

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CATHOLIC CHARITIES HOUSING INC.,

Petitioner,

v.

FHFC CASE NO. 2004-019-UC
Application No. 2004-026S

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, an informal administrative hearing was held in the above-styled case on September 15, 2004, at Tallahassee, Florida, before the Florida Housing Finance Corporation's appointed Hearing Officer David Ramba.

For the Petitioner:

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For the Respondent:

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JOINT EXHIBITS

The following exhibits were offered and accepted into evidence:

<u>Exhibit</u>	<u>Description</u>
Exh. 1.	Joint Stipulation.
Exh. 2.	Exhibit 30 to Application (Item 6T)
Exh. 3.	Exhibit 30 to Application (Cure Item 6T Part III, Section C of the Cure)
Exh. 4.	Preliminary Scoring Summary for Catholic Charities dated April 28, 2004.
Exh. 5.	NOPSE Scoring Summary for Catholic Charities dated May 25, 2004.
Exh. 6.	Final Scoring Summary for the Catholic Charities dated July 8, 2004.
Exh. 7.	Excerpts from the 2004 Universal Cycle Application, Instructions, and Rules.
Exh. 8.	Exhibit 25 to the Application (Item 2P).
Exh. 9.	Exhibit 25 to the Application (Cure Item 2P. Part III to the Cure)
Pet. Exh. 1	Exhibit 24 to the Application.
Pet. Exh. 2	Page 8 of 26 of Petitioner's Application

WITNESSES

No witnesses testified for either party.

STATEMENT OF THE ISSUE

The issue to be resolved is whether Florida Housing erred when it determined that Petitioner failed to meet the threshold requirement under Part III, Section C, subsection 3, of the Universal Application Instructions, demonstrating verification of availability of

infrastructure for sewer capacity, package treatment, or septic tank, on or before the Application Deadline of March 31, 2004.

PRELIMINARY STATEMENT

On or before March 31, 2004, Catholic Charities Housing Inc., ("Petitioner ") submitted an application for its San Jose Mission development to Florida Housing for funding under the State Apartment Incentive Loan (SAIL) in the 2004 Universal Cycle program. On July 9, 2004, Florida Housing notified the Petitioner of the results of the scoring of the application and provided the Petitioner with a Notice of Rights pursuant to §§ 120.569 and 120.57, Fla. Stat. Petitioner timely filed its Election of Rights and its Petition for an informal hearing. Florida Housing filed a motion to strike portions of the Petition that requested a variance under section 120.542, Fla. Stat., and said motion was granted on August 17, 2004. An informal hearing was conducted September 15, 2004, pursuant to §§120.569 and 120.57(2), Fla. Stat. There are no disputed issues of material fact.

FINDINGS OF FACT

1. On or before March 31, 2004, Petitioner submitted an Application to Florida Housing Finance Corporation ("Florida Housing") for the award of funds from the State Apartment Incentive Loan ("SAIL") program for the development of San Jose Mission, an affordable rental housing development in the 2004 Universal Cycle.

2. 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.

3. Florida Housing receives its funds for the SAIL program from an allocation of documentary stamp tax revenue and publishes a Notice of Funding Availability announcing the amount of SAIL funding, which in the 2004 Universal Cycle was approximately \$55,000,000. Florida Housing received requests from all applicants for SAIL loans in the 2004 Universal Cycle.

4. SAIL funds are apportioned 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. See Section 420.5087 (3), Fla. Stat.

5. 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. See Section 420.507 (22)(f), Fla. Stat. and Fla. Admin. Code R. Chapter 67.48.

6. The 2004 Universal Cycle Application, adopted as Form UA1016 (Rev. 3-04) by Fla. Admin. Code R. 67-48.002 (111), consists of Parts I through V and instructions, some of which are not applicable to every Applicant. Some of the parts include "threshold" items.

7. 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, which are different from threshold items.

8. After Petitioner submitted its 2004 Universal Cycle Application, on or before March 31, 2004, Florida Housing's staff commenced scoring the Application

pursuant to Part V, Chapter 420, Fla. Stat. and Fla. Admin. Code R. Chapter 67-48. Florida Housing completed the scoring process on April 28, 2004.

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

10. Florida Housing reviewed each NOPSE that was timely received. On May 28, 2004, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants and Florida Housing's position on any NOPSE.

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 10, 2004 (the "cure period").

12. 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. Florida Housing then reviewed each NOAD and made a determination on each NOAD.

13. Following this process, on July 9, 2004, Florida Housing 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.

14. Petitioner timely requested a hearing on July 30, 2004, when it submitted its Petition on July 30, 2004.

15. Florida Housing determined that Catholic Charities failed threshold because the Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank form submitted by Catholic Charities on or before March 31, 2004, failed to reference whether sewer capacity, package treatment or septic tank was available to the development site prior to the application deadline of March 31, 2004. (Exhibits 2 and 4).

16. Catholic Charities timely submitted a cure for Exhibit 30, Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank.

17. Florida Housing determined that Catholic Charities again failed threshold because the Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank form submitted by Catholic Charities on or before June 10, 2004, failed to reference whether sewer capacity, package treatment or septic tank was available to the development site prior to the application deadline of March 31, 2004. The date on the form read "5/7/04." (Exhibits 3 and 6).

18. Catholic Charities conceded on the issue of proximity tie breaker points contained in their petition.

19. Florida Housing conceded on the issue of whether Catholic Charities met the definition of SAIL eligibility.

CONCLUSIONS OF LAW

20. The Universal Application Instructions, incorporated by reference in Rule 67-48.002(111), F.A.C., constitute a rule under Section 120.52(15), Fla. Statutes. The

Corporation's rules have the force and effect of law. See generally State of Florida v. Jenkins, 469 So.2d 733 (Fla. 1985).

21. The threshold requirements as set forth in the Universal Application Instructions state that "Requirements to meet Threshold include...Ability to proceed must be demonstrated by submission of the required certifications or documentation...of infrastructure..." (Exhibit 7(b)).

22. The Universal Application Instructions further state, "Verification of the availability of each type of infrastructure on or before the Application Deadline must be provided." "Each Verification of Availability of Infrastructure Form...must demonstrate availability on or before the Application Deadline." "Evidence of availability of sewer, package treatment or septic tank must be provided behind a tab labeled "Exhibit 30." (Exhibit. 7(a)).

23. Petitioner submitted its Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank form on or before the Application Deadline of March 31, 2004, without a date on the form. (Exhibit. 2). Accordingly, Florida Housing could not determine if the infrastructure was available on or before the Application Deadline.

24. Petitioner submitted a revised Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank form as a cure on or before June 10, 2004. This form contained the date "5/7/04." (Exhibit 3). This date is after the Application Deadline of March 31, 2004. At hearing, Petitioner admitted that this date was a scrivener's error, but argued that although this revised date is after the Application

Deadline date of March 31, 2004, the "5/7/04" date should be ignored due to other information submitted in Petitioner's Application.

25. At the time Petitioner submitted its Application for SAIL funding, it had completed construction and received its certificates of occupancy for San Jose Mission. Petitioner stated in its Application that certificates of occupancy were issued on April 4, 2003. Petitioner also submitted a list of certificates of occupancy issue dates for each building within the San Jose Mission development at Exhibit 24 of its Application. (Petitioner's Exhibit 1 and 2).

26. At hearing, Petitioner argued that Florida Housing should ignore the scrivener's error because by 'common standards,' all of the services must have been in place by the date the certificates of occupancy were issued.

27. Florida Housing could not ignore the revised date in light of this additional information. Assuming that the certificates of occupancy were issued on April 4, 2003, Petitioner's revised Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank form's date of May 7, 2004, created an inconsistency within the four corners of the Application. These two dates are thirteen months apart and were not reconciled within the Application or by the cures submitted by Petitioner. If Petitioner did in fact have the requisite sewer infrastructure in place on April 4, 2003, it needed to properly document this date on the Verification of Availability of Infrastructure Sewer Capacity, Package Treatment or Septic Tank form. Petitioner failed to do so. Instead, Petitioner put the May 7, 2004, date on the form.

28. The inconsistent dates created confusion as to what was the actual date of service. Florida Housing was not able to determine if there was a problem with the

availability of infrastructure or just a scrivener's error. The rules that govern the scoring process require Florida Housing to strictly determine if Petitioner has met the threshold requirement.

29. Rule 67-48.004(9), Florida Administrative Code, clearly states that in determining final scores, "[I]nconsistencies created by the Applicant as a result of information provided pursuant to subsections (6) (*cures*) and (7) (*NOADS*) above will still be justification for rejection or reduction of points, as appropriate." (emphasis added for clarification) (Exhibit 7(c)).

30. Here, the two dates provided by Petitioner were inconsistent and as such, the rule mandates that Florida Housing could not ignore the scrivener's error and could not tell if the threshold requirement that verification of availability of infrastructure, sewer capacity, package treatment or septic tank had been demonstrated on or before the Application Deadline.

31. The Universal Cycle is a highly competitive application process, one that is both commented on by competing applicants and scored by Florida Housing staff. Florida Housing cannot ignore scrivener's errors because to do so would be unfair and put all other competing applicants at a disadvantage.

32. 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. 2^d 1330 (1995).

33. Florida Housing reasonably interpreted its rules and did not err when it determined that Petitioner failed to meet this threshold requirement when awarding Petitioner its final score.

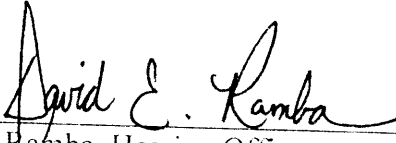
RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law it is hereby RECOMMENDED that Florida Housing enter a final order determining that:

Florida Housing properly denied the Petitioner's Application for competitive SAIL funding because it failed to pass threshold by failing to provide verification of availability of infrastructure, sewer capacity, package treatment or septic tank as being in place for San Jose Mission, by the Application Deadline of March 31, 2004.

It is also recommended that the Beard of Florida Housing review the application for due consideration of a variance under section 120.542, Fla. Stat., given that the uniform applicability of the rule appears to have led to unreasonable, unfair, and unintended result in this particular instance.

Respectfully submitted and entered this 21st day of September 2004.



David Ramba, Hearing Officer

Copies furnished:

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