the provisions of Sec. 120.569 and 120.57 Fla. Stat.

16. Petitioners timely requested informal hearings by filing their separate "Petition[s] for Review of 2003 Universal Scoring Summary" in accordance with sections 120.569 and 120.57(2), Florida Statutes", on July 30, 2003, August 7, 2003, and August 11, 2003.

17. The parties filed a Joint Motion to Consolidate all three petitions on September 8, 2003.

18. One of Florida Housing's primary considerations in evaluating applications for funding is whether applicants can demonstrate that they are ready to proceed with development and construction of their proposed projects. As part of this demonstration, Florida Housing's application requires all applicants to document that they have firm commitments for construction and permanent funding for the proposed projects. Applicants submit documentation of funding commitments beginning at Exhibit 56 to the Universal Application.

19. Following consideration of comments submitted by other Applicants and further review of applications pursuant to Fla. Admin. Code R. 67-48.004(4) and (5), Florida Housing released NOPSE scores on June 9, 2003.

20. In response to preliminary scoring, Petitioners submitted cure materials including revised commitment letters.

21. Florida Housing advised Petitioners by notice that their applications had been rejected due to failure to achieve threshold requirements and that they could contest Florida Housing's actions in accordance with the provisions of Sec. 120.569 and 120.57 Fla. Stat.

22. Other deficiencies relating to financing shortfalls were identified on the Universal Scoring Summary for each Applicant. Each of these identified deficiencies relates to the scoring

of the equity commitment letter, and these financing shortfalls would cease to exist if the equity commitment letter in each Application was scored as firm.

23. Upon further research and review, the parties agree that the proper resolution is that the equity commitment letters provided by Petitioners should be scored as firm.

Findings of Fact Specific to Petitioner Charlotte Crossing, Ltd.

24. In its initial scoring, Florida Housing determined that the documents submitted by Petitioner Charlotte Crossing in Exhibit 56 to the Universal Application did not meet threshold requirements in that the equity commitment did not meet the definition of "firm commitments" under Florida Housing's rules.

25. Also, in its initial scoring of Petitioner Charlotte Crossing's application, Florida Housing determined that Charlotte County does not modify fees for affordable housing developments and that the form signed by the Charlotte County Administrator was executed in error. Therefore, Petitioner Charlotte Crossing did not achieve maximum points for incentives through local government support.

26. The parties agree that Charlotte County does not modify fees for affordable housing developments and the form signed by the Charlotte County Administrator was executed in error. As a result, Petitioner Charlotte Crossing did not achieve maximum points for incentives through local government support and the three (3) points awarded to Petitioner Charlotte Crossing for incentives through local government support is correct.

Findings of Fact Specific to Petitioner Heron Pond Apartments II, Ltd.

27. On or before April 8, 2003, Petitioner Heron Pond Apartments II, Ltd. submitted its timely application to Florida Housing for an award of funds from the SAIL program, and for an allocation of housing credits for the development of affordable rental housing in the 2003 Universal Cycle (the "Application").

28. In its initial scoring, Florida Housing determined that the documents submitted by Petitioner Heron Pond in Exhibit 56 to the Universal Application did not meet threshold requirements in that the equity commitments did not meet the definition of "firm commitments" under Florida Housing's rules

Findings of Fact Specific to Petitioner Meridian West, Ltd.

29. A competing applicant filed a NOPSE against Petitioner Meridian West alleging that the commitment letter from Related Capital Companies, the Petitioner's Housing Credit Syndicator, should not be scored firm. Florida Housing rejected Petitioner Meridian West's application when it determined that the documents submitted in Exhibit 56 to the Universal Application failed to meet threshold requirements in that the commitment letter did not meet the definition of "firm commitments" under Florida Housing's rules.

30. In response to preliminary scoring, and to the NOPSE filed by a competing applicant, Petitioner Meridian West submitted cure materials including a revised commitment letter. Petitioner Meridian West also submitted cure materials relating to the "Bridge Loan", however it failed to mark the new page "revised". In accordance with Fla. Admin. Code R. 67-

48.004(6), Florida Housing was prohibited from considering the revisions, changes or additions to that new page.

31. The parties agree that Petitioner Meridian West's original funding commitment for the "bridge loan" was contained within a syndication commitment, therefore, a demonstration of the ability to fund was not required for the bridge loan in order for the syndication commitment to be scored firm

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and Fla. Admin. Code R. 67-48 *et al.*, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Florida Housing is authorized to institute a competitive application process, for the SAIL program and for the allocation of housing credits, Sec. 420.507 (22)(f), Fla. Stat., and has done so at Fla. Admin. Code R. 67-48.004.

3. Florida Housing's application form and instructions are adopted as Form, UA1016 and incorporated by reference into Fla. Admin. Code R. 67-48.002(111).

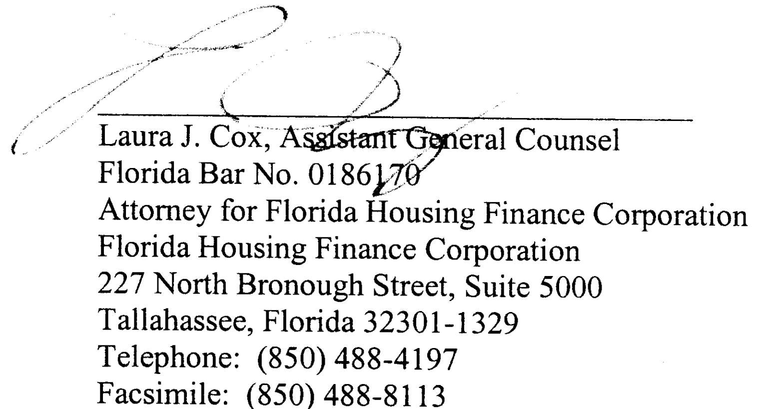
4. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation, Legal Envtl. Assistance Found., Inc., v. Board of County Comm'r of Brevard County, 642 So.2d 1081 (Fla. 1994); Miles v. Florida A and M Univ., 813 So.2d 242 (Fla. 1st DCA 2002), even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable

interpretation. Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So.2d 1330 (Fla. 1st DCA 1995).

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, Florida Housing recommends the Hearing Officer enter a Recommended Order finding that the three (3) points awarded to Petitioner Charlotte Crossing, Ltd. for incentives through local government support should be affirmed; that a demonstration of the ability to fund was not required for Petitioner Meridian West, Ltd.'s original funding commitment for a bridge loan; and that Petitioners' applications should be scored as satisfying threshold requirements for their equity commitment letters.

DATED this *10th* day of September, 2003 in Tallahassee, Florida.



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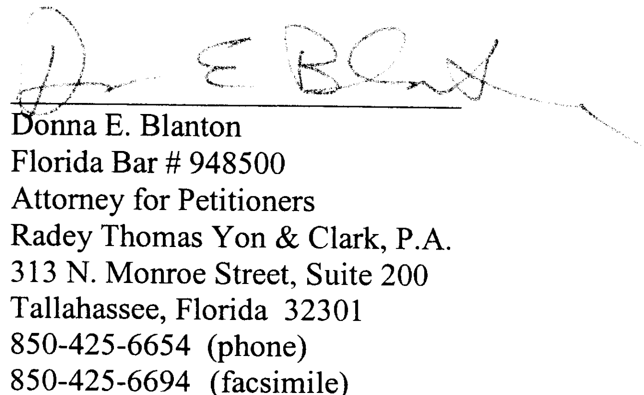

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

EAGLE RIDGE SEBRING LIMITED PARTNERSHIP,

Petitioner,

vs.

FHFC Case No: 2003-034
Application No. 2003-136C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_________________________________/

RECOMMENDED ORDER

An informal administrative hearing was noticed and held on September 11, 2003, at Tallahassee, Florida, before the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

APPEARANCES

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EXHIBITS

The following exhibits were offered by the parties at the hearing and were admitted into evidence by the Hearing Officer:

Petitioner's Exhibit 1/ Respondent's Exhibit 4:	2003 Application Instructions, pp. 57-58.
Petitioner's Exhibit 2:	PNC Bank Loan Commitment Letter, dated April 9, 2002 (from 2002 Woodland Point Apartments Application).
Petitioner's Exhibit 3:	PNC Bank Loan Commitment Letters, dated April 9, 2002 and June 12, 2002 (from 2002 Covington Point Senior Apartments Application).
Petitioner's Exhibit 4:	2002 Universal Scoring Summary for Woodland Point Apartments, dated Oct. 17, 2002.
Petitioner's Exhibit 5:	2002 Universal Scoring Summary for Covington Point Senior Apartments, dated Oct. 17, 2002.
Petitioner's Exhibit 6:	PNC Bank Loan Commitment Letter, dated March 28, 2003 (from original 2003 Eagle Ridge Application).
Petitioner's Exhibit 7:	Columbia Housing Syndication Commitment Letter, dated March 28, 2003 (from original 2003 Eagle Ridge Application).
Petitioner's Exhibit 8/ Respondent's Exhibit 2:	2003 Scoring Summary for Eagle Ridge Apartments, dated July 18, 2003.
Petitioner's Exhibit 9/ Respondent's Exhibit 3:	PNC Bank Loan Commitment Letter, dated June 13, 2003 (from cure materials for 2003 Eagle Ridge Application).
Petitioner's Exhibit 10:	Columbia Housing Syndication Commitment Letter, dated June 13, 2003 (from cure materials for 2003 Eagle Ridge Application).

Petitioner's Exhibit 11:	Composite of: The Meridian Housing Limited Partnership v. FHFC, FHFC Case No. 2002-0027 (Applic. #2002-110S), Final Order (Oct. 10, 2002) & Petition for Informal Administrative Hearing (Aug. 9, 2002); TWC Sixty-Seven, Ltd. v. FHFC, FHFC Case No. 2002-0040 (Applic. #2002-113BS), Final Order (Oct. 10, 2002) & Petition for Formal Administrative Hearing (Aug. 13, 2002); Hatton House Senior Housing Partners, Ltd. v. FHFC, FHFC Case No. 2002-0034 (Applic. #2002-164S), Final Order (Oct. 10, 2002).
Petitioner's Exhibit 12:	Composite of: Belmont Heights Associates Phase III, Ltd. v. FHFC, FHFC Case No. 2003-050 (Applic. #2003-110C), Recommended Order (Sept. 2, 2003) & Petition for Review (Aug. 12, 2003); Arbor Crest, Ltd. v. FHFC, FHFC Applic. No. 2003-093CS, Joint Proposed Recommended Order (Sept. 3, 2003) & Petition for Review of 2003 Universal Scoring Summary (August 8, 2003); Aguaclara, Ltd. v. FHFC, FHFC Case No. 2003-0032 (Applic. #2003-087C), Joint Proposed Recommended Order (Sept. 9, 2003) & Petition Requesting Informal Hearing (Aug. 12, 2003).
Respondent's Exhibit 1:	Cure Package for 2003 Eagle Ridge Application.
Respondent's Exhibit 3-1:	2003 Scoring Summary for Eagle Ridge Apartments, dated June 9, 2003.
Respondent's Exhibit 3-2:	2003 Scoring Summary for Eagle Ridge Apartments, dated May 12, 2003.
Respondent's Exhibit 5:	2002 Application Instructions, pp. 46-47.
Respondent's Exhibit 6:	2003 Eagle Ridge Application.
Respondent's Exhibit 7:	Tidewater Revitalization, Ltd. v. FHFC, FHFC Case No. 2002-023 (Applic. #2002-067C), Final Order (Oct. 10, 2002).

WITNESSES

No witnesses were presented by either party.

STATEMENT OF THE ISSUE

Whether Eagle Ridge Sebring Limited Partnership ("Eagle Ridge") failed to meet the threshold requirements in its original application and cure materials for their loan commitment.

PRELIMINARY STATEMENT

On or before April 8, 2003, Petitioner submitted an application to FHFC for Federal Low Income Housing Tax Credits in FHFC's 2003 Universal Application Cycle. On July 22, 2003, Petitioner received notice from FHFC of the results of the scoring of Petitioner's application and provided Petitioner with a Notice of Rights pursuant to Section 120.569 and 120.57, Florida Statutes. On August 12, 2003, Petitioner timely filed its Petition for Informal Administrative Hearing. On August 18, 2003, Petitioner filed its Amended Petition for Informal Administrative Hearing, which was accepted by the Hearing Officer without objection from Respondent. An informal hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes. There are no disputed issues of material fact.

FINDINGS OF FACT

1. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat. to provide and promote the public welfare by administering the governmental function of financing, and refinancing houses, and related facilities in Florida in order to provide decent, safe, and affordable housing to persons and families of low, moderate, and middle income.

2. Fla. Stat. § 420.5099, *et al.* provides that Florida Housing is the designated entity for Florida that administers the Housing Credit program.

3. This Petition for Informal hearing was filed pursuant to Fla. Stat. §§120.569 and 120.57(2) Fla. Admin. Code R. 28-106.301 and 67-48.005.

4. This hearing concerns the 2003 Universal Scoring Summary for competitive Housing Credits in relation to a proposed multi-family housing development.

5. The Petitioner received notice of the Universal Scoring Summary on July 21, 2003, when Florida Housing mailed a memorandum to all applicants that included "final scores" and a notice of rights.

6. The Petitioner's substantial interests are affected by the Universal Scoring Summary.

7. The Low Income Housing Tax Credit Program is governed by Section 42 of the Internal Revenue Code (IRC), by which Housing Credits are allotted annually to each state on a per capita basis. The purpose of Housing Credit allocations is to encourage private developers to build and operate affordable housing for lower income families. The tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax liability, subject to enumerated limitations, which can be taken for up to 10 years if the project continues to satisfy all IRC requirements.

8. The Housing Credits are allocated annually through Florida Housing (in accordance with a Qualified Allocation Plan developed by Florida Housing) to real estate developers for the purpose of developing affordable multi-family housing projects. Housing Credits are typically sold to investors, with the sale proceeds generating some of the funding necessary for the project. The equity financing generated by the sale of the

Housing Credits reduces the amount of long-term debt required for the development, making it possible to operate the development at rents that are affordable to lower income families.

11. The available pool of federal tax credits each year is finite and, thus, requires qualified projects to compete for Housing Credits. Florida Housing has established a competitive application process. Fla. Admin. Code R. 67-48.002 through 67-48.005, establishes the rules for the application process for competitive Housing Credits.

12. The criteria Florida Housing utilizes in evaluating real estate projects that are competing for Housing Credits are set forth in Fla. Stat. § 420.5099(2).

13. As part of the competitive Housing Credit application process, Florida Housing requires applicants to include in their applications binding, or "firm," commitment letters from their lenders and syndicators. Demonstrating binding funding commitments is a threshold item, the failure of which results in rejection of the application and the ability to compete for Housing Credits. See 2003 Universal Application Instructions, pgs. 61-62 (¶13) and p. 64 (¶5, ¶5.a.). See Fla. Admin. Code R. 67-48.002(11).

14. In keeping with the above distinction drawn between "firm" and "conditional" commitments, page 57 of FHFC's 2003 Application Instructions provides that a "firm" commitment letter must state "[a]ll conditions that are required to be met prior to funding," and the letter must not be subject to any further "committee approval" or the like.

15. Other indicia of a "firm" commitment are stated on pages 57-58 of FHFC's Application Instructions [Petitioner's Exh. 1] as follows:

> A firm commitment must contain:
> - terms
> - interest rate
> - signature of all parties, including acceptance by the Applicant . . .
> - a statement that states the commitment does not expire before December 31, 2003, with the exception of Local Government-issued tax-exempt bonds.

16. Importantly, the above-quoted elements of a "firm" commitment appearing in FHFC's 2003 Application Instructions are materially identical to those set forth in FHFC's 2002 Application Instructions.[1] In particular, the above-quoted interest rate requirement is stated exactly the same in the Application Instructions for both 2002 and 2003. [Compare Petitioner's Exh.1 and Respondent's Exh. 5].

17. When preliminary scores were released by Florida Housing on May 12, 2003, Florida Housing determined that the Petitioner failed the threshold requirements relating to an allocation of Housing Credits.

18. Florida Housing found:

> Loan commitments must state an interest rate in order to be scored firm. The PNC loan commitment does not clearly or absolutely state the interest rate but states '....shall have a pre-committed fixed rate of interest per annum (the 'Note

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[1] Pages 46 and 47 of the FHFC's 2002 Application Instructions [Respondent's Exh. 5] state as follows:

> A firm commitment must contain:
> - terms
> - interest rate
> - signature of all parties, including acceptance by the Applicant . . .
> - a statement that states the commitment does not expire before December 31, 2002, with the exception of Local Government-issued tax-exempt bonds.

Rate') as established at the Construction Loan closing by Lender.' Therefore, the loan commitment is not counted as firm or a source of financing.

19. When the final scores were released by Florida Housing in the Universal Scoring Summary, the Application was identified as failing threshold requirements for the following reasons:

> Applicant submitted a revised loan commitment reflecting an interest rate certain, however the revised commitment letter is not signed by the lender. Therefore, the financial shortfalls remain.
>
> The equity commitment was conditioned upon the PNC loan commitment dated June 13, 2003. Florida Housing found the loan commitment not to be firm and therefore must find the equity commitment, which is conditioned upon the loan, as not firm and as not a source of financing.

20. The Petitioner argued that Florida Housing has treated identical applications from the 2002 Universal Cycle differently from its 2003 application with respect to interest rate requirements.

21. In the 2002 Universal Applications submitted by the Petitioner, in the applications of *Woodland Pointe* and *Covington Pointe*, the interest rate for two of its applications was accepted by Florida Housing because the interest rate was definite, as shown by the following language: *"Interest during the construction of the Construction Loan shall be Prime floating as determined by the Lender."*[2] (Emphasis added.) See Petitioner's Exhibits 2 and 3.

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[2] The remainder of the paragraph is of no relevance to Florida Housing's application process because the following statement pertains to "underwriting" for the Petitioner's own internal analysis and has nothing to do with the requirements of an interest rate for firm commitment purposes: "The Term Loan shall have a pre-commitment fixed rate of interest per annum (the "Note rate") as established at the Construction Loan closing by Lender. The underwritten term debt interest rate is 8.00%, subject to adjustment in the event market conditions change prior to closing." (Part III, Sections A, B, and C; pages 16, 18, 19; Part IV A and B, pages 49, and 52 of the Universal Application Instructions).

22. "Prime" rate is a clear and definite rate of interest, and is the lowest interest rate.

23. In contrast, the current 2003 Universal Application submitted by the Petitioner, the interest was not stated as definite as shown by the following language: *"The Construction/Term Loan shall have a pre-committed fixed rate of interest per annum (the 'Note Rate') as established at the Construction Loan closing by Lender."*[3] See Petitioner's Exhibit 6.

24. The reference by the Petitioner to "a pre-committed fixed rate of interest per annum" does not contain an interest rate as required by the application instructions. The Petitioner argued that the "interest rate language in the Eagle Ridge loan commitment letter, that's [Petitioner's] Exhibit 6, is materially the same as the letters submitted in 2002 by Picerne that are also part of the record. . . . Florida Housing took a contrary position on what was or was not a sufficiently stated interest rate." Tr pg. 27. "Again it's the same language that you'll see in the 2002 PNC Bank commitment letters" Tr pg. 33.

25. The inclusion of the term prime rate, however, has been accepted by Florida Housing as a definite rate of interest. This language was not included in the 2003 Eagle Ridge application.

26. In contrast to what the Petitioner argued, the 2002 Universal Applications of *Woodland Pointe* and *Covington Pointe* did state an interest rate as being "Prime floating as determined by the Lender."

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[3] The remainder of the paragraph is of no relevance to Florida Housing's application process because the following statement pertains to "underwriting" for the Petitioner's own internal analysis and has nothing to do with the requirements of an interest rate for firm commitment purposes: "The underwritten construction/term debt interest rate is 7.50%, subject adjustment in the event market conditions change prior to closing." (Part III, Sections A, B, and C; pages 16, 18, 19; Part IV A and B, pages 49, and 52 of the Universal Application Instructions).

27. In the case of *Magnolia Terrace Housing Partners vs. Florida Housing*, Case No. 2002-0059; Application No. 2002-085C, Florida Housing found that:

> The required elements of a "firm commitment" for the construction loan (hereinafter referred to as the "Mortgage Loan Advance") and the permanent loan (hereinafter referred to as the "Mortgage Loan") are both expressed within the "Forward Commitment" letter issued by GMACCM. The instructions to Part V, Section E (Funding Commitment(s), on pages 46-47 of the Universal Application provide the elements of a firm commitment for debt financing. One of the required elements is an interest rate. As provided in the "Forward Commitment" letter, "[t]he Mortgage Loan Advance shall bear interest at the interest rate for the Mortgage Loan." The interest rate provided in the "Forward Commitment" letter for the Mortgage Loan is 7.50%; therefore the interest rate provided for the Mortgage Loan Advance is 7.50%. For these reasons, the Commitment Letters provide a firm financing commitment. (See Attachment A, copy of *Magnolia Terrace Housing Partners, supra*).

28. *Magnolia Terrace* is distinguishable from the case involving the Petitioner because in *Magnolia Terrace* there was, in fact, an interest rate stated. Thus, contrary to the assertions of the Petitioner, Florida Housing has not changed its interpretation of an interest rate in its loan commitment letters submitted by applicants.

29. The Petitioner cured the interest rate threshold issue and the threshold failure was rescinded by Florida Housing. In doing so, however, the Petitioner's revised loan commitment was unsigned, thereby causing a second threshold failure.

30. The Petitioner argued that "a cross reference from the syndication letter" regarding Housing Credits to the loan commitment letter is sufficient to "cure" the missing signature on the loan commitment letter. Tr pg. 27.

31. The Petitioner admitted that the revised loan commitment letter submitted to Florida Housing "omitted a signature from the loan commitment letter, the revised

commitment letter. . . . And, ultimately, Florida Housing deemed that letter conditional for lack of that signature. . . ." Tr pg. 39-40.

32. Although the Petitioner argued the omitted signature on the revised loan commitment letter was a "clerical error," Petitioner is a sophisticated developer who submitted numerous applications in multiple competitive application cycles. Tr pg 14. The Petitioner knew, or should have known that Florida Housing does not (with specified exceptions, none of which apply here[4]) go outside the four-corners of the application before it.

33. Thus, the "omitted signature" could just as logically have indicated an unwillingness to proceed, when the lender was given the opportunity to revisit the matter before it. Tr. Pg. 39. To find otherwise would place Florida Housing in the precarious position of having to judge what may or may not be "mere clerical errors" versus a true intention to simply not fund a particular development. This is not something that can be undertaken by Florida Housing, nor should such a precedent be established, given Florida Housing's stringent time constraints during the highly competitive application process.

34. Further, the Petitioner's "syndication letter" is clearly insufficient to address the loan commitment letter that is separately required under the 2003 Universal Application Instructions. If one letter satisfied the requirements of the other letter, then both letters would not be required by Florida Housing. Both letters, however, are required and a cross-reference within one does not negate the requirement of the other, separate

[4] The verification exceptions listed in the 2003 Universal Application Instructions are (1) proximity; (2) site plan or plat approval; (3) local government contributions as to the nature and the amount of the contribution; and (4) local government incentives compared against plans and annual reports in accordance with Fla. Stat. 420.9075(9).

commitment. Fla. Admin. Code R. 67-48.002(11); 2003 Universal Application Instructions.

35. In the case of *Tidewater Revitalization, LTD., vs. Florida Housing*, Case No. 2002-0023; Application No. 2002-067C, the Final Order states that, "The June 20, 2002, Second Amendment. . . was not signed by one of the sellers," thus failing site control threshold requirements. The same logic applies in the instant matter pertaining to threshold requirements of the required signature on the commitment letter. See Respondent's Exhibit 7.

36. Finally, the Petitioner cites four cases from the 2002 Universal Application Cycle in Petitioner's Exhibit 12 (*Hatton House, Belmont Heights, Aguaclara Ltd.*, and *Arbor Crest*) in which Petitioner argues that an applicant and Florida Housing "went outside" the four corners of the Application. There are four instances in which Florida Housing's Rules allow verification outside the four corners of the Application. They are: (1) proximity; (2) site plan or plat approval; (3) local government contributions as to the nature and the amount of the contribution; and (4) local government incentives compared against plans and annual reports in accordance with Fla. Stat. 420.9075(9). (Part III, Sections A, B, and C; pages 16, 18, 19; Part IV A and B, pages 49, and 52 of the Universal Application Instructions). See Attachment B.

37. The cases of *Belmont Heights, Aguaclara Ltd.*, and *Arbor Crest* all involved proximity points pertaining to services, and *Hatton House* involved local government contributions and proximity points. Thus, none of the cases cited are applicable to the matter of the Petitioner in which a firm commitment is required and for which matters outside of the Petitioner's application may not be verified by Florida Housing.

CONCLUSIONS OF LAW

15. Pursuant to Fla. Stat. §§ 120.569 and 120.57(2) and Fla. Admin. Code R. 76-47, the Hearing Officer has jurisdiction over the parties to this proceeding.

16. Florida Housing is the designated state housing authority for purposes of allocating Housing Credits and other funding sources. Fla. Stat. § 420.5099 *et. al.*

17. The 2003 Universal Application Instructions (Instructions), which have been adopted and incorporated by reference into Florida Housing's rules, Fla. Admin. Code R. 67-48.002(11).

18. The Prime rate is defined by the *Wall Street Journal* as "The base rate of loans posted by at least 75% of the nation's 30 largest banks." Black's Law Dictionary, Seventh Edition, defines Prime rate under "interest rate, as "The interest rate that a commercial bank holds out as its lowest rate for a short-term loan to its most creditworthy borrowers, usu. large corporations." The Prime rate satisfies Florida Housing's requirement of a defined and firm interest rate.

19. In the case of *Tidewater Revitalization, LTD., vs. Florida Housing*, Case No. 2002-0023; Application No. 2002-067C, the Final Order states that, "The June 20, 2002, Second Amendment. . . was not signed by one of the sellers," thus failing site control threshold requirements.

20. Fla. Admin. Code R. 67-48.004(2), requires that Florida Housing reject any submitted application that is not completed in accordance with the Application instructions and Fla. Admin. Code R. 67-48 *et al.*

21. Without question, an agency must follow its own rules. *Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin.*, 679 So.2d 1237 (Fla. 1st DCA 1996), *review denied* 695 So.2d 701 (Fla. 1997).

22. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. *Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County*, 642 So.2d 1081 (Fla. 1994); *Miles v. Florida A&M University*, 813 So.2d 242 (Fla. 1st DCA 2002). The agency's interpretation will be upheld even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *Golfcrest Nursing Home v. Agency for Health Care Administration*, 662 So. 2d 1330 (1995).

23. Florida Housing's interpretation and application of the rules to the scoring and rejection of the Petitioner's application is neither unreasonable nor clearly erroneous, and should be upheld.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is recommended that the Florida Housing Finance Corporation enter a Final Order denying Petitioner's application for competitive Housing Credits because it failed to meet threshold by failing to provide a mandated signature and, thus, failing to provide a firm commitment.

Respectfully submitted this 26th day of September, 2003.

David E. Ramba, Hearing Officer

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON GREEN APARTMENTS, LTD. (2003-119C)
(PROJECT NAME: MADISON GREEN APARTMENTS)

Petitioner,

vs. FLORIDA HOUSING Case No.: 2003-045
APPLICATION NO.: 2003-119C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
______________________________________/

RECOMMENDED ORDER

An informal hearing on this matter was noticed for September 8, 2003, with an amended notice set for September 11, 2003. MADISON GREEN APARTMENTS, LTD. (2003-119C), ("Petitioner") and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing") submitted a Joint Proposed Recommended Order on August 28, 2003 to the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

APPEARANCES

For Petitioner:

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For Respondent:

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JOINT EXHIBITS

There were no joint exhibits submitted with the Joint Proposed Recommended Order.

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner met the threshold requirement of Site Control when considering the materials in Petitioner's application together with their "cure" materials.

PRELIMINARY STATEMENT

Petitioner applied for funding during the 2003 Universal Cycle, seeking an allocation of Low Income Housing Tax Credits ("Housing Credits"). Petitioner was notified by Florida Housing of its final scores on or about July 18, 2003. On August 12, 2003, Petitioner timely filed a Petition for a Formal Administrative Hearing under Sections 120.569 and 120.57, Florida Statutes, disputing the Florida Housing Finance Corporation's ("Florida Housing") final scoring of its 2003 Universal Cycle Application for the proposed Madison Green Apartments complex. After review of the Petition, the Corporation granted Petitioner an informal hearing in this matter. Petitioner sought a determination that the Petitioner had demonstrated site control sufficient to satisfy the Application's Threshold requirement. The parties agree that the Confirmation Agreement and original Application material adequately demonstrated site control.

FINDINGS OF FACT

1. Respondent, Florida Housing Finance Corporation, ("Florida Housing"), is a public corporation under Chapter 420, Fla. Stat., to administer the financing and refinancing of projects which provide housing affordable to persons and families of low, moderate and middle income in Florida.

2. Florida Housing has established by rule a process (the "Universal Cycle") in which applicants for any of the above-referenced Florida Housing multi-family rental program

submits a single application (the "Universal Cycle Application") by which projects are evaluated, scored and competitively ranked.

3. The 2003 Universal Cycle Application, adopted as Form UA1016 (Rev. 4/03) by Rules 67-21.002(96) and 67-48.002(111), Fla. Admin. Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application. Other parts allow applicants to earn points; however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

4. On or before April 8, 2003, Petitioner, Madison Green Apartments, Ltd. ("Madison Green") submitted an application to Florida Housing in which it sought an allocation of tax credits under the Low-Income housing Tax Credit (HC) program in the 2003 Universal Cycle. Madison Green's ability to obtain funding is predicated upon the development satisfying the threshold requirements of the application. Site control is one of the application's threshold requirements.

5. After Petitioner submitted its 2003 Universal Cycle Application, Florida Housing's staff undertook preliminary scoring of the Application pursuant to Part V, Chapter 420, Florida Statutes, and Rule Chapter 67-48, Florida Administrative Code, completing the scoring process on May 12, 2003.

6. After completing preliminary scoring, Florida Housing's staff notified Petitioner of the results. Madison Green scored 66 out of a possible 66 total points. In addition, Madison Green was awarded 7.50 out of a possible 7.50 proximity tie-breaker points.

7. However, in the Preliminary Scoring, the Corporation indicated that the Application failed to adequately demonstrate site control and therefore failed to achieve a threshold requirement of the application. In addition, competitors filed Notices of Possible Scoring Error ("NOPSE's") questioning whether the Applicant demonstrated site control. The Corporation's preliminary threshold determination of Madison Green's application was based, in part, on the conclusion that Madison Green did not demonstrate site control.

8. Madison Green submitted additional documentation, revised forms, and other information that it deemed appropriate to address issues raised in the NOPSE's, Florida Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June 19, 2003 (the "cure period").

9. In response to the preliminary scoring and NOPSE's, Madison Green submitted as a "cure" a Confirmation and Reaffirmation as to Purchase and Sale Agreement, as Amended ("Confirmation Agreement"). Exhibit "A" to the Confirmation Agreement contained a legal description for the subject property, which identified a 12.93 acre tract of land. However, this Exhibit was not marked "revised."

10. The Confirmation Agreement was submitted to clarify the binding effect and scope of the real estate documents that had been submitted as part of the initial Application. In the original submittal, the Applicant provided a copy of a Purchase and Sale Agreement dated May 8, 2001 (the "Purchase Contract") which covered approximately 20 acres of land in Flagler

County which was described on Exhibit A to the Purchase Contract. That legal description included the east half of a specifically described tract in Flagler County.[1]

11. Also included with the initial Application was a First Amendment to Purchase and Sale Agreement dated April 5, 2002 (the "First Amendment"). In the recitations on the first page of that First Amendment, the complete legal description for the entire 20 acres covered by the original Purchase Contract is set forth. Paragraph 2 of the First Amendment specifically states that the eastern 12.93 acres of the detailed property was to be included in the first phase being acquired by the purchaser. This is the same legal description as set forth in Exhibit A to the Confirmation Agreement.

12. The property that was the subject of the Purchase Contract and the First Amendment can be readily identified without reference to Exhibit A of the Confirmation Agreement. Exhibit A of the Confirmation Agreement contains nothing more than the words "the Easterly 12.93 acres of" inserted before the legal description from the Purchase Contract. Paragraph 2 of the First Amendment identifies the same parcel as that described in Exhibit A of the Confirmation Agreement. In short, the exact legal description of the property covered by the real estate contracts could be discerned from any of a variety of sources that were included with the original Application. The legal description contained in Exhibit A to the Confirmation Agreement was therefore redundant and not necessary to demonstrate site control.

13. The Confirmation Agreement submitted as the Cure unequivocally confirmed that Madison Green has site control over the proposed development site. The seller certified in the

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[1]The initial Application also included a copy of a Second Amendment to the Purchase Contract as well as an assignment of the Purchase Contract to the Applicant.

text of the Confirmation Agreement that the subject property was under the control of Madison Green.

14. In a Notice dated July 21, 2003, Florida Housing released its Final Scores and Notice of Rights of the applications in the 2003 Universal Application Cycle. According to the scoring summary, Madison Green's Application received a final score of 66 points out of a possible 66 points and was awarded 7.50 proximity tie-breaker points. However, the final scoring reflected that, because Madison Green allegedly failed to satisfy an application threshold requirement, its Application would not be entitled to an allocation of tax credits. The Notice of Rights notified Petitioner that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

15. Petitioner timely requested a hearing by filing its Petition for Formal Administrative Hearing on August 12, 2003.

16. After reviewing Madison Green's Petition, Florida Housing agreed that the Madison Green demonstrated site control and that it satisfied the threshold requirements of the application.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and Rule 67-47, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Pursuant to Section 420.507(22)(f), Fla. Stat., Florida Housing is authorized to institute a competitive application process, and has done so in accordance with Rule 67-48.004, Fla. Admin. Code.

3. Florida Housing's application form and instructions are adopted as Form UA1016, Rule 67-48.002(111), Fla. Admin. Code.

4. Madison Green submitted an application for the 2003 Universal Application Cycle to Florida Housing in which it sought an allocation of tax credits under the Low-Income housing Tax Credit (HC) program in the 2003 Universal Cycle.

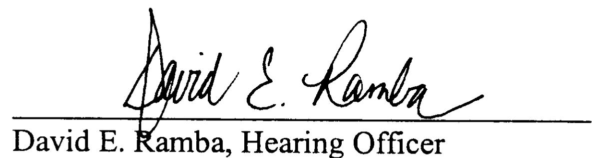
5. Part III, Section C.2., of the Application requires that the applicant demonstrate site control over the property it intends to develop. The material Madison Green submitted with the original Application included an appropriate legal description of the subject property. The "cure" material submitted by Madison Green was redundant with respect to the legal description. Therefore, failing to stamp "revised" on this exhibit to the cure material was immaterial and was not needed to demonstrate site control. Madison Green therefore satisfied the Application's threshold requirements.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is hereby RECOMMENDED:

That a FINAL ORDER be entered by Respondent finding that Madison Green Apartments demonstrated site control and has satisfied the Application's threshold requirements of Part III, Section C.2., of the 2003 Universal Application and should be scored as having 66 total points and 7.50 proximity tie-breaker points.

DATED this 2nd day of September, 2003 in Tallahassee, Florida.



David E. Ramba, Hearing Officer

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

RTD PHASE I, LTD.,

Petitioner,

v.

FHFC CASE NO. 2003-038
Application No. 2003-089S

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 this matter on September 10, 2003.

APPEARANCES

For Petitioner, RTD Phase I, Ltd. (RTD):	Donna E. Blanton, Esquire Radey Thomas Yon & Clark, P.A. 313 N. Monroe Street, Suite 200 Tallahassee, FL 32301
For Respondent, Florida Housing Finance Corporation (Florida Housing):	Paula C. Reeves Deputy General Counsel Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUE

The sole issue in this hearing was whether Petitioner RTD Phase I, Ltd., met threshold requirements for minimum set-aside commitments in connection with its Application in the 2003 Universal Cycle for a SAIL loan from Florida Housing Finance Corporation. The issue turns on whether RTD demonstrated that it is "scheduled" to be assisted with Housing Credits and therefore entitled to select as a minimum set-aside 40% of its units at 60% of area median income ("AMI") or less.

PRELIMINARY STATEMENT

The parties entered into a Joint Stipulation of issues, facts, and exhibits, which was identified at hearing as Joint Exhibit 1. It will be referred to as Jt. Exh. 1 Para. __. Exhibits identified in the Joint Stipulation will be identified as Exh. No. __ to Jt. Exh. 1. Petitioner and Respondent each introduced exhibits at the hearing. These will be referred to, respectively, as Pet. Exh. __ and Resp. Exh. __. A transcript of the hearing was filed and considered. It will be cited as Tr., page __, lines __.

FINDINGS OF FACT

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

1. The Petition for Informal Hearing was filed pursuant to Fla. Stat. Sections 120.569 and 120.57(2) and Fla. Admin. Code Rr. 28-106.301 and 67-

48.005.

2. Florida Housing is a public corporation organized pursuant to Section 420.504, Florida Statutes, to provide and promote financing of affordable housing and related facilities in Florida. Florida Housing is an agency as defined in Section 120.52, Fla. Stat., and, therefore, is subject to the provisions of Chapter 120, Fla. Stat.

3. Florida Housing administers the State Apartment Incentive Loan Program ("SAIL") pursuant to Section 420.5087, Fla. Stat. Florida Housing also is the statutorily created "housing credit agency" responsible for the allocation and distribution of low-income housing credits in Florida. *See* § 420.5099, Fla. Stat.

4. To encourage the development of low-income housing for families, Congress in 1987 created federal income tax credits, also known as housing credits. Section 42 of the Internal Revenue Code ("Section 42") governs tax credit programs. *See* Pet. Exh. 1. Florida Housing has adopted § 42 as a rule. 67-48.002(19), F.A.C. Tax credits equate to a dollar-for-dollar reduction of the holder's federal tax liability, which can be taken for up to ten years if the project satisfies the Internal Revenue Code's requirements each year. The developer sells, or syndicates, the tax credits to generate a substantial portion of the funding necessary for the construction of the development.

5. SAIL loans are allocated by Florida Housing through a competitive

application process. Applications are submitted to Florida Housing through a once-a-year program process referred to as the Universal Cycle, which is governed by Chapter 67-48, F.A.C.

6. The Universal Cycle is a single-application process for competitive Housing Credit program, the SAIL program, and the Home Investment Partnership Program operated by Florida Housing pursuant to Section 420.5089, Fla. Stat., and Federal Housing and Urban Development regulations.

7. Florida Housing uses a scoring process outlined in Rule 67-48.004, F.A.C., and in a Qualified Allocation Plan ("QAP"). The provisions of the QAP are adopted and incorporated herein by reference in Rule 67-48.025, F.A.C.

8. The 2003 Universal Application Package, adopted by Rule 67-48.002(111), F.A.C., includes forms and instructions for applicants.

9. Some application requirements are "threshold" items, and failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application. *See* Universal Application Instructions.

10. This hearing concerns the 2003 Universal Scoring Summary for the proposed multi-family housing development, the Oaks at Riverview, RTD Phase I, Ltd.

11. RTD submitted an Application to Florida Housing for a SAIL loan in the

2003 Universal Cycle in connection with a proposed multi-family housing development in Tampa, Florida, known as RTD. Jt. Exh. 1 ¶2.

12. The Applicant proposed to be funded by tax-exempt private activity bonds from the Housing Finance Authority of Hillsborough County.

13. Preliminary scores for all applicants were released by Florida Housing on May 12, 2003. Following consideration of comments submitted by other Applicants and further review of applications pursuant to Rules 67-48.004(4) and (5), Florida Housing released NOPSE[1] scores on June 9, 2003. Applicants then were permitted to submit "cures" to problems identified in the NOPSE scores. *See* R. 67-48.004(6). Applicants also were allowed to comment on the "cures" submitted by competitors by filing Notices of Alleged Deficiencies ("NOADs"). *See* R. 67-48.004(7).

14. After review of NOADs, final scores were released by Florida Housing through a Universal Scoring Summary dated July 18, 2003. Each applicant, including RTD, received its own Universal Scoring Summary. Jt. Exh.1 ¶ 6; Exh. No. 1 to Jt. Exh. 1.

15. When preliminary scores were released by Florida Housing on May 12, 2003, RTD was determined not to have met threshold requirements relating to

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[1]NOPSE stands for Notice of Possible Scoring Error.

minimum set-aside commitments. See Jt. Exh. 1 ¶¶ 8-9 and Exh. 2 to Jt. Exh. 1 (Preliminary Scoring Summary) at Item # 1T.III.E.1.a Florida Housing stated:

> Page 26 of the Universal Application Instructions states that in order for a SAIL Applicant to select a minimum set-aside 40% of its units at 60% AMI or less, it must have "received an allocation of Housing Credits or is 'scheduled' to be assisted with Housing Credits". The Applicant failed to provide documentation that it met any of the previous criteria for qualifying for the minimum set-aside of 40% of its units at 60% AMI or less.

16. In response, RTD submitted two cures. One cure revised page 22 of RTD's Application and included a letter from the executive director of the Housing Finance Authority of Hillsborough County, both demonstrating that a tax-exempt private activity bond allocation has been reserved for RTD in an amount up to $10,500,000. Jt. Exh. 1 ¶ 10; Exh. No. 3 to Jt. Exh. 1.

17. Florida Housing does not dispute that RTD has a firm commitment from the Housing Finance Authority of Hillsborough County for $10.5 million in tax-exempt private activity bonds. Tr. at Page 81, lines 9-15.

18. The second cure included a letter from Reznick, Fedder & Silverman, the Housing Credit Certified Public Accountants for RTD, stating that RTD development satisfies the Internal Revenue Code's "50 percent" test to receive the Housing Credits. Jt. Exh.1 ¶12; Exh. No. 4 to JT. Exh.1. The letter concludes: "Using the

projected aggregate building and land and tax-exempt bond proceeds above [provided by Housing Finance Authority of Hillsborough County], the project has a fraction of 50.28% and meets the 50 percent test in §42(h)(4)(B)."

19. Section 42 of the Internal Revenue Code states that when 50% or more of the aggregate basis of a building and its land is financed with tax-exempt private activity bonds, the building may receive non-competitive Housing Credits that do not count against the state's allocation. *See* 26 U.S.C. § 42(h)(4)(B) (Pet. Exh.1). This is also a formal rule of Florida Housing. The Internal Revenue Code was adopted as a rule of Florida Housing in Rule 67-48.002(19), F.A.C. In Rule 67-48.027(2)(a), F.A.C., Florida Housing has specifically required that tax-exempt bond-financed developments, as defined in § 42(h)(4)(B) of the Internal Revenue Code shall "have 50% or more of the aggregate basis of any building and the land on which the building is located financed by tax-exempt bonds."

20. Florida Housing does not dispute that RTD may ultimately have satisfied the applicable test (the "50% test") of the Internal Revenue Service pertaining to the receipt of non-competitive, "4 percent" Housing Credit for the proposed development. Jt. Exh. 1 ¶ 5.

21. Florida Housing rules permit an affordable housing development that uses Housing Credits to set aside 40% of its units for those at or below 60% AMI.

See 26 U.S.C. § 42(g)(1)(B) (Pet. Exh. 1); 67-48.002(19), F.A.C.; 67-48.027(1), F.A.C.; Universal Application Package.

22. The Applicant selected as a minimum set-aside, 40% of its units at 60% of area median income (AMI) or less.

23. The parties agree that RTD may ultimately have satisfied the applicable test of the Internal Revenue Service (IRS) pertaining to the receipt of non-competitive, "4 percent" Housing Credits for the proposed development.

24. RTD received notice of the Universal Scoring Summary on July 21`, 2003, when Florida Housing mailed a memorandum to all applicants that included "final scores" and a notice of rights.

25. RTD's substantial interests are affected by the Universal Scoring Summary.

26. When preliminary scores were released by Florida Housing on May 12, 2003, Florida Housing determined that RTD failed the threshold requirements relating to minimum set-aside commitments. The reason given by Florida Housing for its determination is as follows:

> Page 26 of the Universal Application Instructions states that in order for a SAIL Applicant to select as a minimum set-aside 40% of its units at 60% AMI or less, it must have "received an allocation of Housing Credits or is 'scheduled' to be assisted with Housing Credits." The

Applicant failed to provide documentation that it met any of the previous criteria for qualifying for the minimum set-aside of 40% of its units at 60% AMI or less.

27. In response, RTD submitted two attempts to remedy the threshold requirement (Cures). One attempted Cure revised page 22 of RTD's Application and included a letter from the Executive Director of the Housing Finance Authority of Hillsborough County, both purporting to demonstrate that a tax-exempt private activity bond allocation has been reserved for RTD in an amount up to $10,500,000.

28. Florida Housing used the "Total Development Cost" from the Application of $24,0916,027 to determine whether Petitioner's firm commitment of $10,500,000 tax-exempt private activity bonds was 50% or greater "of its financing." Florida Housing should have used the aggregate basis of building and lands pursuant to Rule 67-48.027(2)(a), F.A.C.

29. The second attempted Cure by RTD, included a letter from *Reznick Fedder & Silverman*, the Housing Credit Certified Public Accountants for RTD. The letter stated that RTD satisfied the applicable federal test to receive the Housing Credits. The letter states that the aggregate basis of the building and lands is $20,871,221. Fifty percent or more of the development will be financed by tax-exempt bonds.

30. The SAIL loan for which the RTD applied is authorized by Fla. Stat.

Section 420.5087, (SAIL Statute), which states in pertinent part that the corporation shall have the power to underwrite and make the applicable loan provided "The sponsor uses the federal low-income housing tax credit, and the project meets the tenant income eligibility requirements of s. 42 of the Internal Revenue Code of 1986, as amended... ." 420.5087(2)(c), Fla. Stat.

31. The SAIL statute establishes the minimum set-aside requirements for SAIL-financed affordable housing project. Jt. Exh. 1 ¶ 14. Those set-aside requirements vary, depending on what other funding sources the development uses. § 420.5087, Fla. Stat. When a proposed development uses low-income housing tax credits as part of its funding, the statutory SAIL set-aside requirements are the same as those required by Congress under the Housing Credit program. See § 420.5087(2)(c), Fla. Stat., which provides:

> (2) The corporation shall have the power to underwrite and make state apartment incentive loans or loan guarantees to sponsors, provided:
>
> . . .
>
> (3) The sponsor uses the federal low-income housing tax credit, <u>and the project meets the tenant income eligibility requirements of S. 42 of the Internal Revenue Code of 1986, as amended</u> . . .

(Emphasis supplied).

32. The Universal Application Instructions (Instructions), which have been adopted and incorporated by reference into Florida Housing's rules,[2] restate the minimum set-aside requirements for SAIL applicants. The Instructions provide in relevant part on page 26:

> "Pursuant to Rule 67-48, F.A.C., the SAIL minimum set-aside requirements shall be:
>
> - 20% of the units set-aside at 50% of area median income; or
>
> - 40% of the units set-aside at 60% of area median income only if the Development received an allocation of Housing Credits or is "scheduled" to be assisted with Housing Credits... .
>
> For purposes of meeting threshold requirements of this Application only, 'scheduled' shall mean:
>
> The Application is one for both SAIL and HC; or
>
> The Applicant includes evidence within its Application that the Development has a firm commitment, as determined by Florida Housing after scoring the Financing portion of this Application, for 50% or more of its financing from tax-exempt private activity bonds."

33. When the final scores were released by Florida Housing in the Universal Scoring Summary, the Application was identified as failing threshold requirements relating to minimum set-aside commitments. The same reason was given in the

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[2]See Fla. Admin. Code R. 67-48.002(111).

Preliminary Scoring Summary:

> "The Applicant attempted to cure Item 1T by stating that the Application passed what the Applicant called the real world 50% test established by the Internal Revenue Service and as such, it should be concluded that the Development is "scheduled" to be assisted by Housing Credits. Page 26 of the Universal Application Instructions though states: "... 'scheduled' shall mean: The Application is one for both SAIL and HC; or The Applicant includes evidence within its Application that the Development has a firm commitment, as determined by Florida Housing after scoring the Financing portion of this Application, for 50% or more of its financing from tax-exempt private activity bonds." The Application fails to meet this definition of "scheduled" and therefore, the Applicant must select the minimum set-aside of 20% of the units at 50% AMI. The Applicant having failed to do so, has failed to cure Item 1T."

34. RTD has demonstrated that it has a firm commitment to receive up to $10.5 million from tax-exempt private activity bonds. Exh. No. 3 to Jt. Exh. 1.

35. The phrase "Total Development Cost" is a term of art specifically defined by Florida Housing in Rule 67-48.004(109), F.A.C. Simplistically put, it means the total of all costs incurred in the completion of a development. The phrase "aggregate basis of any building and the land on which the building is located" is a separate and different term of art as set forth in Rule 67-48.027(2)(a), F.A.C., as well as the Internal Revenue Code which has been adopted as a rule by Florida Housing. The two terms of art do not have the same definition and are not interchangeable.

CONCLUSIONS OF LAW

36. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rules 28-106.301 and 67-48.005, F.A.C., the Hearing Officer has jurisdiction over the parties to this proceeding.

37. The Petitioner's substantial interests are affected by the proposed agency action of the Respondent corporation. Therefore, Petitioner has standing to bring this proceeding.

38. Florida Housing is authorized to institute a competitive application process pursuant to Section 420.507(22)(f), Fla. Stat., and has done so through Rule 67-48.004, F.A.C.

39. The 2003 Universal Application Package, including the instructions is a Rule incorporated by reference by Rule 67-48.002(111), F.A.C.

40. The Federal Internal Revenue Code has been adopted by Florida Housing as a Rule and incorporated by reference in Rule 67-48.002(19), F.A.C.

41. Section 420.5087(2)(c), Fla. Stat., provides that Florida Housing shall have the power to underwrite and make state apartment incentive loans provided "The sponsor uses the federal low-income housing tax credit, and the project meets the tenant income eligibility requirements of s. 42 of the Internal Revenue Code of 1986... ."

42. Florida Housing's rules in the Universal Application Package instructions state at page 26 that

> Pursuant to Rule 67-48, F.A.C., the SAIL minimum set-aside requirement shall be: . . . 40% of the unit set-aside at 60% of area median income only if the Development is "'scheduled'" to be assisted with federal housing credits.
>
> For purposes of meeting threshold requirements of this Application only, "'scheduled'" shall mean: . . . the Applicant includes evidence within its Application that the Development has a firm commitment, as determined by Florida Housing after scoring the Financing portion of this Application, for 50% or more of its financing from tax-exempt private activity bonds.

43. Florida Housing does not dispute that RTD has a firm commitment for $10.5 million in tax-exempt private activity bonds. The sole issue is whether $10.5 million in tax-exempt private activity bonds is "50% or more of its <u>financing</u>". (Emphasis supplied)

44. While in the main, Florida Housing's Rules are exemplary in their clarity in dealing with complex matters, in this instance the meaning of the word "financing" as used above is not facially apparent. One must look to the underlying basis of the provisions involved to determine what is meant by the word "financing" as used in the pertinent context.

45. Section 420.5087(2)(c), Fla. Stat., makes it clear that § 42 of the Internal

Revenue Code applies in this case. Section 42 of the Internal Revenue Code has been adopted as a Rule of Florida Housing. *See* Rule 67-48.002(19), F.A.C. Section 42(h)(4)(B) of the Internal Revenue Code, (a Rule of Florida Housing), deals with situations, such as the Applicant proposes here, where 50% or more of building is financed with tax-exempt bonds subject to a volume cap and the Code therein sets forth what is referred to as the "50% rule" which incorporates the "aggregate basis concept." Although Florida Housing has already adopted these provisions as a rule by adopting the Internal Revenue Code as a Rule, Florida Housing has gone further in this regard with its Rule 67-48.027(2)(a), F.A.C. There it specifically states that "Tax-Exempt Bond-Financed Developments, as defined in Section 42(h)(4)(B) of the Code, . . . shall: (a) Have 50% or more of the aggregate basis of any building and the land on which the building is located financed by tax-exempt bonds. . . ." Thus, it is clear from the underlying statutory foundation as well as the Rules of Florida Housing that in cases such as this the ultimately decisive measure is whether the tax-exempt private activity bonds equal 50% or more of the aggregate basis of any building and the land on which the building is located.

Florida Housing, however, argues that the word "financing" as used in the pertinent part of its Rules in the Instructions at page 26 does not refer to 50% or more of the aggregate basis of any building and the land on which the building is located,

but rather refers to the "Total Development Cost" set forth in the Application. This argument is rejected.

The phrase "Total Development Cost" is specifically defined by Florida Housing in its Rule 67-48.002(109), F.A.C. "Total Development Cost" as defined is something different from the "aggregate basis of the building and the land on which the building is located" as referenced in Rule 67-48.027(2)(a), Fla. Stat., and in the Internal Revenue Code. Tax-exempt bond-financed developments are not required by Florida Housing's Rules to have 50% or more of the Total Development Cost financed by tax-exempt bonds. Rather, tax-exempt bond financed developments are required by Florida Housing's Rules to have 50% or more of the aggregate basis of any building and land on which the building is located financed by tax-exempt bonds. *See* 67-48.027(2)(a), F.A.C., and the Internal Revenue Code. Thus, logic suggests that "financing" does not mean "Total Development Cost" because that is not the regulatory measure applied by Florida Housing's Rules. The measure applied in this situation is "aggregate basis."

Had Florida Housing intended that the Applicant have a firm commitment for 50% or more of its "Total Development Cost" from tax-exempt private activity bonds, it would have been a simple matter just to include that phrase in its Rule rather than using the word "financing." Indeed, two paragraphs later in its Instructions, at page

27, in two places Florida Housing poses the requirement with regard to MMRB applicants that "If less than 50% of the Total Development Cost is being financed by Tax-Exempt Bonds [the applicant must make a certain commitment]." To interpret the "word financing" to mean "Total Development Cost" under these circumstances is unreasonable and erroneous and contradicts the rules which are the foundation of this requirement.

The word "financing" as used in the Rules in this instance is confusing if not read in context. The definition found in Random House Webster's College Dictionary, 2000, of the word is "the act of obtaining or furnishing funds for an enterprise" and "the funds so obtained." Such a definition standing by itself does not elucidate an Applicant attempting to carefully comply with the Application requirements of Florida Housing. It must be read in the context of the "50% of the aggregate basis" requirement set forth in the other Rules of Florida Housing. Read in that context it has useful meaning.

Florida Housing has argued that in the Application process they do not use the "50% test" established by § 42 of the Internal Revenue Code and Rule 67-48.027(2)(a), F.A.C. Rather, they argue that the test they use mandates that 50% of the "Total Development Cost" shown on the Application completed by the Applicant be used. They argue that the policy underlying "the more generous test used in the

application phase" is to ensure a margin of error prior to the underwriting process. They say that "the margin of error is needed due to the potential for widely fluctuating costs of construction that are not well known in the early application process."

While that may or may not be a laudable policy, the agency has not adopted this policy as a Rule. Instead, they have adopted Rules that clearly impose the "50% test" established by § 42 of the Internal Revenue Code and Rule 67-48.027(2)(a), F.A.C., which applies the "aggregate basis" concept. In the face of required rulemaking, merely asserting that an interpretation is the policy of the rule maker in the face of contrary rules is not enough.

Florida Housing, in fact, has addressed this very issue of the potential for fluctuating costs between the Application process and the credit underwriting process by the Rule in its Instructions at page 61 wherein it states "However, the Applicant acknowledges that verification of ALL information contained in this Application will be obtained and any funding award preliminarily secured by the Applicant is expressly conditioned upon such verification and the successful completion of credit underwriting." (Emphasis supplied) Thus, by its own Rules, the agency has addressed the situation where the information available at credit underwriting may be more certain than the information addressed in the Application stage.

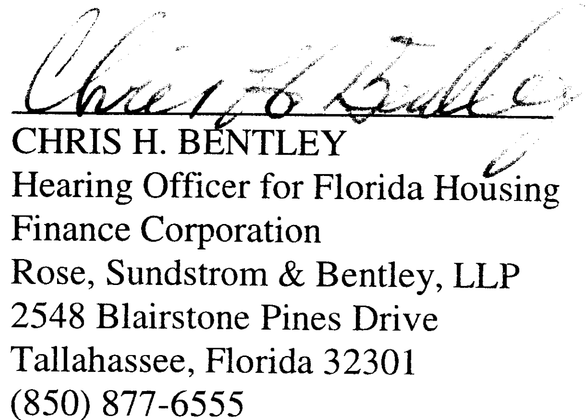
46. The correct interpretation of the word "financing" in the Instructions incorporates the aggregate basis concept set forth in § 42 of the Internal Revenue Code and Rule 67-48.027(2)(a), F.A.C. As set forth in the Findings of Fact, RTD's Application, with its cures, establish that more than 50% of the aggregate basis of any building and the land on which the building is located will be financed by tax-exempt bonds. Therefore, pursuant to the Rules in the Instructions, RTD is "scheduled" to be assisted by Housing Credits. Because RTD's development is "scheduled" to be assisted by Housing Credits as contemplated by the SAIL statute, Rule 67-48.027(2)(a), and by the Instructions, RTD is entitled to select 40% of its units at 60% of area median income as its minimum set-aside and has not failed threshold requirements for this item.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED:

1. That a Final Order be entered determining that RTD's Application meets all threshold requirements.

Respectfully submitted and entered this 22nd day of September, 2003.



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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 Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Monday, September 29, 2003. 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.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VILLAGE CENTRE APARTMENTS, LTD.,

Petitioner,

v.

FHFC CASE NO. 2003-040
Application No. 2003-099C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

____/

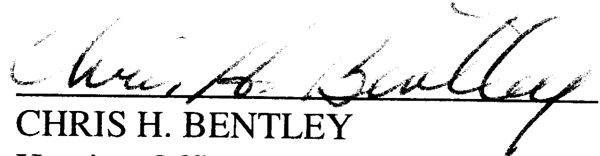
ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, an informal hearing was scheduled before the undersigned Hearing Officer on September 10, 2003. Prior to the hearing, the parties reached an agreement resolving the sole issue in dispute, and submitted to the undersigned Hearing Officer a Joint Proposed Recommended Order, which is attached hereto as Exhibit A. In essence, the parties agreed that Petitioner, VILLAGE CENTRE APARTMENTS, LTD., meets threshold requirements for evidence of site control and, therefore, satisfies all threshold requirements.

Based upon this agreement and the Joint Proposed Recommended Order, there is no need for additional Findings of Fact and/or Conclusions of Law, and the issues raised in the Petition are moot. Accordingly, no Findings of Fact or Conclusions of

Law are made herein. The parties jointly executed Joint Proposed Recommended Order is attached as Exhibit A.

Respectfully submitted and entered this 16th day of September, 2003.



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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VILLAGE CENTRE APARTMENTS, LTD.

Petitioner,

vs.

Application No. 2003-099C
2003 Universal Cycle

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_______________________________/

JOINT PROPOSED RECOMMENDED ORDER

Petitioner Village Centre Apartments, Ltd. ("Village Centre") and Respondent Florida Housing Finance Corporation ("Florida Housing") present the following Joint Proposed Recommended Order:

APPEARANCES

For Petitioner:

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For Respondent:

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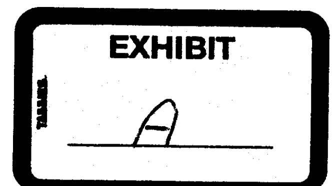


PRELIMINARY STATEMENT

Village Centre timely filed an application with Florida Housing for housing credits in the 2003 Universal Cycle in connection with the development of a "Front Porch Community" apartment complex in West Palm Beach called Village Centre. On July 21, 2003, Village Centre was provided notice through Florida Housing's Universal Scoring Summary that it did not meet threshold requirements to satisfy evidence of site control. Village Centre timely filed a petition for informal administrative hearing on July 30, 2003, disputing Florida Housing's determination and seeking a Recommended Order that Village Centre's application meets all threshold requirements. The parties agree that the new contracts submitted by Village Centre with its "cure" provide evidence of site control and that the Application, therefore, satisfies all threshold requirements.

FINDINGS OF FACT

1. Village Centre timely submitted an Application to Florida Housing for housing credits in the 2003 Universal Cycle in connection with a proposed 84-unit "Front Porch Community" apartment complex in West Palm Beach, Florida.

2. To encourage the development of low-income housing for families, Congress in 1987 created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar-for-dollar reduction of the holder's federal tax liability, which can be taken for up to ten years if the project satisfies the Internal Revenue Code's requirements each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for the construction of the development.

3. Florida Housing is a public corporation organized pursuant to section 420.504, Florida Statutes, to provide and promote financing of affordable housing and related facilities in Florida. Florida Housing is an agency as defined in section 120.52, Florida Statutes, and, therefore, is subject to the provisions of Chapter 120, Florida Statutes.

4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of low-income Tax Credits (also known as housing credits) in Florida. *See* § 420.5099, Fla. Stat. In this capacity, Florida Housing determines which entities will receive housing credits for financing the construction or rehabilitation of low-income housing .

5. Florida Housing is governed by a Board of Directors appointed by the Governor with the Secretary of the Department of Community Affairs sitting ex-officio.

6. Housing credits are allocated by Florida Housing through a competitive application process. Applications for housing credits are submitted to Florida Housing through a once-a-year process referred to as the Universal Cycle, which is governed by chapter 67-48, Florida Administrative Code.

7. The Universal Cycle is a single-application process for the housing credit program, the Florida Housing-administered SAIL program under section 420.5087, Florida Statutes, and the Home Investment Partnership Program operated by Florida Housing pursuant to section 420.5089, Florida Statutes, and federal Housing and Urban Development regulations.

8. Florida Housing uses a scoring process for the award of housing credits outlined in rule 67-48.004, Florida Administrative Code, and a Qualified Allocation Plan (QAP). The provisions of the QAP are adopted and incorporated by reference in rule 67-48.025, Florida Administrative Code.

9. Pursuant to the QAP, housing credits are apportioned among the most populated counties, medium populated counties, and least populated counties. The QAP also establishes various set-asides and special targeting goals. One of the set-asides in the QAP is for Front Porch Florida Community developments. *See* ¶ 3, 2003 Qualified Allocation Plan.

10. The 2003 Universal Application Package, adopted by rule 67-48.002(111), Florida Administrative Code, includes forms and instructions for applicants. Some application requirements are "threshold" items, and failure to properly include a threshold item or satisfy a threshold requirement results in a rejection of the application.

11. Preliminary scores for all applicants were released by Florida Housing on May 12, 2003. Following consideration of comments submitted by other Applicants and further review of applications pursuant to rule 67-48.004(4) and (5), Florida Housing released NOPSE[1] scores on June 9, 2003. Applicants then were permitted to submit "cures" to problems identified in the NOPSE scores. *See* r. 67-48.004(6). Applicants also were allowed to comment on the "cures" submitted by competitors by filing Notices of Alleged Deficiencies (NOADs). *See* r. 67-48.004(7).

12. After review of NOADs, final scores were released by Florida Housing through a Universal Scoring Summary dated July 18, 2003. Each applicant received its own Universal Scoring Summary.

13. Village Centre's application included contracts for purchase of five separate parcels of land. These contracts were attached to the application as evidence of site control as required by Part III.C.2.a of the Universal Application Instructions. One contract was a direct sale contract between Village Centre and the sellers; the other was between the West Palm

---

[1] NOPSE stands for Notice of Possible Scoring Error.

Beach Community Redevelopment Agency, as the seller, and Village Centre for three parcels that were to be conveyed through an eminent domain action.

14. Village Centre's application was preliminarily scored by Florida Housing on May 12, 2003, in accordance with the provisions of rule 67-48.004. Pursuant to rule 67-48.004(4), other applicants then submitted NOPSEs concerning the contracts Village Centre submitted. One NOPSE stated in relevant part that one of the land sellers, West Palm Beach Community Redevelopment Agency, appeared not to currently own the property because the contract stated that the seller intended to acquire the land by eminent domain. Noting that Florida Housing requires that development proceed within a certain timeframe, the NOPSE stated that "[t]here can be no assurance that the City of West Palm Beach or West Palm Beach Community Redevelopment Agency will, through its eminent domain efforts, secure title to the subject real estate in time for Applicant to meet the foregoing deadlines."

15. Pursuant to rule 67-48.004(5), Florida Housing transmitted the NOPSEs to Village Centre and concurred that Village Centre failed to meet threshold requirements because the contracts submitted were not sufficient to demonstrate site control. In its NOPSE Scoring Summary issued on June 9, 2003, Florida Housing stated:

> It has not been demonstrated that the Seller has ownership of the property and has the ability to convey the property to the Purchaser (the Applicant). The March 26, 2003 Agreement of Purchase and Sale indicates that the Seller intends to file an eminent domain action in the Circuit Court in and for Palm Beach County to acquire the parcels of land and a condition for closing, as stated at Article 5.2(i) of the Agreement, is that the Seller is able to obtain title to the property by purchase or eminent domain.

16. Pursuant to rule 67-48.004(6), Village Centre submitted a cure in response to the NOPSE scoring. In the Statement of Explanation accompanying the cure, Village Centre stated:

> Florida Housing rejected the Application because the documentation submitted was not sufficient to demonstrate site control. Applicant is providing qualified Purchase and Sale contracts valid through 12/31/03 for the parcels that were previously subject to an eminent domain action.
> Applicant requests that Florida Housing accept this revised information as satisfying the threshold requirement for Site Control.

17. In its Universal Scoring Summary, Florida Housing rejected the cure, again finding that Village Centre failed to meet threshold requirements for site control, despite the submission of the three new contracts. Florida Housing stated:

> Applicant attempted to cure Item 3T by providing three new contracts for purchase and sale, all dated 6/17/03, in place of the 3/26/03 Agreement of Purchase and Sale. This cure is deficient because the contracts and site control by the Applicant are contingent upon the result of pending eminent domain suit(s) regarding portions of the proposed development site and none of the material submitted by the Applicant indicates the current status of this litigation.

18. The Universal Scoring Summary, along with a Notice of Rights, was conveyed to Village Centre on July 21, 2003. Village Centre timely requested an informal administrative hearing in accordance with sections 120.569 and 120.57(2), Florida Statutes, and rules 28-106.301 and 67-48.005, Florida Administrative Code.

19. All other scoring deficiencies in Village Centre's application were rescinded as a result of the Universal Scoring Summary. Thus, the only issue preventing Village Centre from meeting threshold requirements is the site control issue relating to the cure.

20. Village Centre submitted three new contracts with its cure that were direct purchase agreements between Village Centre and three separate landowners. These contracts do not involve an eminent domain action. They serve as substitutes for the contract between the West Palm Beach Community Redevelopment Agency and Village Centre originally submitted with the application that was dependent upon the eminent domain action.

21. The contracts submitted with Village Centre's cure to satisfy site control requirements are not contingent upon any pending eminent domain suits. Rather, the eminent domain suits are contingent upon the contracts, ensuring that the subject properties will be conveyed to Village Centre in the event that closings on the contracts do not occur within the timeframe specified by the Application Instructions and Florida Housing's rules. The eminent domain actions have no effect on the contracts attached to the cure, and the eminent domain actions will become moot upon the closing of the contracts. The contracts submitted with Village Centre's cure meet the definition of "qualified contracts" as provided in the Application Instructions and adequately demonstrate site control.

22. For this reason, the three new contracts submitted by Village Centre with its cure provide evidence of site control. Thus, Village Centre has satisfied the threshold requirement for site control under Part III.C.2 of the Universal Application Instructions. Accordingly, the determination in the 2003 Universal Scoring Summary regarding Item 3T should be rescinded.

CONCLUSIONS OF LAW

1. Pursuant to sections 120.569 and 120.57(2), Florida Statutes, and rules 28-106.301 and 67-48.005, Florida Administrative Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Florida Housing is authorized to institute a competitive application process pursuant to section 420.507(22)(f), Florida Statutes, and has done so through rule 67-48.004, Florida Administrative Code.

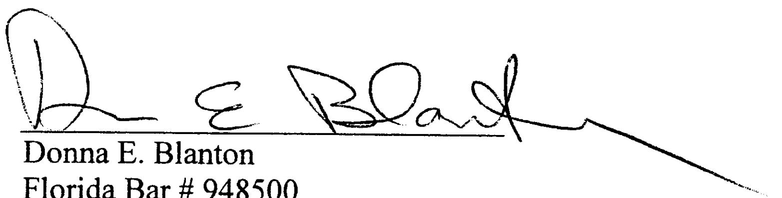
3. The 2003 Universal Application and accompanying instructions are incorporated by reference into rule 67-48.002(111), Florida Administrative Code.

4. Petitioner has provided information in its cure that satisfies the requirements for evidence of site control, as described in Part III.C.2. of the Universal Application Instructions. Accordingly, Petitioner meets the threshold requirements for Part III.C.2.

RECOMMENDATION

Based on the Findings of Fact and Conclusions to Law stated above, the parties recommend that the Hearing Officer enter a Recommended Order determining that Village Centre's application meets threshold requirements for evidence of site control, and the Village Centre application, therefore, satisfies all of Florida Housing's threshold requirements.

Respectfully submitted,



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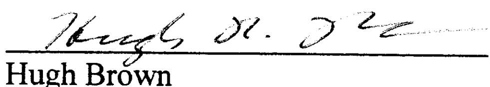

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