STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CREATIVE CHOICE HOMES
XXX, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2004-027-UC
Application No. 2004-078C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on October 14, 2004. On or before March 31, 2004, Creative Choice Homes XXX, Ltd. ("Petitioner") submitted its 2004 Universal Cycle Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for funding/allocation from the Low Income Housing Tax Credit Program. Petitioner timely filed its Petition for Review, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition did not raise disputed issues of material fact. An informal hearing was held in this case on August 31, 2004, in Tallahassee, Florida, before Florida Housing's designated Hearing Officer, Chris H. Bentley. Petitioner and Respondent timely filed Proposed Recommended Orders.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
_____ /DATE: 10/14/04

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order finding that Petitioner has demonstrated site control by providing a Qualified Contract in accordance with the rules of Florida Housing Finance Corporation and thereby meets that threshold requirement.

RULING ON THE RECOMMENDED ORDER

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED:**

1. The findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

2. The conclusions of law of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

3. Accordingly, it is found and ordered that Petitioner has demonstrated site control by providing a Qualified Contract in accordance with the rules of Florida Housing Finance Corporation and thereby meets that threshold requirement.

IT IS HEREBY ORDERED that Petitioner's Application Petitioner has demonstrated site control by providing a Qualified Contract in accordance with the rules of Florida Housing Finance Corporation and thereby meets that threshold requirement.

DONE and ORDERED this 14th day of October, 2004.

FLORIDA HOUSING FINANCE CORPORATION

By: Terry Vanlandingham
Chairperson

Copies to:

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

Stephen P. Auger
Deputy Development Officer
Florida Housing Finance Corporation
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Tallahassee, FL 32301

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
P.O. Drawer 190
215 S. Monroe St., Suite 500
Tallahassee, FL 32302

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CREATIVE CHOICE HOMES, XXX, LTD.,

Petitioner,

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FHFC CASE NO. 2004-027-UC
Application No. 2004-078C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

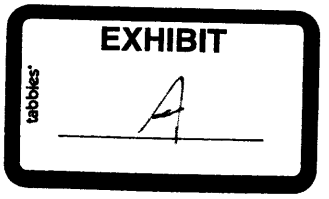
_____/

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 August 31, 2004.

APPEARANCES

For Petitioner, Creative Choice Homes XXX, Ltd.:	Michael P. Donaldson, Esquire Carlton Fields, P.A. P. O. Drawer 190 Tallahassee, FL 33202-0190
For Respondent, Florida Housing Finance Corporation (Florida Housing):	Hugh R. Brown, Esquire Deputy 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 in whether Petitioner, Creative Choice Homes, XXX, Ltd., submitted documentation with its Application and subsequent Cure to demonstrate site control as required by Part III.C.2 of Universal Application Instructions.

PRELIMINARY STATEMENT

The parties entered into a Joint Stipulation of Facts and Exhibits, which has been marked as Joint Exhibit 1 in this proceeding. In addition to Joint Exhibit 1, Joint Exhibits 2 through 6 have also been admitted into evidence. Petitioner's Exhibits 1 and 2 were marked as demonstratives. Petitioner's Exhibit 3 was admitted into evidence as undisputed fact subject to relevance.

FINDINGS OF FACT

Based upon the undisputed facts and Exhibits received into evidence at the hearing, the following relevant facts are found:

1. Creative Choice is a Florida for-profit limited partnership with its address at 4243 Northlake Blvd., Suite D, Palm Beach Gardens, FL 33410 and is in the business of providing affordable rental housing units.

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 the State of Florida. (Section 420.504, Fla. Stat.; Rule 67-48, Fla. Admin. Code).

3. The Low Income Housing Tax Credit ("Tax Credit") program is created within the Internal Revenue Code, and awards a dollar for dollar credit against federal income tax liability in exchange for the acquisition and substantial rehabilitation or new construction of rental housing units targeted at low and very low income population groups. Developers sell, or syndicate, the Tax Credits to generate a substantial portion of the funding necessary for construction of affordable housing development.

4. Florida Housing is the designated "housing credit agency" responsible for the allocation and distribution of Florida's Tax Credits to applicants for the development of rental housing for low income and very low income families.

5. Awards for the Low Income Housing Tax Credit and other programs are included in a single application process (the "Universal Cycle"), in which applicants submit a single application (the "Universal Cycle Application").

6. The 2004 Universal Cycle Application, adopted as Form UA 1016 (Rev. 3-04) by rule 67-48.002(111), Fla. Admin. Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. 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, including "tie-breaker" points; however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

7. On March 31, 2004, all applicants, including Creative Choice, submitted applications to Florida Housing for review. Creative Choice submitted its application in an attempt to obtain funding assistance in the construction of a 132-unit affordable housing apartment complex in Tampa, Hillsborough County, Florida, named Fountainview Apartments.

8. On April 29, 2004, Florida Housing completed its preliminary review and scoring of Creative Choice's application. At that time Creative Choice was awarded a preliminary score of 66 points out of a possible 66 points and a 7 ½ out of 7 ½ proximity tie-breaker points. However, Florida Housing concluded that Creative Choice failed to meet threshold requirements based on a lack of demonstrating the required site control.

9. Subsequent to the release of Florida Housing's preliminary scores, each applicant, pursuant to Rule 67-48.004(4), Fla. Admin. Code, was allowed to submit to Florida Housing Notices of Possible Scoring Errors ("NOPSE"), in order to point out errors in Florida Housing's scoring of competitor applications. Several NOPSE's were filed which challenged the scoring of Creative Choice's application in various aspects, but they are not pertinent to the issues of the instant case.

10. In response to the NOPSE's and Florida Housing's preliminary review, applicants were allowed 15 days to submit revised documentation to correct any errors in their applications pursuant to Rule 67-48.004(6), Fla. Admin. Code ("cures"). All revised documentation was due to Florida Housing by June 10, 2004. Creative Choice submitted "cures" in an attempt to gain maximum points possible and to remedy any alleged threshold failures. Specifically, Creative Choice submitted additional information to demonstrate its control over the proposed development site.

11. Subsequent to the submittal of additional cure information pursuant to Rule 67-48.004(7), Fla. Admin. Code, each applicant was allowed the opportunity to provide a Notice of Alleged Deficiency ("NOAD") with respect to the revised documentation submitted by competing applicants. No NOADs were filed challenging Creative Choice's cures.

12. On July 9, 2004, Florida Housing finalized its review of the additional documentation and issued final scores. The Notice of Final Scores was received by Creative Choice on July 12, 2004. Creative Choice's final score was 66 out of a possible 66 points. Creative Choices was also awarded 7 ½ out of a possible 7 ½ proximity tie-breaker points. However, Florida Housing continued to conclude that Creative Choice failed to meet threshold requirements regarding site control.

13. The Universal Application at Part III, beginning at page 6 of 35, requests information concerning the proposed development. At Part III.C.2, page 19 of 35, the Universal Application requires the applicant to provide information which demonstrates that the applicant has or will have control over the proposed development site ("site control").

14. In response to this requirement, Creative Choice, in its initial application submitted (at Exhibit 27 to the application), multiple contracts for the purchase and sale of designated parcels of property. The submittal of multiple contracts was necessary because the site upon which the Fountainview Apartments are proposed to be built is owned by multiple parties. One of the owners is Associated Out-Doors Clubs, Inc. Accordingly, a Contract For Sale and Purchase executed by representatives of CCH Acquisition, Inc., a Florida corporation, as the buyer and Associated Out-Door Clubs, Inc., as the seller was provided at Exhibit 27 (Joint Exhibit 2 in this proceeding) to the Application. Addendum No. 1 to the Contract for Sale and Purchase in paragraph 9 states that the Contract is contingent upon the approval of the Seller's Board of Directors. Also provided at Exhibit 27 was an assignment of the contract described above from CCH Acquisition, Inc., to the applicant entity, Creative Choice XXX, Ltd., the Petitioner in this case (Joint Exhibit 2).

16. After conducting its preliminary review, Florida Housing concluded in its initial scoring summary that Creative Choice failed to meet threshold requirements for site control, giving the following explanation in the Scoring Summary dated April 27, 2004:

> The Applicant provided several contracts to demonstrate site control for the proposed Development site. Section 9 of the Addendum No. 1, dated 12/10/03, to the Contract for Sale and Purchase dated 12/10/03 has a contingency that requires the approval of the Seller's Board of Directors for the conveyance of this property. The Application has not shown that this sale has been approved.

17. In response to Florida Housing's initial review and the specific comments found in the Scoring Summary, Creative Choice submitted as a cure a letter from the General Counsel for Associated Out-Door Clubs, Inc., indicating that the Board of Directors had approved the contract and that the contingency set forth in paragraph 9 of Addendum No. 1 had been satisfied (Joint Exhibit 5).

18. On July 9, 2004, Florida Housing issued its Final Scoring Summary which again concluded that Creative Choice had failed to meet threshold, and provided the following explanation:

> The Applicant attempted to cure Item 1T by providing a letter from the seller's attorney stating that the Board of Directors had approved the transaction. The cure is deficient because no consents to action, resolution, or other official action of

the Out-Door Clubs, Inc.'s Board of Directors demonstrating the Board's consent was provided.

19. The sole issue in this proceeding is whether the purported contract contained in Joint Exhibit 2 submitted with the original Application, along with the letter from the General Counsel for Associated Out-Door Clubs, Inc. submitted during the "Cure" period indicating that the Board of Directors of the seller had approved the contract (Joint Exhibit 5) demonstrates site control within the requirements of the rules of Florida Housing.

20. Addendum No. 1 to the Contract for Sale and Purchase between Associated Out-Door Clubs, Inc. and CCH Acquisition, Inc. (Joint Exhibit 2; Exhibit 27 to the Application) in paragraph 9 entitled Approval states:

> This Contract is contingent upon the approval of the Seller's Board of Directors. Seller shall initiate contact with the Board of Directors within five days of the Effective Date of this Contract for the purpose of seeking approval for this transaction. Seller shall diligently and in good faith attempt to achieve the Board of Director's approval as soon as reasonably possible.

21. The "Cure" provided by the Applicant with regard to the above-referenced Contract for Sale and Purchase is the letter (Joint Exhibit 5) from Robert A. Morra, Esquire, General Counsel for the Seller Associated Out-Door Clubs, Inc., which states

> This is to confirm that our firm has served as General Counsel for Associated Out-Door Clubs, Inc. ("AOC") for

over 40 years. I personally prepared the Consents to Action which were executed by all of the Directors of AOC and I attended the Board Meeting on January 30, 2004 at which the subject contract was discussed in some detail.

This is to confirm that the Board of Directors of AOC has approved the subject contract and the contingencies set forth in provision 9 of the Contract has been satisfied. . . .

CONCLUSIONS OF LAW

22. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rules 28-106.301 and 66-48.005, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

23. The Petitioner's substantial interests are affected by the Proposed Agency Action of the Respondent. Therefore, Petitioner has standing to bring this proceeding.

24. The 2004 Universal Application Package including instructions, exhibit forms and an uncompleted application are incorporated as a rule by reference by Rule 67-48.002(111), Fla. Admin. Code.

25. Rule 67-48.004(13)(b) states that Florida Housing shall reject an Application if, following the submission of the additional documentation, revised pages and other information as the Applicant deems appropriate "The Applicant fails to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions . . . ."

26. Part III.C.2 of the Universal Application Instructions entitled "Evidence of Site Control (Threshold)" states in pertinent part:

> Evidence of Site Control: Applicant must demonstrate site control by providing the documentation required in Section a., b., or c., as indicated below. The required documentation, including any attachments or exhibits, must be provided behind a tab labeled "Exhibit 27". Site control must be demonstrated for all sites if the proposed Development consists of Scattered Sites. A legal description of the Development site must be provided behind a tab labeled 'Exhibit 27'
>
> a. Provide a Qualified Contract - A qualified contract is one that has a term that does not expire before the last expected closing date of December 31, 2004 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, 2004; 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 the qualified contract which assigns all of the buyer's rights, title and interests in the qualified contract to the Applicant, is provided.

28. Part III.C.2 of the Universal Application Instructions also provides in pertinent part:

> Evidence of Site Control: Applicant must demonstrate site control by providing the following documentation:
> a. Provide a fully executed qualified Contract for Purchase and Sale for the subject property behind a tab labeled 'Exhibit 27'. . . .

29. Florida Housing argues correctly that the sale and purchase agreement between Associated Out-Door Clubs, Inc. and CCH Acquisition, Inc. (Joint Exhibit 2 in this proceeding), submitted with the original Application as part of "Exhibit 27", is not in and of itself a contract. It merely sets out an offer to purchase on certain extensive terms. Addendum No. 1 to that Contract for Sale and Purchase (Joint Exhibit 2) in paragraph 9 therein specifically states:

> Approval This Contract is contingent on the approval of the Seller's Board of Directors. Seller shall initiate contact with the Board of Directors within five days of the Effective Date of this Contract for the purpose of seeking approval for this transaction. Seller shall diligently and in good faith attempt to achieve the Board of Director's approval as soon as reasonably possible.

This language makes plain that there is no acceptance by the Seller of the terms offered by the Buyer and embodied in the Contract until the Contract is approved by the Seller's Board of Directors. As such, it is not a "Qualified Contract" as that term is defined in Part III.C.2.a of the Universal Application Instructions. It does not meet that requirement because, while it contains almost all of the requisite elements of a "Qualified Contract" in terms of expiration dates, option extensions, etc., it fails in one overwhelming element. It is not a contract. Until it is accepted as provided for in Addendum No. 1 by the Board of Directors of the Seller, it is nothing more than an offer.

30. In its initial scoring summary, Florida Housing addressed this issue by stating in pertinent part:

> . . . Section 9 of Addendum No. 1dated 12/10/03 to the Contract for Sale and Purchase dated 12/10/03 has a contingency that requires the approval of the Seller's Board of Directors for the conveyance of the property. The Applicant has not shown that this sale has been approved. (Emphasis supplied.)

31. Florida Housing effectively noted in its scoring summary that the contract had not been approved by the Seller's Board of Directors. It then, in essence, gave direction to the Applicant by stating in its scoring summary "The Applicant has not shown that this sale has been approved". The clear reasonable interpretation of this language is that, during the Cure period, the Applicant must show that the sale has been approved. The language used by Florida Housing its in scoring summary does not require any specific method for showing that the sale has been approved. There are several different ways by which the Applicant could properly show that the sale has been approved. One of those methods might be by the Minutes of a Board Meeting; another might be by the executed written acceptance of a Contract by each Member of the Board of Directors; another method might be by the statement of the General Counsel of the corporation and thus its agent, that the contract had been approved by the Board of Directors. Absent specific direction by Florida Housing, an Applicant does not have to

guess which means of showing that the sale has been approved would be acceptable to Florida Housing. What must be concluded as a matter of law to be acceptable is any reasonable and reliable method for showing that the sale has been approved.

32. The method chosen by the Applicant to respond to Florida Housing's statement in the scoring summary was, during the "Cure" period, to provide the letter referenced in paragraph 21 above (Joint Exhibit 5) from the attorney represented as General Counsel for the Seller who in that letter unequivocally confirms that the Board of Directors of Associated Out-Door Clubs, Inc., approved the subject Contract in accordance with paragraph number 9 of Addendum No. 1 to the Contract. It is reasonable and rationale under the rules of Florida Housing to, in this instance, rely upon a statement such as that made by General Counsel in Joint Exhibit 5. The General Counsel's letter constitutes the statement of an agent for the Seller apparently authorized to act on the part of the corporation.

Further, and importantly, the General Counsel, an attorney in the State of Florida, is subject to Chapter 4, RULES OF PROFESSIONAL CONDUCT of the Florida Rules of Court. Therein it states in the Preamble that:

> a lawyer is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice . . . . Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities . . .

Rule 4-4.1 entitled "Truthfulness in statements to others" of the Rules of Professional Conduct, Florida Rules of Court, 2004, states "in the course of representing a client, a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person . . . ."

Violation of this rule by an attorney subjects that attorney to disbarment or other disciplinary action and to the threat of deprivation of his or her right to practice their profession. The ethical obligation of an attorney to be truthful is not an obligation in name only. There are serious consequences to those who fail that obligation. Thus, it is reasonable for Florida Housing to rely on the statement of an attorney who is General Counsel for the Seller who states that the Board of Directors of the Seller has approved the Contract in accordance with paragraph 9 of Addendum No. 1 to the Contract.

33. The Petitioner has demonstrated site control by providing a Qualified Contract in accordance with the Universal Application Instructions and has satisfied that threshold requirement.

34. The Hearing Officer has reviewed the Final Orders cited by Florida Housing and has determined that the factual situations in those Orders is substantially different from the factual situation in this case and therefore those Orders are not controlling.

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 Petitioner, Creative Choice Homes, XXX, LTD.'s Application, in its entirety, has demonstrated site control by providing a Qualified Contract in accordance with the rules of Florida Housing Finance Corporation and thereby meets that threshold requirement.

Respectfully submitted and entered this 20th day of September, 2004.

CHRIS H. BENTLEY
Hearing Officer for Florida Housing Finance Corporation
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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 September 25, 2004. 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.