

BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

PINNACLE PARK, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Agency Case No. 2005-100C

Respondent.

**AMENDED PETITION REQUESTING INFORMAL HEARING
AND GRANT OF THE RELIEF REQUESTED**

Pursuant to Sections 120.569 and 120.57, Florida Statutes ("F.S."), Rule 67-48.005(2), Florida Administrative Code ("FAC") and Rule 28-106.301, FAC, Petitioner, PINNACLE PARK, LTD. ("Petitioner") requests an informal hearing concerning the scoring by Florida Housing Finance Corporation ("FHFC") of Petitioner's Application No. 2005-100C, and to then grant the relief requested. In support of this Petition, Petitioner states as follows:

AGENCY AFFECTED

1. The name and address of the agency affected is Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329. The Agency's file or identification number with respect to this matter is 2005-100C.

PETITIONER

2. The Petitioner is Pinnacle Park, Ltd., a Florida limited partnership. The address of the Petitioner is c/o Pinnacle Housing Group, LLC, 9400 S. Dadeland Boulevard, Suite 100, Miami, Florida 33156, telephone number (305) 854-7100. Petitioner's representative is Gary J. Cohen, Esq., whose address is c/o Shutts & Bowen LLP, 201 S. Biscayne Boulevard, Suite 1500, Miami, Florida 33131, telephone number (305) 347-7308.

PETITIONER'S SUBSTANTIAL INTERESTS

3. Petitioner's substantial interests will be affected by the determination of FHFC as follows:

(a) Petitioner has applied for an allocation of competitive 9% low-income housing tax credits under the FHFC Housing Credit ("HC") program. The HC Program is set forth in Section 42 of the Internal Revenue Code of 1986, as amended, and it awards developers and investors a dollar for dollar reduction in income tax liability through the allocation of tax credits in exchange for construction of affordable rental housing units. FHFC is the agency designated by the United States Treasury to administer the allocation of tax credits in the State of Florida.

(b) An HC application is comprised of numerous forms which request information of each applicant. FHFC adopted the forms by reference in Rule 67-48, FAC.

(c) On or about February 16, 2005, Petitioner submitted to FHFC a HC application in the Large County set-aside for the 2005 funding cycle. The application was submitted in an attempt to assist in the financing of the construction of a 128 unit apartment complex in Miami, Florida.

(d) The application was scored by FHFC in accordance with the provisions of Rule 67-48, FAC. By letter dated on or about March 18, 2005, FHFC advised Petitioner that its

preliminary score was 62 points, with 4.5 proximity tie-breaker points, and that the threshold requirement of site control was not met. As a result of Notices of Potential Scoring Errors (“NOPSE’s”) filed against Petitioner, FHFC notified Petitioner on or about April 15, 2005 that its score was reduced to 57 as a result of a determination that its Local Government Contribution (a \$1,000,000 County loan) received 0 of a possible 5 points, and that Petitioner failed to meet “threshold” due to a permanent financing shortfall and an excess of uses over financing sources attributable to the \$1,000,000 County loan not being considered “firm”.

(e) On or about April 26, 2005, Petitioner submitted “cure” documentation to FHFC contending that Petitioner (i) should receive an additional 4 points for local government incentives, (ii) should receive 5 points for local government contribution, (iii) should receive an additional 3 proximity tie-breaker points for lack of proximity to other developments on the FHFC development proximity list by virtue of qualifying as an urban in-fill development, and (iv) should be found to have satisfactorily met all threshold requirements.

(f) On or about May 25, 2005, FHFC advised Petitioner that its total points increased from 57 to 61, that Petitioner’s total proximity tie-breaker points increased from 4.5 to 7.5, that Petitioner continued to receive 0 of a possible 5 points for local government contribution due to FHFC’s determination that it would be necessary for Petitioner to obtain the Miami-Dade County Board of County Commission approval to a decrease in the development’s number of three-bedroom units (which such approval had not been obtained), and that Petitioner continued to fail threshold due to a permanent financing shortfall and an excess of uses over financing sources due to the \$1,000,000 Miami-Dade County loan not being considered firm due to FHFC’s determination of the necessity of obtaining Board of County Commission consent to

the decrease in number of three-bedroom units (the same issue as presented above with respect to local government contribution).

(g) FHFC's scoring of Petitioner's local government contribution (a \$1,000,000 loan from Miami-Dade County) is the subject matter of this Petition; such scoring affects both the 5 points which Petitioner should have received for local government contribution and the permanent financing shortfall/excess of uses over financing sources which FHFC contends constitute threshold failures. The single issue is whether FHFC is correct in its determination that a decrease in number of three-bedroom units from the number originally proposed in Petitioner's loan application to Miami-Dade County to a lesser number of three-bedroom units proposed in Petitioner's HC application to FHFC required approval from the Miami-Dade County Board of Commissioners in order to maintain the County's \$1,000,000 loan commitment as firm and final. As evidenced by the contract which was executed by Miami-Dade County effective April 21, 2005 without further approval of the Board of County Commission (attached as Exhibit "D"), no such further approval was in fact required.

(h) Under the HC program, the HC applications are scored by FHFC. A finite amount of tax credits are allocated to applicants in certain geographic areas (large county, medium county and small county areas as defined by FHFC) and pursuant to certain set-aside classifications. Only those applications receiving the highest scores are awarded tax credits. Petitioner's ability to finance its proposed project will be jeopardized if tax credits are not obtained; accordingly, Petitioner's substantial interests are affected by this proceeding.

NOTICE OF AGENCY DECISION

4. Petitioner received notice of FHFC's notice of its "cure" documentation by Federal Express delivery on or about May 26, 2005. Attached as Exhibit "A" is a copy of the Universal Scoring Summary setting forth the scoring, which scoring gives rise to this Petition.

ULTIMATE FACTS ALLEGED

5. In Petitioner's initial HC application submitted on or about February 16, 2005, Petitioner indicated (in Part IV. Section A and Exhibit 45 thereto) that the development had received a commitment for a \$1,000,000 loan from Miami-Dade County, thereby entitling Petitioner to receive 5 points for local government contribution. In fact, 5 points were awarded to Petitioner for its local government contribution in the initial scoring received by Petitioner on or about March 18, 2005.

6. On or about March 28, 2005, a Notice of Possible Scoring Error ("NOPSE") was filed against Petitioner's application alleging (in part) that Petitioner's local government contribution should receive 0 of a possible 5 points because the further consent/approval of the Board of County Commissioners of Miami-Dade County was required for such loan, since Petitioner's HC application indicated a fewer number of 3-bedroom units than those included in Petitioner's application for funding submitted to Miami-Dade County (the "County").

7. On or about April 15, 2005, FHFC issued its scoring summary after analyzing NOPSE's. In such scoring summary, FHFC determined that Petitioner's local government contribution did not qualify because the HC application reflected a smaller number of 3-bedroom units than the application provided to the County.

8. On or about April 26, 2005, Petitioner submitted "cure" documentation to FHFC. The portion of such "cure" documentation pertaining to the award of 5 points for local government contribution (the County's \$1,000,000 loan to Petitioner) is attached as Exhibit "B".

9. In the "cure" documentation submitted with respect to the award of 5 points for local government contribution, Petitioner submitted a letter from the County Manager of the County dated April 21, 2005. The letter clearly indicated that (i) the unit mix and number of units proposed in the applications filed with FHFC were different from the unit mix and number

of units proposed in the application filed with the County, and (ii) that the County's firm commitment to make a \$1,000,000 loan to Petitioner remained in place and did not require any further Board of County Commission approval. Such letter continued on to state that it superseded and clarified any prior correspondence between the County and FHFC which may be contradictory to this letter; that is, the April 21, 2005 letter superseded any prior correspondence (including e-mails between the County and FHFC) pertaining to the issue. See attached Exhibit "B".

10. In the final scoring summary (attached as Exhibit "A"), FHFC determined that the \$1,000,000 County loan did not meet the definition of a "local government contribution". In making this determination, FHFC relied (see Item 3C in the final scoring summary) on a letter dated May 3, 2005 from the County Manager submitted as part of a Notice of Alleged Deficiency ("NOAD") filed against Petitioner.

**FACTS WHICH WARRANT REVERSAL
OF AGENCY'S PROPOSED ACTION**

11. The specific facts which warrant reversal of FHFC's proposed action are as follows:

FHFC has incorrectly determined that the \$1,000,000 loan from the County to Petitioner does not constitute a valid local government contribution. FHFC reaches this conclusion relying upon the NOAD filed against Petitioner containing a letter dated May 3, 2005 from the County Manager (a copy of which is attached as Exhibit "C"), which letter states in part that "However, if the developer requests a contractual change in the number and mix of units funded, such a request would require approval from the Board of County Commissioners." See Item 3C on the scoring summary attached as Exhibit "A" evidencing FHFC's reliance on this letter as grounds for determining that Petitioner's local government contribution was not valid.

LOCAL GOVERNMENT CONTRIBUTION

12. There is no question that the decrease in number of three-bedroom units does not require Board of County Commission approval. It is clearly established by the documents referenced below that no such approval is necessary.

13. The process for closing on a loan from the County (once awarded) is as follows. The next step, after receipt of Board of County Commission approval (obtained on February 1, 2005; see Exhibit "G") and execution by the County of Exhibit 45 to Petitioner's HC application, is the execution of a contract for such loan. This step occurred on April 21, 2005, and such contract contained the same number of total units and unit mix as set forth in the FHFC application. The County delivered the unexecuted contract to Petitioner for execution, and Petitioner executed and dated such contract on April 21, 2005 and mailed it back to the County for counter-execution, which occurred at a later date. Such contract was entered into without further Board of County Commission approval. The County would not have mailed the contract to Petitioner for execution (containing the same number of total units and unit mix as set forth in the FHFC application, and reflecting an increase in the total number of units and a decrease in the number of three-bedroom units from that contained in the County loan application) unless no further Board of County Commission approval was necessary. Attached as Exhibit "D" is a copy of the "FY 2005 Affordable Housing Contract" between Miami-Dade County and Petitioner, with an effective date of April 21, 2005 (the "Surtax Loan Contract"). On page 20 (Attachment A) of the Surtax Loan Contract, entitled "Scope of Services", it is clear that the County (by its execution of the Surtax Loan Contract) has approved (without further approval of the Board of County Commission) a project with 128 total units, consisting of 22 one-bedroom units, 97 two-bedroom units and 9 three-bedroom units. This total number of units and total number of three-bedroom units are identical to the total number of units and number of three-bedroom units set

forth in Petitioner's application to FHFC. It is clear that the County, when entering into the Surtax Loan Contract on April 21, 2005 without any further Board of County Commission approval, definitively demonstrated that no further Board of County Commission approval was necessary in order to decrease the number of three-bedroom units from the number originally proposed in the original County loan application. This conclusively establishes that further Board of County Commission approval was not necessary in order to decrease the number of three-bedroom units, notwithstanding FHFC's finding in its final scoring summary that the decrease in number of three-bedroom units required Board of County Commission approval. Petitioner did not submit the Surtax Loan Contract as part of its "cure" documentation because it had not been countersigned by the County as of the deadline for submitting "cures".

14. Attached as Exhibit "E" is a letter dated June 10, 2005 from the County to FHFC, clarifying the prior letters from the County dated April 21, 2005 and May 3, 2005 pertaining to the scoring of the local government contribution for Petitioner. The letter unequivocally states that the increase in the total number of units from 115 units (as indicated in the application for County loan funding) to 128 units (as indicated in the Petitioner's application to FHFC), and the change in unit mix (10 one-bedroom units, 70 two-bedroom units and 35 three-bedroom units in the County loan application, and 22 one-bedroom units, 97 two-bedroom units and 9 three-bedroom units in Petitioner's application to FHFC) do not require further approval of the Board of County Commissioners.

15. In contrast, attached as Exhibit "F" is a letter dated June 10, 2005 from the County to FHFC pertaining to Pinnacle Plaza (Application No. 2005-096C) wherein the County indicated that in such other case, a decrease in the number of units (from 150 units indicated in

the County loan application to 132 total units as contained in the FHFC Application) would in fact require further Board of County Commission approval.

16. The letters in Exhibits “E” and “F”, when read together, clearly reflect the policy of Miami-Dade County that Board of County Commission approval is necessary for a decrease in the total number of units, is not necessary for an increase in the total number of units, and is not necessary for a change in unit mix. As the June 10, 2005 letter regarding Petitioner’s Pinnacle Park development indicates, there can be no doubt that there is no necessity for Board of County Commission approval for the decrease in the number of three-bedroom units and the increase in the total number of units proposed, and that the \$1,000,000 County loan is firm and final.

17. The June 10, 2005 letter attached as Exhibit “E” was the last in a series of letters and correspondence between Miami-Dade County and FHFC. Prior letters were dated April 21, 2005 and May 3, 2005. FHFC has based its case on the May 3, 2005 letter, which provided in relevant part that “However, if the developer requests a contractual change in the number and mix of units funded, such a request would require approval from the Board of County Commissioners.” The June 10, 2005 letter clarifies and corrects the May 3, 2005 letter. The May 3, 2005 letter attempted to address both the Pinnacle Park and Pinnacle Plaza developments and attempted to provide one answer to both developments although the factual scenarios for the two developments were significantly different; in Pinnacle Park the total number of units was increased and the number of three-bedroom units decreased; in Pinnacle Plaza both the total number of units and the number of three-bedroom units were decreased. The May 3, 2005 letter, attempting to address both situations, indicated that a request for any contractual change in the number of units funded requires further County approval; the intent of the County was to

indicate that only a decrease in the total number of units funded requires County approval. This intent is clearly demonstrated by the June 10, 2005 letters attached as Exhibits "D" and "E". As such, FHFC's reliance on the May 3, 2005 County letter as support for its position that further County approval is required for an increase in the number of units funded and a decrease in the number of three-bedroom units is misplaced; such position runs directly counter to the County's letter of June 10, 2005 (attached as Exhibit "D") sent by the County to FHFC.

18. Attached as Exhibit "G" is a copy of the County Manager's Memorandum and accompanying Board of County Commission resolution dated February 1, 2005 approving the allocation of funding to applicants for CDBG, HOME, Surtax and other forms of County funding assistance. Petitioner had applied for \$1,000,000 of Surtax loan financing. On page 30 of the County Manager's Memorandum was included a recommendation that "administrative non-substantial amendments" to the plan approved by the Board of County Commission" (that is, the funding recommendations approved at the February 1, 2005 Board of County Commission meeting) need not require the approval of the Board of County Commissioners, but that "substantial amendments" continue to require Board of County Commission approval.

19. On page 33 of the attached Exhibit "G" (page 2 of the actual Board of County Commission resolution Number R-160-05 adopted on February 1, 2005), the Board of County Commission approves the funding recommendations proposed by the County Manager (including the funding recommendation for Petitioner for \$1,000,000) and states (see circled portion on page 33 of Exhibit "G") that the County Manager is authorized to make non-substantive modifications to the FY2005 action plan (that is, the funding recommendations). Clearly, Board of County Commission approval was not necessary (in light of the County Manager's recommendation and the resolution adopted by the Board of County Commissioners)

to the “changes” which FHFC refers to in the scoring summary; no further Board of County Commission approval was necessary since the “changes” at issue involve non-substantive amendments.

20. In light of the County Manager’s Memorandum (which was adopted by the Board of County Commission Resolution) and the Board of County Commission Resolution (both of which identify what constitutes a “non-substantive amendment” which does not require further Board of County Commission approval) it is clear that the decrease in number of three-bedroom units did not require any further approval from the Board of County Commission. The Resolution and County Manager Memorandum are the controlling documents in reaching this determination, and leave no doubt as to the lack of necessity of any further Board of County Commission approval.

21. FHFC has a continuing duty to verify the validity of Local Government contributions. Page 65 of the Universal Application Instructions provides in relevant part that “Local Government contributions may be verified by Corporation Staff during the scoring and appeals process”. The term “scoring and appeals process” is not defined in the Instructions or Rule 67-48; however, in Rule 67-48.004(18), it is clear that the term “scoring and appeal process” includes the period after issuance of final pre-appeal scores which includes informal and formal appeals. Such Rule prohibits contact with Board members during the “scoring and appeal process”, and prohibits verbal contact with staff prior to the issuance of final pre-appeal scores, but allows verbal communication with FHFC staff after the issuance of final pre-appeal scores; clearly the “scoring and appeal process” connotes a period extending beyond the May 26, 2005 issuance of final pre-appeal scores and includes the period prior to the issuance of final post-appeal scores. As such, FHFC’s ability to verify the validity of Local Government

contributions extends beyond the issuance of final pre-appeal scores (May 26, 2005) and includes the pendency of these hearings. When exercising that duty in the instant case, FHFC must conclude (based upon all the evidence summarized above) that no further County approval was, is or will be required, and that the commitment for the \$1,000,000 County loan was firm and final as of the Application Deadline and today. FHFC has a duty to “get it right” in determining the validity of Local Government contributions; Miami-Dade County and Petitioner have supplied evidence herein clearly demonstrating such validity.

22. The fact that the documents contained in Exhibits “D”, “E” and “F” were not included in Petitioner’s “Cure” documentation is irrelevant. The foregoing documents do not in any way change Petitioner’s position that, as of the Application Deadline of February 16, 2005, the Local Government contribution from Miami-Dade County (the \$1,000,000.00 Loan) was firm and final; such documents oppose the FHFC position and support Petitioner’s position in its Application and hereunder. Such documents are admissible under Florida Administrative Code Rule 28-106.302(1).

RELEVANT RULES AND STATUTES

23. Rule 67-48, FAC, specifically incorporates the HC application, and the forms referenced therein. The instructions to Part IV Section A (incorporated by the aforementioned Rule) provide, in relevant part, that 5 points will be awarded for qualifying local government contributions. Petitioner has complied with the instructions for Part IV, Section A and provided evidence (in its “cure” documentation) and herein that 5 points should be awarded for its local government contribution. By virtue of the foregoing, Petitioner has complied with and satisfied all threshold requirements of the application.

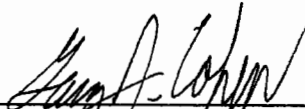
RELIEF SOUGHT

24. The specific action which Petitioner wishes FHFC to take is to reverse its previous decisions and add 5 points to Petitioner's score for local government contribution, and to determine that (as a result of determining that the \$1,000,000 County loan qualifies as a local government contribution and is firm) Petitioner has met all threshold requirements and does not have either a permanent financing shortfall or an excess of uses over financing sources.

WHEREFORE, Petitioner respectfully requests FHFC:

1. To add 5 points to Petitioner's score, resulting in 66 points.
2. Determine that Petitioner has satisfied the threshold requirements set forth in Items 2T and 3T in the scoring summary.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and one copy of the foregoing have been sent by Federal Express for delivery on July 5, 2005 to Stephen P. Auger, Deputy Development Officer, Attn: Corporation Clerk of the Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, Florida 32301, on this 1st day of July, 2005.



GARY J. COHEN, ESQ.

PLEASE CALL THE
PUBLIC RECORDS
CLERK

(850) 488-4197

FOR COPIES OF THE
EXHIBITS
TO THIS PETITION