

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

BRISBEN TIERRA BAY LIMITED
PARTNERSHIP,

Petitioner,

v.

FHFC CASE NO.: 2002-0044
App No.: 2002-145B

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 the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

APPEARANCES

For Petitioner:

Warren H. Husband, Esquire
Metz, Hauser & Husband, P.A.
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For Respondent:

Hugh R. Brown, Assistant General Counsel
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EXHIBITS

1. Prehearing Stipulation.
2. Assignment and Assumption Agreement dated April 12, 2002, between Brisben Advisors, Inc. and Brisben Tierra Bay Limited Partnership (from Exhibit 23 to the Tierra Bay Application #2002-165B).
3. Real Estate Purchase Agreement dated April 11, 2002, between John D. Jassy and Brisben Advisors, Inc. with attachments A through D (Id.).
4. Vacant Land Contract between Kenneth D. Goodman and John D. Jassy dated December 5, 2001, with Addendum dated December 10, 2001, with an undated Attachment and Legal Description.
5. 2002 Preliminary Universal Scoring Summary for the Tierra Bay application dated May 13, 2002.
6. 2002 NOPSE Universal Scoring Summary for the Tierra Bay application dated June 10, 2002.
7. Cure documentation submitted by Tierra Bay regarding site control (Exhibit 23 to the Universal Application) (5 pages).
8. NOAD filed against Tierra Bay application as pertaining to site control issue (3 pages).
9. 2002 Final Universal Scoring Summary for the Tierra Bay application dated July 22, 2002.

PRELIMINARY STATEMENT

On or before April 15, 2002, Petitioner submitted an application to Florida Housing for Multi-Family Mortgage Revenue Bonds 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. There are no disputed issues of material fact.

STATEMENT OF THE ISSUE

The issue in this case is whether FHFC erred when it scored Petitioner's application for Multi-Family Mortgage Revenue bonds in the 2002 Universal Cycle program. Specifically, whether FHFC correctly rejected Petitioner's application for failure to adequately demonstrate site control over the property that is the subject of the proposed development.

FINDINGS OF FACT

1. Petitioner, Brisben Tierra Bay Limited Partnership ("Tierra Bay"), 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. Because Florida Housing's available pool of tax-exempt bond financing 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.

6. Florida Housing's competitive application process for MMRB 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.

7. The 2002 Universal Application and accompanying instructions are incorporated as form "UA1016" by reference into Chapter 67-21, Florida Administrative Code, by Rule 67-21.002(97).

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

9. 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").

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

11. 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."

12. 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.

13. 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.

14. 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.”

15. 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 funding in order of rank; Florida Housing issues Final Orders allocating the tentative funding and inviting successful applicants in the credit underwriting process.

16. On or about April 15, 2002, Tierra Bay and others submitted applications for MMRB financing in the 2002 cycle. Tierra Bay requested \$20,980,000 in tax-exempt bond funding to help finance a 272-unit garden style apartment complex to be located in unincorporated Collier County, Florida. In its application, Tierra Bay committed all of these units to house families earning 60% or less of the area median income.

17. 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.

18. After considering all NOPSEs, Florida Housing notified applicants by overnight mail on 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.

19. 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 Tierra Bay and others of their adjusted scores on or about July 23, 2002.

20. 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.”

21. Site control is a “threshold” requirement. Failure to properly document site control results in the rejection of the application and its elimination from the rankings for funding.

22. In its initial scoring of the Tierra Bay application, Florida Housing found that the documents submitted in the Tierra Bay application regarding site control met threshold requirements.

23. Subsequently, and following the submission of a NOPSE by a competing applicant, Florida Housing found that the site control documentation submitted by Tierra Bay had failed threshold.

24. Tierra Bay submitted cure materials in response to the NOPSE and scoring change, including a "Partial Assignment and Assumption Agreement."

25. Following the submission of this cure material, and the filing of a NOAD by a competing applicant, Florida Housing again determined that the Tierra Bay application failed the threshold site control requirement.

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 this matter.

2. Page 17 of UA1016 instructions require that:

A qualified contract is one that has a term that does not expire before the last expected closing date of December 31, 2002 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date not earlier than December 31, 2002; provides that the buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless a fully executed assignment of qualified contract which assigns all of the buyer's rights, title and interests in the qualified contract to the Applicant, is provided.

3. The structure of this arrangement provided a permissible option to purchase the land dedicated to this project. The base contract for the sale from Kenneth D. Goodman, Trustee of the Manatee Road Land Trust to John D. Jassy did not meet the requirements of a qualified contract as set forth in the UA1016 instructions. Specifically, the provisions for extending the

closing date beyond December 31, 2002 are not solely based upon the payment of monies by the seller.

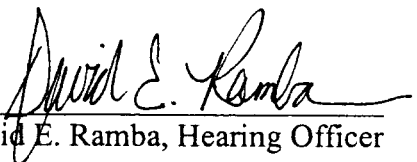
4. FHFC gave applicant sufficient notice that it failed to provide a qualified contract as outlined on page 17 of the UA1016 Application Instructions, and properly rejected the Tierra Bay Application for failure to adequately demonstrate site control.

RECOMMENDATION

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

The FHFC issue a final order affirming the scoring of Petitioner's application and rejecting the application for failure to establish site control.

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


David E. Ramba, Hearing Officer

Copies furnished:

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