

**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.**

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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, 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):

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For Respondent, Florida Housing  
Finance Corporation  
(Florida Housing):

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## **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<sup>1</sup> 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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<sup>1</sup>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, and the project meets the tenant income eligibility requirements of S. 42 of the Internal Revenue Code of 1986, as amended . . .

(Emphasis supplied).

32. The Universal Application Instructions (Instructions), which have been adopted and incorporated by reference into Florida Housing's rules,<sup>2</sup> 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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<sup>2</sup>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 financing". (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.

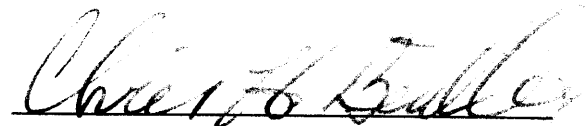
46. The correct interpretation of the word “financing” in the Instructions incorporates the aggregate basis concept set forth in § 42 of the Internal Revenue Code and Rule 67-48.027(2)(a), F.A.C. As set forth in the Findings of Fact, RTD’s Application, with its cures, establish that more than 50% of 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 22<sup>nd</sup> 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.