

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

**WALTON COUNTY DEVELOPMENT  
CORP.,**

**Petitioner,**

**v.**

**FHFC CASE NO. 2002-0066  
Application No. 2002-719H**

**FLORIDA HOUSING FINANCE  
CORPORATION,**

**Respondent.**

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**RECOMMENDED ORDER**

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on September 5, 2002.

**APPEARANCES**

For Petitioner, Walton County  
Development Corp.:

Cathy M. Sellers, Esq.  
Jon C. Moyle, Jr., Esq.  
Moyle Flanigan Katz Raymond &  
Sheehan  
118 North Gadsden Street  
Tallahassee, FL 32301

For Respondent, Florida Housing  
Finance Corporation:

Matthew A. Sirmans  
Assistant 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 is whether Petitioner's application failed to meet the threshold requirements for financing. More specifically, the issue, as raised in the Petition, is whether Petitioner's failure to include in its application a "Letter of Receipt and Acceptance" from the Respondent indicating the lender's ability to provide funds is cause for the rejection of Petitioner's application.

## **PRELIMINARY STATEMENT**

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 5. At the commencement of the hearing, the parties also filed a Prehearing Stipulation containing a Joint Stipulation of Facts. That document basically describes the application process and the circumstances regarding the scoring of Petitioner's application with regard to the issue in dispute. The Joint Stipulation of Facts is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

At the hearing, counsel for the Respondent argued that even if Petitioner were to prevail with respect to the issue raised in its Petition (the effect of Petitioner's failure to include the Letter of Receipt and Acceptance), its application failed to meet threshold funding requirements due to a shortfall in funding. This ground for failure to achieve threshold was indicated in the "final" scoring summary received into

evidence as Exhibit 4. However, this ground for failure to meet threshold was not raised as an issue in the Petition for Administrative Hearing and, other than Exhibit 4, no documentary evidence was offered as to this issue. None of the parties' stipulated facts address this issue. In its Proposed Recommended Order, Petitioner argued the funding shortfall issue and, without seeking leave to reopen the informal hearing for the receipt of additional documentary evidence, attached to its Proposed Recommended Order documents identified as Exhibit 7. Counsel for the Respondent moved to strike that Exhibit and, in that same Motion, further argued that other parts of Petitioner's application, which are not part of the record and which are not attached to the Motion to Strike, defeat Petitioner's argument with regard to the issue of a shortfall in funding. Having considered the Motion to Strike and the Petitioner's Response thereto, the Motion is granted. The undersigned further concludes that the issue of a funding shortfall is not properly before her. It was not raised in the Petition. Rule 67-48.005(1), Florida Administrative Code, specifically provides that "the petition must specify in detail each issue and score sought to be reviewed." Moreover, there is insufficient evidence in the record of this proceeding to render any Findings of Fact or Conclusions of Law with regard to that funding shortfall issue.

### **FINDINGS OF FACT**

Based upon the undisputed facts and documents received into evidence at the

hearing, the following relevant facts are found:

1. Petitioner, Walton County Development Corporation, applied for funding in the 2002 HOME Rental Application Cycle for the Shady Lane development, a proposed 45-unit multiplex development to be located in the City of DeFuniak Springs, Florida.

2. The HOME Rental Application Package, or “HOMER 1015,” which includes the application forms and instructions thereto, is adopted by reference as a rule in the Respondent’s existing Rule 67-48.002(61), Florida Administrative Code.

3. Rule 67-48.004(13)(b), Florida Administrative Code, requires Respondent to reject an application if an applicant fails to achieve the threshold requirements detailed in the applicable application and application instructions.

4. Among the threshold items specified in the application instructions is that financing documentation reflect firm commitments. Those instructions further state, at page 24, that “[c]ommitments from lenders who cannot demonstrate ability to fund will not be considered firm and the commitment will not count as a source of financing.”

5. Those same instructions provide that if the commitment is not from a regulated financial institution or a governmental entity, evidence of ability to fund, including a copy of the lender’s most current audited financial statements, must be provided. The instructions allow such financial statements to be included in the application package or submitted directly to the Respondent. If submitted directly to

the Respondent, a copy of the Respondent's Letter of Receipt and Acceptance must accompany each application which contains a commitment letter from a lender whose statements were submitted directly to the Respondent.

6. In its "cure" documentation, Petitioner increased its total project cost and submitted a revised commitment for construction financing from Midland Mortgage Investment Corporation. Petitioner stated in its "cure" that its revised documents included a "debt commitment and evidence of the lender's ability to fund." However, the only document provided was a commitment letter from Midland. No evidence of the lender's ability to fund was included.

7. A competing applicant filed a Notice of Alleged Deficiency ("NOAD"), noting that evidence of ability to fund the loan was not provided by the Petitioner. In its "final" scoring, Respondent concluded that Petitioner failed to meet threshold because "evidence was not provided that the lender was a regulated financial institution or of the lenders' ability to fund. Therefore, the funding source could not be scored as firm."

8. Prior to the date of Petitioner's timely submission of "cure" documentation, Midland had submitted to the Respondent financial information, and the Respondent provided a Letter of Receipt and Acceptance. This letter, consistent with the application instructions, provides that "[a] copy of this Letter of Receipt and Acceptance must accompany each commitment letter submitted by your institution in the application during this cycle." Thus, Petitioner should have submitted this

Letter as part of its “cure” documentation, and the submission of such a Letter would have relieved it of the obligation to submit the lender’s most current audited financial statements.

### **CONCLUSIONS OF LAW**

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. The Petitioner’s substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

The sole issue in this proceeding is whether Respondent properly rejected Petitioner’s application for failure to demonstrate a firm financial commitment from a lender demonstrating an ability to fund. More specifically, the issue is whether the Petitioner’s failure to include the Respondent’s Letter of Receipt and Acceptance with its revised “cure” documentation constitutes a failure to meet threshold requirements.

Petitioner makes two arguments in support of its position. First, Petitioner argues that because it is Respondent itself, and not some third party, which issued the Letter of Receipt and Acceptance, the Petitioner’s failure to include that letter constitutes a non-substantive omission, and that Respondent should have taken official recognition of its own Letter and considered it in scoring Petitioner’s

application. Second, Petitioner argues that Rule 67-48.004(9), Florida Administrative Code, prohibits the rejection of its application because the Respondent did not identify the failure to include the Respondent's Letter of Receipt and Acceptance until the final stage of the evaluation and scoring process.

Petitioner's first argument ignores the clear and plain requirements contained within the application instructions, which constitute rules adopted by reference in Rule 67-48.002(61), as well as Rule 67-48.004(1), which provides:

All Applications must be complete, legible and timely when submitted, except as described below. Corporation staff may not assist any Applicant by copying, collating, or adding documents to an Application nor shall any Applicant be permitted to use the Corporation's facilities or equipment for purposes of compiling or completing an Application.

There can be no doubt that the application instructions clearly require that reliance upon a lender which is not regulated and which is not a governmental entity requires a demonstrated ability to fund in order for its commitment to be considered firm as a valid source of financing. This demonstration must be provided either by the submission of audited financial statements or a Letter of Receipt and Acceptance prepared by the Respondent. Neither was provided by Petitioner in its "cure" documentation, and therefore its application was not complete. Since neither the lender's financial statements nor the Letter was provided, there was no demonstration that the lender had the ability to fund. Therefore, according to the instructions, that lender's commitment could not be considered firm.

Petitioner's suggestion that Respondent should have taken official recognition of its own Letter of Receipt and Acceptance would have required Respondent's staff to copy, collate and add documents to Petitioner's application in order to render the application complete, and would have the effect of allowing Petitioner to use the Respondent's facilities and/or equipment for purposes of compiling or completing its application. This would be directly contrary to Rule 67-48.004(1), Florida Administrative Code. Had Respondent intended to take official recognition or official notice of its own prior Letters of Receipt and Acceptance, it would not have instructed applicants to include such Letters in their application, nor would it have added the requirement contained in the Letter itself that a copy of the Letter "must accompany each commitment letter submitted by your institution in the application during this cycle." While there may be some items in the application which the Respondent is permitted to verify, this clearly is not one of those items. It is clear from the instructions that Respondent intended to rely upon both the applicant and the lender to supply it with the lender's ability to fund when considering whether the commitment is a firm commitment.

Had Petitioner included Midland as a source of financing in its initial application submittal (even though it apparently had not yet been issued a Letter of Receipt and Acceptance), it may have been able to provide documentation of Midland's ability to fund during the "cure" process. However, by waiting until the



“cure” period to list Midland as a funding source, there was no further opportunity to provide documentation of its ability to fund the financing commitment.

Petitioner’s reliance on Rule 67-48.004(9), Florida Administrative Code, for the proposition that Respondent may not reject or reduce points in its “final” scoring unless an issue was previously identified in its preliminary scoring or as a result of a Notice of Possible Scoring Error (“NOPSE”) defies common sense when it is applied to new information submitted for the first time in “cure” documentation. The application process envisions an original application and a preliminary scoring by the Respondent (subsection (3) of Rule 67-48.004); the filing of NOPSEs by competing applicants (subsection (4) of Rule 67-48.004); the Respondent’s decision regarding the NOPSE along with any other items identified by Respondent to be addressed by the Applicant (subsection (5) of Rule 67-48.004); the submission of additional documentation (“cure” documentation) by the applicant (subsection (6) of Rule 67-48.004); Notices of Alleged Deficiencies (“NOADs”) (subsection 7 of Rule 67-48.004); and, ultimately, “final” scoring by the Respondent. With regard to “final” scoring, Rule 67-48.004(9) provides, in part, that

no Application shall be rejected or receive a point reduction as a result of any issues not previously identified in the notices described in subsections (3), (4) and (5) above. However, inconsistencies created by the Applicant as a result of information provided pursuant to subsection (6) above will still be justification for rejection or reduction of points, as appropriate.

Petitioner's argument would result in the conclusion that if the additional information submitted as a "cure" is totally new and different from information submitted in the initial application and does not otherwise create an inconsistency with another item in the application, the Respondent is prohibited from considering the new information submitted as a "cure," or, at least, may not reduce points or reject an application based upon new and different information submitted as a "cure." This argument constitutes a too narrow and literal reading of Rule 67-48.004(9), and would result in a complete abdication of the Respondent's duties and obligations. Such an interpretation would encourage applicants to withhold all relevant information until submission of its "cure" documentation, and would render meaningless the NOAD opportunities provided in Rule 67-48.004(7) and (8).

A reasonable interpretation of Rule 67-48.004(9) requires that the phrase "inconsistencies created by the Applicant" as a result of the cure information mean "inconsistencies" not only within the four corners of the Application, as addressed in subsection (6) of Rule 67-48.004(6), but also "inconsistencies" with the requirements of Respondent's rules, which include the application instructions. Otherwise, the Respondent would be totally without authority to review and evaluate new information submitted in the cure process, no matter how essential such new information may be to the overall objectives of the low income housing program. Such was clearly not the intent of Rule 67-48.004(9), Florida Administrative Code, and would render the application process meaningless. In summary, if new

information is submitted during the “cure,” such as a new funding commitment from a lender, Respondent may reduce points and/or reject the application if the newly submitted and revised documentation does not meet the requirements adopted by rule.

### **RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner’s application be rejected for failure to meet the threshold requirement of demonstrating a firm commitment for financing by an entity with the ability to fund such a commitment.

Respectfully submitted and entered this 26<sup>th</sup> day of September, 2002.



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

Copies furnished to:

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

Matthew A. Sirmans  
Assistant General Counsel  
Florida Housing Finance Corporation  
227 North Bronough Street, Suite 5000  
Tallahassee, FL 32301-1329

Cathy M. Sellers, Esq.  
Jon C. Moyle, Jr., Esq.  
Moyle Flanigan Katz Raymond & Sheehan  
118 North Gadsden Street  
Tallahassee, FL 32301

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**PREHEARING STIPULATION**

**JOINT STIPULATION OF THE FACTS**

**The parties have agreed to and stipulate to the following:**

1. On or before April 15, 2002, Petitioner submitted an Application to Florida Housing Finance Corporation ("Florida Housing") for the award of funds from the HOME Rental Application Cycle ("HOME") for the Shady Lane development, a proposed development of affordable rental housing in the 2002 HOME Rental Cycle.
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. Florida Housing receives its funds for the HOME program from an allocation of federal funds. Pursuant to the Notice of Fund Availability published in Florida Administrative

***ATTACHMENT A***

Weekly there was approximately \$21,320,100 available to fund HOME applications in the 2002 Universal Cycle.

4. Florida Housing has established by rule a competitive application process to evaluate, score and competitively rank all applicants. Awards for the Home Investment Partnership program are included in a single application process (the "Universal Cycle") governed by Rule Chapter 67-48, Florida Administrative Code.

5. The 2002 HOME Application, and instructions for completion, adopted as Form HOMER1015 by R. 67-48.002(61), F.A.C., contains parts I through VI, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. 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. After Petitioner submitted its 2002 HOME Application, on or before April 15, 2002, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Florida Statutes, and Rule Chapter 67-48, Florida Administrative Code. Florida Housing completed the preliminary scoring process on May 13, 2002.

7. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any issue raised in the preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June 26, 2002 (the "cure period").

8. Petitioner submitted a 2002 Cure Form ("Cure"), with a revised commitment for construction financing from Midland Mortgage Investment Corporation, pursuant to the requirements under Part V, Section C, of the HOME Rental Application. Petitioner stated in its

Cure that it included evidence of the lender's ability to fund. Petitioner included this evidence as "Exhibit B" in its Petition.

9. 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 which caused Florida Housing to determine that evidence of the lender's ability to fund was not enclosed as part of the cure.

10. Part V, Section C, of the HOME Rental Application states that the petitioner must, "[P]rovide documentation of all commitments from both the construction and the permanent lender(s) or of any sources of funding." It further states in part, "If the commitment is not from a regulated Financial Institution in the business of loans...evidence of ability to fund must be provided...If submitted directly to the Corporation, a copy of the Corporation's Letter of Receipt and Acceptance must accompany each Application Package which contains a commitment letter from the lender whose statements were submitted directly to the Corporation."

11. Florida Housing determined that Petitioner's cure for item 3T (Part V Section C, Exhibit 44) did not include evidence that the lender, Midland Mortgage Investment Corporation was a regulated financial institution, or of the lender's ability to fund. Florida Housing did not score the funding source as firm, as Petitioner failed to submit a copy of Florida Housing's Letter of Receipt and Acceptance. As such, Florida Housing determined that petitioner failed to meet threshold criteria.

12. A Letter of Receipt and Acceptance, which complied with the documentation requirements of Part V, Section C, of the HOME Rental Application, was authored by Florida

Housing on May 20, 2002. A true and accurate copy is within the official business records of Florida Housing.

13. Following this process, Florida Housing on July 22, 2002, sent Pre-Appeal Scores 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, Florida Statutes.

14. Petitioner timely requested an informal hearing by filing its "Petition for Informal Proceeding in Accordance with sections 120.569 and 120.57(2), Florida Statutes," on August 13, 2002.

15. The issues before the Hearing Officer for decision in the informal hearing are whether it was unreasonable or clearly erroneous for Florida Housing to determine that Petitioner failed to meet threshold criteria in its scoring of Petitioner's application and to not take official recognition of the May 20, 2002, Letter of Receipt and Acceptance. The Hearing Officer must also determine whether Florida Housing complied with its rules in reaching its determination that Petitioner failed to meet threshold criteria.

16. The parties proffer the following joint exhibits:

1. Exh. 1: Exhibit B to Petitioner's Petition
2. Exh. 2: NOAD filed on item V. Section C. Exh. 44
3. Exh. 3: Cure form for item item V. Section C. Exh. 44
4. Exh. 4: Florida Housing 2002 Home Rental Application Summary (3 pages)
5. Exh. 5: HOME Rental Application Instruction and Information

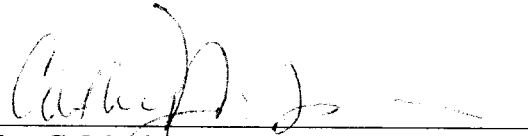


Respectfully submitted this 5<sup>th</sup> day of September, 2002.



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Matthew A. Sirmans, Asst. General Counsel  
Florida Bar No. 0961973  
Florida Housing Finance Corporation  
227 North Bronough Street, Suite 5000  
Tallahassee, Florida 32301-1329  
Telephone: (850) 488-4197  
Facsimile: (850) 488-8113



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Jon C. Moyle Jr.  
Florida Bar No. 0727016  
Cathy Sellers  
Florida Bar No. 0784958  
Moyle Flanningan Katz Raymond &  
Sheehan, P.A.  
118 North Gadsden Street  
Tallahassee, Fl 32301  
Telephone (850) 681-3828  
Facsimile (850) 681-8788

Attorneys for Walton Housing Partners, Ltd

## **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's Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Monday, October 7, 2002. 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.