

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

ASWAN VILLAGE ASSOCIATES, L.L.C.,

Petitioner,

v.

FHFC CASE NO.: 2002-0037

App No.: 2002-015S

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

\_\_\_\_\_ /

**RECOMMENDED ORDER**

Pursuant to notice, on September 13, 2002, an informal administrative hearing was held in this case in Tallahassee, Florida, before for 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:**

Lynn C. Washington  
Holland and Knight LLP  
701 Brickell Avenue, Suite 3000  
Miami, FL 33131

**For Respondent:**

Hugh R. Brown, Assistant General Counsel  
Florida Housing Finance Corporation  
227 N. Bronough Street, Ste. 5000  
Tallahassee, Florida 32301-1329

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## EXHIBITS

Petitioner:

1. Petition in re Aswan Village Application.
2. Original 2002 Universal Cycle Application of Aswan Village Associates, L.L.C., #2002-015S.
3. Final Scoring Summary for Application #2002-015S, dated July 22, 2002.
4. Revised Exhibit 21 to the Aswan Village application (Surveyor Certification).
5. Revised Exhibit 48 to the Aswan Village application (letter from the Enterprise Social Investment Corporation dated June 21, 2002).
6. Revised Exhibit 50 to the Aswan Village application (undated letter from Miami-Dade County).
7. Original Exhibit 45 to the Aswan Village application (Commitment to Defer Developer Fee form).
8. Original Exhibit 10 to the Aswan Village application (Developer Certification and Experience Chart).
9. Revised Exhibit 45 to the Aswan Village application (Commitment to Defer Developer Fee forms (2)).
10. Revised Exhibit 52 to the Aswan Village application (letter dated June 17, 2002, from the Banc of America Community Development Corporation).
11. Revised Exhibit 43 to the Aswan Village application (Construction of Rehab Analysis form).
12. Original Exhibit 44 to the Aswan Village application (Permanent Analysis form).

### **PRELIMINARY STATEMENT**

On or before April 15, 2002, Petitioner submitted an application to Florida Housing for SAIL funding in the 2002 Universal Cycle program. On July 22, 2002, 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, Florida Statutes. On August 13, 2002, Petitioner timely filed its Petition for a hearing, but did not specify a preference for either a formal hearing under Section 120.57(1), Florida Statutes, or an informal hearing pursuant to Section 120.57(2), Florida Statutes. Petitioner did not submit an Election of Rights in this matter. Upon reviewing the Petition, Florida Housing determined that no disputed issues of material fact existed, and an informal hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes. No disputes of material fact were raised during this informal hearing.

### **STATEMENT OF ISSUE**

The issue in this case is whether Florida Housing Finance Corporation ("Florida Housing") erred when it scored Petitioner's application for State Apartment Incentive Loan (SAIL) program funding in the 2002 Universal Cycle program. Specifically, the issue is whether Florida Housing correctly rejected Petitioner's application for failure to meet threshold requirements regarding seven (7) items, including the Surveyor Certification form, an Equity Commitment letter, a Local Government Contribution letter, the Commitment to Defer Developer Fee forms, a Partner Contribution letter,

and for resulting financing shortfalls in the Construction Analysis and Permanent Analysis portions of the application.

### **FINDINGS OF FACT**

1. Petitioner, Aswan Village Associates, L.L.C. (“Aswan Village”), is a Florida limited liability company in the business of developing affordable housing in the State of Florida, with its principal place of business at c/o Banc of America Community Development Corporation, 100 S.E. Second Street, 14th Floor, Miami, Florida 33131.

2. Florida Housing is a public corporation, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in Florida. (Section 420.504, Florida Statutes).

3. Through the State Apartment Incentive Loan (“SAIL”) program, Florida Housing funds low-interest mortgage loans to developers from various sources of state revenue, which are generally secured by second mortgages on the property.

4. Because Florida Housing’s available pool of SAIL funds is limited, qualified projects must compete for this funding. To determine which proposed projects will put the available funds to the best use, Florida Housing has established a competitive application process to assess the relative merits of proposed projects.

5. Florida Housing’s competitive application process for SAIL financing is included with other financing programs in a common process, in a single application

(the “Universal Application”) governed by rule Chapters 67-21 and 67-48, Florida Administrative Code.

6. For the 2002 Universal Application cycle, applicants who complete and submit form UA1016 with attachments are given a preliminary score by Florida Housing.

7. Following the issuance of preliminary scores, applicants are provided an opportunity to challenge the scoring of any competing application through the filing of a Notice of Possible Scoring Error (“NOPSE”).

8. Florida Housing considers each NOPSE filed, and provides each applicant with notice of any resulting change in their preliminary scores (the “NOPSE scores”).

9. 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.”

10. 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.

11. After considering the submitted NOADs, Florida Housing provides notice to applicants of any resulting scoring changes. The resulting scores are known as “pre-appeal” scores.

12. Applicants may appeal and challenge, via formal or informal hearings, Florida Housing’s scoring of any item for which the applicant received less than the maximum score, or for any item that resulted in the rejection of the application for failure to meet “threshold.”

13. Upon the conclusion of the informal hearings, and of formal hearings where appropriate, Florida Housing issues the final scores and ranking of applicants. Applicants are then awarded tentative MMRB and/or SAIL funding in order of rank; Florida Housing issues Final Orders allocating the tentative funding and inviting successful applicants in the credit underwriting process.

14. On or before April 15, 2002, Aswan Village and others submitted applications for SAIL financing in the 2002 Universal Application Cycle. Aswan Village requested \$2,000,000 in SAIL funds to help finance its project, a 216-unit garden-style apartment complex to be located in Opa-Locka, Florida.

15. Florida Housing evaluated all applications and notified applicants of their preliminary scores on or before May 14, 2002. Applicants were then given an opportunity to file NOPSEs on or before May 24, 2002.

16. After considering all NOPSEs, Florida Housing notified applicants by overnight mail on or about June 11, 2002, of any resulting changes in the scoring of their applications. Applicants were then required to submit, on or before June 26, 2002, “cure” materials to correct any alleged deficiencies in their applications previously identified by Florida Housing.

17. Applicants were required to file NOADs on competing applications on or before July 8, 2002. After considering the submitted NOADs, Florida Housing issued notice to Aswan Village and others of their adjusted scores (a.k.a. “pre-appeal scores”) on or about July 22, 2002.

18. The Aswan Village application pre-appeal scores indicate that Florida Housing rejected the application on seven (7) threshold grounds, including: the imaged and/or retyped Surveyor Certification form, a disqualified Equity Commitment letter, a disqualified Local Government Contribution letter, disqualified Commitment to Defer Developer Fee forms, a disqualified Partner Contribution letter, and for resulting financing shortfalls in the Construction Analysis and Permanent Analysis portions of the application.

#### **CONCLUSIONS OF LAW**

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

2. The Surveyor Certification form as provided by FHFC clearly indicates that the entire application will be rejected for failure to meet threshold if the form is

“scanned, imaged, altered or retyped.” Petitioner admits that the surveyor “imaged” the form, and as this is a threshold issue, mandatory rejection of this application is required by Rules 67-48.004(2), (9) and (13), Florida Administrative Code and page 55 of the UA1016 instructions.

3. Petitioner has admitted that the Enterprise Social Investment Corporation letter does not constitute a firm commitment to provide the equity financing, which is a threshold issue.

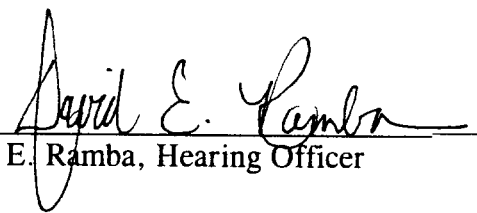
4. Based on the admission of these issues by Petitioner and these issues being threshold issues, there is no purpose in addressing the other threshold issues in contention as they are now moot.

#### **RECOMMENDATION**

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

That Florida Housing Finance Corporation enter a Final Order affirming the rejection of Petitioner’s application, and denying the relief requested in the Petition.

DATED this 23rd day of September, 2002 in Tallahassee, Florida.

  
\_\_\_\_\_  
David E. Ramba, Hearing Officer



Copies furnished:

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Miami, Florida 33131

Hugh R. Brown, Assistant General Counsel  
Florida Housing Finance Corporation  
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Tallahassee, Florida 32301-1329

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

BRISBEN FLORIDA II LIMITED  
PARTNERSHIP (MEADOW POINTE),

Petitioner,

v.

FHFC CASE NO.: 2002-0045  
App No.: 2002-166BS

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

\_\_\_\_\_ /

**RECOMMENDED ORDER**

Pursuant to notice, on September 10, 2002, an informal administrative hearing was held in this case in Tallahassee, Florida, before for 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:**

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

**For Respondent:**

Hugh R. Brown, Assistant General Counsel  
Florida Housing Finance Corporation  
227 N. Bronough Street, Suite 5000  
Tallahassee, Florida 32301-1329

## EXHIBITS

The following exhibits were offered jointly by the parties and were received by the Hearing Officer:

1. Prehearing Stipulation
2. Part II, Section A.1 of the Meadow Pointe application (#2002-166BS).
3. Part V, Section A.1 of the Meadow Pointe application.
4. The initially submitted Exhibit 43 to the Meadow Pointe application (“Construction or Rehab Analysis”).
5. 2002 Preliminary Universal Scoring Summary for the Meadow Pointe application dated May 13, 2002.
6. NOPSE filed against Part V, Section A.1 of the Meadow Pointe application (3 pages).
7. 2002 NOPSE Universal Scoring Summary for the Meadow Pointe application dated June 10, 2002.
8. Cure materials filed by Meadow Pointe pertaining to Exhibit 43 of the initial application (2 pages).
9. 2002 Final Universal Scoring Summary for the Meadow Pointe application dated July 22, 2002.
10. Pages 56-76 of the UA1016 Application instructions.

## PRELIMINARY STATEMENT

On or before April 15, 2002, Petitioner submitted an application to Florida Housing for Multi-Family Mortgage Revenue Bonds and SAIL funds in the 2002 Universal Cycle program. On July 22, 2002, 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, Florida Statutes. On August 13, 2002, Petitioner filed its Election of Rights. On August 13, 2002, Petitioner timely filed its Petition for Informal Administrative Hearing (“Petition”). An informal hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes.

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 9. Meadow Pointe also introduced an excerpt from the Application Instructions for the 2002 Universal Cycle, which was admitted into evidence without objection as Exhibit 10. There are no disputed issues of material fact.

### **STATEMENT OF THE ISSUE**

The issue in this case is whether the Florida Housing Finance Corporation (“FHFC”) erred in rejecting Petitioner’s application to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds (“Bonds”) after the application was found to be ineligible to compete for SAIL funds in the 2002 Universal Cycle program.

### **FINDINGS OF FACT**

1. Petitioner, Brisben Florida II Limited Partnership (“Meadow Pointe”), is an Ohio limited partnership with its address at 7800 East Kemper Road, Cincinnati, Ohio 45249, and is in the business of providing affordable housing units.

2. Respondent, Florida Housing Finance Corporation (“Florida Housing”) is a public corporation that administers governmental programs relating to the financing and refinancing of affordable housing and related facilities in Florida, pursuant to Section 420.504, Florida Statutes.

3. To encourage the development of affordable rental housing for low-income families, Florida Housing provides low-interest mortgage loans to developers of qualified multi-family housing project. In exchange for an interest rate lower than conventional

market rates, the developer agrees to “set-aside” a specific percentage of the rental units for low-income tenants.

4. Through its Multi-Family Mortgage Revenue Bond (MMRB) program, Florida Housing funds these mortgage loans through the sale of tax-exempt and taxable bonds. Applicants then repay the loans from the revenues generated by their respective projects.

5. Through the State Apartment Incentive Loan (“SAIL”) program, Florida Housing funds low-interest mortgage loans to developers from various sources of state revenue, which are generally secured by second mortgages on the property.

6. Because Florida Housing’s available pool of tax-exempt bond financing and SAIL funds is limited, qualified projects must compete for this funding. To determine which proposed projects will put the available funds to best use, Florida Housing has established a competitive application process to assess the relative merits of proposed projects.

7. Florida Housing’s competitive application process for MMRB and SAIL financing is included with other financing programs within a single application process (the “Universal Application”) governed by rule Chapters 67-21 and 67-48, Florida Administrative Code.

8. The 2002 Universal Application and accompanying instructions are incorporated as form “UA1016” by reference into Chapter 67-21 by Rule 67-21.002(97), Florida Administrative Code, and into Chapter 67-48 by Rule 67-48.002(116), Florida Administrative Code.

9. For the 2002 Universal Application cycle, applicants who complete and submit form UA1016 with attachments are given a preliminary score by Florida Housing.

10. Following the issuance of preliminary scores, applicants are provided an opportunity to challenge the scoring of any competing application through the filing of a Notice of Possible Scoring Error (“NOPSE”).

11. Florida Housing considers each NOPSE filed, and provides each applicant with notice of any resulting change in their preliminary scores (the “NOPSE scores”).

12. 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.”

13. 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.

14. After considering the submitted NOADs, Florida Housing provides notice to applicants of any resulting scoring changes. The resulting scores are known as “pre-appeal” scores.

15. Applicants may appeal and challenge, via formal or informal hearings, Florida Housing’s scoring of any item for which the applicant received less than the maximum score,

or for any item that resulted in the rejection of the application for failure to meet “threshold.”

16. Upon the conclusion of the informal hearings, and of formal hearings where appropriate and timely, Florida Housing issues the final scores and ranking of applicants. Applicants are then awarded tentative MMRB and/or SAIL funding in order of rank; Florida Housing issues Final Orders allocating the tentative funding and inviting successful applicants in the credit underwriting process.

17. On or about April 15, 2002, Meadow Pointe and others submitted applications for MMRB and SAIL financing in the 2002 Universal Application cycle. Meadow Pointe requested \$3,190,000 in tax-exempt MMRB funding and \$1.5 million on SAIL funding to help finance its project, a 236-unit garden style apartment complex in Brevard County, Florida. In its application, Meadow Pointe committed all of these units to house families earning 30-60% or less of the area median income.

18. Florida Housing evaluated all applications and notified applicants of their preliminary scores on or before May 14, 2002. Applicants were then given an opportunity to file NOPSEs on or before May 24, 2002.

19. After considering all NOPSEs, Florida Housing notified applicants by overnight mail on or about June 11, 2002, of any resulting changes in the scoring of their applications. Applicants were then required to submit, on or before June 26, 2002, “cure” materials to correct any alleged deficiencies in their applications previously identified by Florida Housing.

20. Applicants were required to file NOADs on competing applications on or before July 8, 2002. After considering the submitted NOADs, Florida Housing issued notice to Meadow Pointe and others of their adjusted scores on or about July 23, 2002.

21. One of Florida Housing's primary considerations in evaluating applications for funding is whether the applicant can demonstrate that it is ready to proceed with development and construction of its proposed project. As part of this demonstration, Florida Housing's application requires all applicants to document that they have legal title to the property on which the project is proposed to be constructed, or that they have the legal right to acquire such title, e.g., through a contract for sale or a long-term lease. These legal rights are commonly referred to as "site control." Applicants submit documentation of "site control" in Exhibit 23 to the Universal Application.

22. In its initial scoring, Florida Housing determined that the documents submitted by Meadow Pointe in Exhibit 23 to the Universal Application did not sufficiently demonstrate site control, and rejected the application for failure to meet threshold requirements, in that the contract provided did not meet the definition of "qualified contract" under Florida Housing rules.

23. Additionally, a competing applicant filed a NOPSE against Meadow Pointe, alleging that the site control documents did not clearly indicate which entity signed the purchase contract and which entity assigned the interest in the purchase contract.

24. In response to preliminary scoring, and to the NOPSE filed by a competing



applicant, Meadow Pointe submitted cure materials including a “Restated and Amended Sixth Amendment” (the “Restated Sixth Amendment”) to the original purchase contract which addressed the issues raised by Florida Housing’s scoring and the NOPSE filed against Meadow Pointe. The cure materials did not include the original Sixth Amendment to the purchase contract.

25. The Restated Sixth Amendment was initially accepted by Florida Housing as curing the two previously identified site control defects, and rescinded the rejection of the application on these grounds.

26. In issuing a final score, however, Florida Housing took the position that the documents submitted did not adequately demonstrate site control, due to a “gap” on the contract created by the absence of the original Sixth Amendment to the purchase contract.

27. The parties agree that the cure materials submitted by Meadow Pointe sufficiently demonstrate site control, and that the application should not have been rejected for failing to meet threshold on these grounds.

28. In response to a NOPSE filed by a competing applicant, Florida Housing determined that Meadow Pointe was ineligible to compete for SAIL funding under Rule 67-48.009(9), Florida Administrative Code, which provides, in pertinent part:

“Except for small county requests, Applicants may not request SAIL funding for Developments receiving priority in FHFC’s multifamily bond program for having no other FHFC funding.”

29. Florida Housing determined that Meadow Pointe had received priority in the MMRB program during the 2001 application cycle, for having no other Florida Housing funding.

30. As a result of excluding the requested \$1.5 million SAIL loan as part of the development financing, Florida Housing also concluded that Meadow Pointe had a construction financing shortfall of \$597,979.

31. The parties agree that Meadow Pointe is ineligible to apply for SAIL funding during the current 2002 Universal Application cycle.

#### CONCLUSIONS OF LAW

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

2. Rule 67-48.009 (9), Florida Administrative Code renders the applicant ineligible for SAIL funding and the parties agreed in their prehearing stipulation that applicant is ineligible to apply for SAIL funding during the 2002 Universal Application cycle.

3. Page 65 of UA1016 Application instructions provides, in pertinent part, that “[a]n application that requested SAIL funds and also requested MMRB or Competitive HC that is selected for tentative funding of MMRB or Competitive HC but is not selected for tentative funding of SAIL must, within 30 days of the date that the Board takes action

on the informal appeals, submit documentation to Florida Housing and if assigned, their assigned credit underwriter, demonstrating that it is able to fill the SAIL funding gap.”

4. Respondent interprets the Application instructions to require the SAIL application to be eligible to compete before these application instructions apply.

5. The plain meaning of FHFC’s application instructions does not require that the application be eligible to compete for SAIL funding, simply that they request it along with a request for MMRB or Competitive HC.

6. FHFC, in numerous other parts of their application instructions, requires that applicants be “eligible” for certain programs to move further in the application process or to be able to access additional funding.

7. FHFC’s application instructions are clear and unambiguous, and cannot construe their rules in a manner that contradicts the rule’s express language. *See, Eager v. Florida Keys Aqueduct Auth.*, 580 So.2d 771 (Fla. 3<sup>rd</sup> DCA 1991), review denied, 591 So. 181 (Fla. 1991). Although an agency’s interpretation of their rules will not be overturned unless the interpretation is clearly erroneous, review is not needed unless the language is not plain or the meaning is unclear.

#### **RECOMMENDED ORDER**

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

A Final Order be entered allowing the Applicant to continue to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds and, within 30 days of the date that the Board takes action on the informal appeals, allow Applicant to submit

documentation that they are able to fill the SAIL funding gap in accordance with the 2002 Universal Application instructions.

Dated this 23<sup>rd</sup> day of September, 2002 in Tallahassee, Florida

A handwritten signature in cursive script that reads "David E. Ramba". The signature is written in black ink and is positioned above a horizontal line.

David E. Ramba, Hearing Officer

Copies furnished:

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